



REPUBLIC OF KENYA



Omuse & 8 others v Sauti Savings & Credit Cooperative Society Ltd & 9 others (Environment and Land Case Civil Suit E106 of 2021) [2025] KEELC 498 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELC 498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E106 OF 2021**

**JO MBOYA, J
JANUARY 31, 2025**

BETWEEN

**VINCENT EKEYA OMUSE 1ST PLAINTIFF
ALFRED ONYANGO ATIENO 2ND PLAINTIFF
ODEDE REZIN OCHIENG 3RD PLAINTIFF
DENIS OLUOCH APOPOZ 4TH PLAINTIFF
JAMES OCHIENG AGENGO 5TH PLAINTIFF
ONESMUS KIMUYU KIMEU 6TH PLAINTIFF
MICHAEL OMWANDA AJWANG 7TH PLAINTIFF
PETER WASONGA OUNA 8TH PLAINTIFF
KHADIJA ALI 9TH PLAINTIFF**

AND

**SAUTI SAVINGS & CREDIT COOPERATIVE SOCIETY LTD .. 1ST DEFENDANT
DAVID ELLY NDWIGAH 2ND DEFENDANT
STELLAMARIS MUTHAMA 3RD DEFENDANT
FRANCIS NGILA 4TH DEFENDANT
JOHN WAMBUGU 5TH DEFENDANT
MUREITHI WAMAE 6TH DEFENDANT
GERALD OMBEWA 7TH DEFENDANT
JOHNSON MUTUNGI 8TH DEFENDANT
WINSTON ADELI 9TH DEFENDANT**



JUDGMENT

Introduction And Background

1. The Plaintiffs' approached the court vide Plaint dated the 11th March 2021; and in respect of which the Plaintiffs' sought for various reliefs. The Plaint under reference was thereafter amended vide Plaint dated the November 29, 2021. Furthermore, the amended Plaint, was re-amended culminating into the re-amended Plaint dated the 18th September 2023.
2. Vide the re-amended Plaint dated the 18th September 2023, the Plaintiffs' have sought for the following reliefs [verbatim]:
 - i. The Defendants be compelled to process and issue Original Land Titles to the Plaintiffs in respect of the allocated plots numbered below:



Name	Plot No.
Vincent Ekeya Omuse	521(1305) 471(1345)
Alfred Onyango Atieno	151(928)
Odede Rezin Ochieng	169(949)
Denis Oluoch Apopoz	533(1317)
James Ochieng Agengo	233(1016) 234(1017) 409(1191)
Onesmus Kimuyu Kimeu	7(784) 8(785)
Michael Omwanda Ajwang	398(1180)
Peter Wasonga Ouna	242(1025) 161(938) 206(989) 285(1068) 463(1247) 508(1292)
Khadija Ali	203 & 204 (formerly issued Plot No. 626 and 627)

- ii. The Chief Land Registrar, Nairobi do facilitate the issuance of the Titles as described in (a) (i) above;
- iii. A permanent injunction restraining the Defendants, whether by themselves, servants or agents, employees, authorized representatives, assigns or any other person or authority from digging, excavating, entering, remaining upon, further trespassing upon the land or in any other way dealing with L.R No. Nairobi Block 82/8760.
- iv. The Plaintiffs be granted possession of their plots.
- v. Any purported Lease, Sell, Mortgage and Charge to third parties be nullified and the Defendants be held liable to the said third parties.
- vi. In the alternative & without prejudice to prayers (i)-(iv); the Defendants be compelled to compensate the Plaintiffs for the loss of their Plots at the current market value (current being the date of the judgement herein).



- vii. General Damages for breach of Agreement.
 - viii. Punitive and Exemplary Damages.
 - ix. Cost of the suit.
 - x. Any other remedies the Honourable Court deems just and expedient to grant.
3. Upon being served with the original Plaint, the Defendants herein entered appearance and thereafter filed a statement of Defence dated the 5th July 2022. The Defendants herein denied and disputed the claims raised by and on behalf of the Plaintiffs. In addition, the Defendants contended that the Plaintiffs shall be invited to strict proof.
 4. Following the close of pleading, the subject matter was set down for case conference. During the case conference, the advocates for the parties covenanted that same had filed and exchanged the requisite pleadings; list and bundle of documents and the witness statements. Moreover, the advocates for the parties also posited that the suit was ready for hearing.
 5. Be that as it may, the parties thereafter entered into and executed a partial consent dated the 14th June 2023 and which consent was thereafter adopted by the court. Instructively, the parties agreed on the various List[s] and bundle of documents filed by and on behalf of the respective parties being admitted in evidence, save for the valuation report[s]. Furthermore, the parties also agreed that the witness statement filed by the respective witnesses were to be admitted without the makers thereof attending court and testifying.
 6. Additionally, the parties agreed that same waved their right to cross examination as pertains to the witnesses, save for the expert witness[ess]. For good measure, it was agreed that only the expert witnesses were to be subjected to cross examination.
 7. Other than the foregoing, the parties agreed that the mandate of the court would only be to determine the requisite compensation due and payable to the Plaintiffs in lieu of the plots that had hitherto been sold to the Plaintiffs and to determine the question of costs, namely, who between the parties is liable to pay the costs of the suit, if any.
 8. Suffice it to state that the consent at the foot of the letter dated the 14th June 2023 was duly adopted and constituted as an order of the court. Consequently, and in the premises, the judgment herein shall only address the question of compensation and the incidence of costs.

Evidence By The Parties:

a. 1st To 8th Plaintiffs' Case:

9. The 1st to the 8th Plaintiffs' case is premised on the evidence of one witness, namely, Florence Oluoch. Same testified as PW1.
10. It was the testimony of the witness [PW1] that same is a registered and practising valuer. In addition, the witness averred that same [PW1] holds a Bachelor's degree in Land Economics from the University of Nairobi. Furthermore, the witness averred that same is also duly gazetted as a registered and practising valuer.
11. Additionally, it was the testimony of the witness that same is conversant with the facts of this matter. In particular, the witness averred that same [PW1] was instructed by one Vincent Omuse and the rest of the Plaintiffs in June 2023. Moreover, the witness testified that same was instructed to undertake valuation over and in respect of various sub-plots, which formed part of a bigger plot, namely, Nairobi



Block/83/8760. Nevertheless, the Witness thereafter corrected the details of the Land Reference and stated that same was LR.No Nairobi Block/82/8760.

12. It was the further testimony of the witness that same proceeded to and undertook valuation of the various plots in accordance with her instructions. In addition, the witness averred that thereafter same prepared a valuation report dated the 27th June 2023 and which valuation report same [witness] sought to tender and produce as an exhibit before the court. In the absence of any objection to the production, the valuation report was tendered and produced to the court as an exhibit on behalf of the named Plaintiffs.
13. The witness further testified that during the course of undertaking the inspection and the consequential valuation, same [witness] established that the plots in question were not serviced. In particular, the witness averred that there was lack of infrastructure. In any event, the witness averred that lack of infrastructure would impact on and/or affect the value of the designated plots.
14. Furthermore, it was the testimony of the witness that same undertook the valuation of the plots as they were. At any rate, the witness averred that in the course of valuing the properties, same [witness] took into account the sentiments of the clients. However, the witness clarified that the sentiments and opinions of the clients do not determine the final valuation. For good measure, the witness posited that the final valuation is informed by the opinion, expertise and experience of the valuer.
15. On cross examination by learned counsel for the Defendants, the witness averred that same is the one who prepared the valuation report dated the 27th June 2023. In particular, the witness averred that same is duly qualified and authorised to undertake valuation.
16. Upon being referred to the documents at page 227 of the Plaintiffs bundle of documents, the witness averred that the documents in question is a sale agreement. It was the further testimony of the witness that in the course of undertaking the valuation, same [witness] considered the terms or clauses of the sale agreement.
17. Whilst under further cross examination, the witness averred that the sale agreement contained terms/ clauses alluding to the fact that the vendor was to procure the services towards infrastructure, but the purchasers were to pay the costs of the infrastructure.
18. It was the further testimony of the witness that the costs of the infrastructure are important. In any event, the witness added that the costs of infrastructure would be relevant whilst undertaking a valuation exercise.
19. Regarding the document at page 220 of the Plaintiffs list and bundle of documents, the witness averred that the document in question is an extract of the proposed sub-division scheme plan. In addition, the witness averred that the proposed sub-division scheme plan contains provision for infrastructure. Nevertheless, the witness averred that at the time of undertaking the valuation, the infrastructure had not been provided.
20. It was the further testimony of the witness that in the course of undertaking the valuation exercise and preparing the valuation report, same [witness] took into account lack of infrastructure. Besides, the witness averred that same also took into account the sizes/acreage of the plots in question.
21. Additionally, the witness testified that same adopted and deployed the comparable approach in arriving at the values of the designated plots. In this regard, the witness posited that same has included the comparable in the body of the valuation report.



22. Whilst still under cross examination, the witness averred that the comparable[s] which same deployed and utilized were not serviced. Further and in addition, the witness averred that the comparable[s] were also undeveloped and thus vacant.
23. It was the further testimony of the witness that where a plot is zoned for high-rise building, such a plot would have a higher value than one which is reserved for single dwelling. However, the witness averred that same [Witness] arrived at a value and thereafter affixed the value at the foot of the valuation report.
24. On re-examination, the witness averred that the sale agreement which same [witness] was referred to contains clauses concerning the procurement of infrastructural services by the vendor and payment of such services by the purchasers.
25. The witness further averred that the cost of infrastructure would affect the value of the plot. Nevertheless, the witness added that the valuation relates to and concerns the value of the land at the time of undertaking the valuation. Furthermore, the witness continued that valuation does not take into account things that are not on the land at the time of the valuation.
26. Whilst still under re-examination, the witness averred that same was able to take into account the sub-division plans. In any event, the witness testified that same valued the plots that are situated on L.R No. Nairobi Block 82/8760.
27. With the foregoing testimony, the 1st to 8th Plaintiffs' case was closed.

b. 9th Plaintiff's Case:

28. Similarly, the 9th Plaintiff's case is premised on the evidence of one witness, namely, Stanley Juma Muli. Same testified as PW2.
29. It was the testimony of the witness [PW2] that same is a registered and practising valuer. In addition, the witness averred that same was instructed by the 9th Plaintiff to undertake inspection on a designated plot situate on L.R No. Nairobi Block 82/8760. In this regard, the witness averred that same thereafter proceeded to and undertook the valuation exercise.
30. It was the further testimony of the witness that thereafter same [witness] prepared a valuation report dated the 13th October 2023 and which valuation report the witness sought to adopt and produce before the court. In the absence of any objection to the production of the valuation report, same was duly produced and admitted as an exhibit on behalf of the 9th Plaintiff.
31. It was the further testimony of the witness that in the course of undertaking the valuation exercise, same took into account the comparable[s], namely, comparable properties situated within the same location. In any event, the witness added that same deployed a comparable approach in arriving at the values adverted to at the foot of the valuation report.
32. The witness [PW2] further averred that a comparative approach entails comparing the property in question with a suitable comparable property in the same locality. In any event, the witness testified that the valuation was based on an un-serviced plot.
33. Whilst still testifying in chief, the witness averred that even though same went to the suit property same [witness] was however not able to enter the suit property because the same was fenced. Furthermore, the witness averred that there were security guards stationed at the gate and same [security guards] denied him [witness] access to the property.



34. On cross examination, by learned counsel for the 1st to 8th Plaintiffs', the witness averred that the values that same arrived at can be applied to similar properties within the same area/locality. Furthermore, the witness testified that the plots under reference are served by the same infrastructure.
35. It was the further testimony of the witness that same [witness] is aware that the Defendants have filed a valuation report. Nevertheless, the witness averred that the valuation report[s] by the Defendants are premised on the market value.
36. Whilst under further cross examination, the witness averred that the market value approach could not be the correct/appropriate approach in determining the values of the suit properties. In addition, the witness averred that the values returned by the Defendant's valuer are not accurate.
37. On cross examination by learned counsel for the Defendants, the witness averred that same is a qualified, registered and practising valuer. Furthermore, the witness averred that same qualified to sign a valuation report in the year 2022.
38. It was the further testimony of the witness that same prepared and has since filed a valuation report before the court. Nevertheless, the witness admitted that his valuation report does not include the pictures of the plots which same [Witness] valued.
39. It was the further testimony of the witness that the plots under reference measured 7 meters by 14 meters. Furthermore, the witness testified that the market value of 1 Acre of land would be higher than what has been alluded to and referenced in the valuation report.
40. Whilst still under cross examination, the witness testified that same did not enter onto the suit plots. Nevertheless, the witness clarified that the plots which were the subject of valuation were un-serviced. In addition, the witness has testified that same deployed and used a comparable approach. In any event, the witness added that the comparable[s] deployed are un-serviced.
41. It was the further testimony of the witness that the comparable[s] that have been deployed have been alluded to in the body of the valuation report. Nevertheless, the witness confirmed that some of the comparable[s] are serviced whilst others are un-serviced.
42. The witness testified that the availability of infrastructure would affect the value of the plots. In this regard, it was the testimony of the witness that if the infrastructure has been put in place, then the value of the plots would be higher.
43. It was the further testimony of the witness that valuation is an objective assessment of the value of the designated property. In this regard, the witness averred that there are several methods/approaches which can be deployed by a valuer. Nevertheless, the witness reiterated that same deployed the comparable approach.
44. Whilst still under cross examination, the witness averred that same reached and/or arrived at a value of Kes. 4,300,000/= only. For good measure, the witness stated that he [witness] arrived at the conclusion based on the comparable approach.
45. On re-examination by learned counsel for the 9th Plaintiff, the witness averred that the comparable plots, which were referenced and deployed by himself were not serviced. In any event, the witness clarified that the un-serviced plot mean[s] that the plots in question are connected to the service.
46. Whilst still under re-examination, the witness averred that a valuer is obligated to deduce value. For good measure, the witness clarified that valuation is not arrived by averaging the values of comparable[s].



47. With the foregoing testimony, the 9th Plaintiff's case was closed.

c. Defendants' Case:

48. The Defendants' case is anchored on the evidence of four witnesses, namely; Nicholas Owino, Robert Nzioki, Stephen Kioko Kimweli and Alex Ntiwa. Same testified as DW1, DW2, DW3 and DW4, respectively.
49. It was the testimony of the witness [DW1] that same is the Deputy Director of valuation at the Ministry of Lands Public Works, Housing and Urban Development. In addition, the witness averred that same is also a valuer by profession.
50. It was the further testimony of the witness that same is conversant with the facts of this matter. In particular, the witness averred that same was instructed to undertake the valuation of a designated plot. In this regard, the witness testified that same thereafter prepared a valuation report dated the 22nd September 2023 and which report same sought to tender and produce before the court. There being no objection to the production of the report, same [valuation report] was tendered and produced as exhibit D9 on behalf of the Defendants.
51. Moreover, the witness added that the valuation report under reference relates to three [3] parcel of lands located at Donholm Area within the City of Nairobi. In particular, the witness averred that the plots which are the subjects of valuation were L.R No. Nairobi Block 82/9402, 9403 and 9404, respectively.
52. It was the further testimony of the witness that the sizes/acreage of the two plots are duly shown/ reflected in the valuation report before the court. In addition, the witness averred that same [witness] has also indicated the market values of each of the plots in question.
53. It was the further testimony of the witness that the aggregate value of the three [3] plots is Kes. 1,298,900,000/= only. However, the witness shortly made a correction and said that the aggregate value of the three [3] plots is Kes. 1,300,000,000/= only.
54. The witness further testified that the three [3] plots under reference were sub-division[s] of L.R No. Nairobi Block 82/8760. Nevertheless, the witness averred that same did not visit and/or inspect the three [3] plots. On the contrary, the witness averred that same relied on a previous valuation done on the 3rd April 2014.
55. On cross examination by learned counsel for the 1st to 8th Plaintiffs, the witness averred that same was instructed and retained by the Defendants. Nevertheless, the witness admitted and acknowledged that same has not tendered before the court the terms of reference attendant to his engagement.
56. Regarding the valuation report filed by the witness, same testified that he did not visit the plots under reference. Furthermore, the witness averred that land appreciates in value. However, the witness added that the rate of appreciation is not stable. For good measure, the witness clarified that the rate of appreciation fluctuates from time to time.
57. It was the further testimony of the witness that the value of land depends on several factors. In particular, the witness averred that the value will also depend on the size/acreage of the land. In this regard, the witness averred that the value of one size acre land in the same area will no doubt be higher than the value of the plot.
58. Whilst still under cross examination, the witness averred that the value of one acre of land can be arrived at by aggregating the values of plots sub-divided and/ or arising therefrom.



59. Upon being shown a newspaper dated the 1st February 2022, the witness averred that the newspaper under reference is the business daily. In addition, the witness averred that the newspaper beforehand has a segment touching on various properties within the city of Nairobi. Moreover, the witness added that there is a segment relative to Donholm Area within the city of Nairobi.
60. It was the further testimony of the witness that the segment of the business daily containing values of the designated property at Donholm is indicated to have been prepared by M/s Hass Consults. In addition, the witness averred that same is privy to and knowledgeable of the same company, namely, Hass Consult.
61. Other than the foregoing, it was the testimony of the witness that a valuer can rely on information availed by his/her own client. However, the witness added that the valuer cannot rely on the opinion of the client in returning the value of the property.
62. It was the further testimony of the witness that valuation relates to the property as it is. In any event, the witness averred that same deployed the comparable sales method in arriving at the values, contained/alluded to at the foot of the valuation report.
63. On cross examination by learned counsel for the 9th Plaintiff, the witness averred that same does not know the market value for the 21 plots. Furthermore, the witness testified that the government was paid for the services that was rendered by himself. Nevertheless, the witness averred that same has neither tendered nor produced the receipts before the court.
64. Whilst still under cross examination, the witness averred that same did not carry any physical inspection of the properties in question. However, the witness shortly beat an about-turn and stated that same undertook a site visit onto the parcel of lands in question.
65. It was the further testimony of the witness that same has alluded to and indicated the fact of the visitation in the report before the court. Furthermore, the witness testified that the valuation was undertaken on the basis of a comparable approach.
66. Whilst under cross examination, the witness stated that even though same deployed the comparable approach, same has not indicated the comparable[s] that were adverted to and/or relied upon in the body of his report. Nevertheless, the witness contended that the comparable[s] were contained in his workings.
67. When pressed further, the witness [DW1] averred that the workings adverted to have not been tendered before the court.
68. The second witness who testified on behalf of the Defendants was Robert Nzioki. Same testified as DW2.
69. It was the testimony of the witness [DW2] that same is a qualified, registered and practising valuer. In addition, the witness averred that same holds a Bachelor's degree in Land Economics from the University of Nairobi.
70. Moreover, it was the testimony of the witness that same was instructed/engaged by the Defendants to undertake a valuation exercise of the designated properties. To this end, the witness averred that same thereafter undertook the valuation exercise and prepared a valuation report dated the 6th November 2023 and which report the witness sought to tender and produce before the court.
71. There being no objection to the production of the report, same [valuation report] was produced as an exhibit on behalf of the Defendant. In addition, the witness averred that in the course of preparing the



- valuation report, same [witness] relied on two other reports prepared by Engineer Stephen Kimweli [DW3] and Physical Planner Alex Ntiwa [DW4], respectively.
72. The witness further testified that same has alluded and adverted to the values of the plots in his valuation report. Furthermore, the witness testified that same has also referenced the methodology that was deployed in undertaking the valuation exercise.
 73. It was the further testimony of the witness that the average value of the plots was Kes. 2,406,000/= only. Nevertheless, the witness testified that thereafter same [witness] took into account the terms of the sale agreement that was entered into by the parties. Moreover, the witness also averred that same was also guided by the planning regulations which were in force at the point in time.
 74. It was the further testimony that the market values which same arrived at was thereafter subjected to the conditions of the sale agreement. In particular, the witness averred that the conditions included that the purchasers were to meet the costs of providing the infrastructural services.
 75. Additionally, the witness testified that by the time same [witness] undertook the valuation, the infrastructure had not been put in place. In this regard, the witness posited that the plots were un-serviced.
 76. It was the further testimony of the witness that same took into account the costs of providing the infrastructural services and thereafter deducted the same from the market value of the plots.
 77. Upon being referred to the valuation report, tendered by and on behalf of the Plaintiffs, the witness averred that the valuation report speaks to an item called asking price. Nevertheless, the witness averred that the item known as asking price is not the same as the market value. For good measure, the witness clarified that asking price can be the subject of negotiation whereas the market value is the obtaining price of a particular property in a particular area and at a particular period of time.
 78. It was the further testimony of the witness that market value refers to the mutual and agreed value of the designated property. Instructively, the witness averred that asking price is different from market price.
 79. On cross examination by learned counsel for the 1st to 8th Plaintiffs, the witness averred that same was retained and instructed by the Defendants. Nevertheless, the witness clarified that the instructions came from the firm of M/s Kagwe Karanja & Co Advocates, who were acting on behalf of the Defendant.
 80. Whilst under cross examination, the witness averred that a valuation report may be unreliable if the report does not follow the standards and principles of valuation. Nevertheless, the witness averred that there is no clause that references [sic] creative valuation.
 81. It was the further testimony of the witness that same did not subject the valuation report to peer review. Furthermore, the witness averred that same did not carry out and/or undertake any official search over and in respect of the suit property.
 82. It was the further testimony of the witness that same carried out and undertook the valuation exercise using the comparable approach. In this regard, the witness alluded to the comparable[s] in the valuation report. However, the witness stated that same has not attached any sale agreement before the court.
 83. Regarding the contents of page 9 of the valuation report, the witness averred that the said page adverts to and contains various observations that were arrived at by himself. In addition, the witness averred that the observations were procured from the ground when he [witness] undertook the inspection.



84. It was the further testimony of the witness that when same undertook the inspection attendant to the preparation of the valuation report, the suit plots were not serviced.
85. On the other hand, the witness testified that in arriving at the final values, same [witness] took into account the contents of the expert report by Eng. Stephen Kimweli and physical planner, namely, Alex Ntiwa. In any event, the witness averred that the reports in question were availed unto him by the client. For good measure, the witness reiterated that same took into account the contents of the two [2] expert reports.
86. Whilst still under cross examination, the witness acknowledged that same was availed copies of the valuation reports prepared on behalf of the Plaintiffs. Nevertheless, the witness testified that valuation is a question/issue of opinion, experience and expertise.
87. It was the further testimony of the witness that in the course of arriving at the values adverted to in the valuation report, same [witness] deployed a comparable approach. In any event, the witness averred that same has since alluded to the comparable[s] in the body of the valuation report.
88. However, it was the further testimony of the witness that when same visited the suit properties, the same was fenced. For good measure, the witness has posited that he [witness] has included the observation that the property in question was fenced.
89. It was the further testimony of the witness that same has alluded to the costs estimates for road construction and a bridge. However, the witness clarified that the costs estimate under reference were availed by Eng. Kimweli [DW3].
90. On further cross examination, the witness testified that same valued the acreage of 30 acres. Nevertheless, the witness testified that the plots in question are various and that the same are located within the 30 acres piece of land.
91. It was the further testimony of the witness that the time between the valuation and the date of his testimony is too short to enable the properties to gain value in appreciation. Moreover, the witness averred that the duration in question is too short to affect the values of the properties.
92. On cross examination by learned counsel for the 9th Plaintiff, the witness averred that same was duly retained and instructed by the Defendants. Thereafter the witness stated that same proceeded to and undertook the valuation of the plots in question.
93. It was the further testimony of the witness that the plots in question are not serviced. Furthermore, the witness averred that the plots in question have also not been surveyed. In any event, the witness averred that same [witness] was not informed whether the land had been surveyed.
94. Whilst still under cross examination, the witness testified that same relied on the report by Eng. Kimweli [DW3] and another report by physical planner Alex Ntiwa [DW4]. In any event, the witness added that the reports under reference were availed unto him by the client.
95. It was the further testimony of the witness that same arrived at the values of the properties and thereafter deducted the costs of infrastructure from the final valuation figures. In any event, the witness averred that the costs of infrastructure will affect the value of the suit properties.
96. The witness testified that valuation is ordinarily based on the situation on the ground. In addition, the witness stated that same [witness] adopted and deployed a comparable approach. In any event, the witness contended that same has highlighted the comparable[s] at the foot of the valuation report.



97. Moreover, the witness averred that the valuation report prepared and tendered before the court by himself is objective.
98. The 3rd witness who testified on behalf of the Defendants was Stephen Kioko Kimweli. Same testified as [DW3].
99. It was the testimony of the witness that same a Civil Engineer by profession. In addition, the witness averred that same holds a Bachelor's degree in science [Civil Engineering] from the University of Nairobi. Furthermore, the witness added that same is registered with the Engineer's Registration Board.
100. It was the further testimony of the witness that same is conversant with the facts of the instant matter. To this end, the witness averred that same had been instructed by the Defendants to prepare the costs estimate[s] for undertaking assorted civil engineering works on the suit property. Moreover, the witness averred that pursuant to the instructions, same proceeded to and prepared a report dated the 20th October 2023 and which report the witness sought to tender and produce before the court.
101. In the absence of any objection to the production of the report by the witness, same [report] was duly tendered and produced as an exhibit on behalf of the Defendants.
102. It was the further testimony of the witness that the report in question concerns the costs estimates for the proposed infrastructural works on L.R No. Nairobi Block 82/8760 [but now known as Nairobi Block 82/9402; Nairobi Block 82/9403 and Nairobi Block 82/9404].
103. It was the further testimony of the witness that the property under reference belong to and is registered in the name of the 1st Defendant. Nevertheless, the witness clarified that the costings/estimate relates to various infrastructural works including access roads to the different proposed plots; drainage system for storm water; sewerage system; portable water supply; perimeter wall around the entire parcel of land; the entry gate and street lighting.
104. It was the further testimony of the witness that upon the preparation of the report under reference, same [Witness] returned a figure of Kes. 979, 109, 767/= only, as the value/estimate of the proposed infrastructural works.
105. The witness further averred that the costings/estimate[s] contained in the report were arrived at on the basis of the proposed sub-division scheme plan. For good measure, the witness added that the proposed sub-division scheme plan was to cover a total of 46 plots.
106. On cross examination, by learned counsel for the 1st to 8th Plaintiffs, the witness averred that same [witness] was instructed by the Defendants through the law firm of M/s Kagwe Kamau & Company Advocates. In particular, the witness averred that same has a copy of the letter of instructions before the court. Instructively, the witness averred that the instruction letter is part of the report that has been tendered and produced before the court.
107. It was the further testimony of the witness that same visited the suit property sometime in September/October 2023. Nevertheless, the witness averred that same could not recall/ remember the exact date to the visitation of the locus in quo.
108. Whilst still under cross examination, the witness averred that when same visited the locus in quo there was a perimeter wall surrounding the entire suit property. Furthermore, the witness added that there was also an entry gate on the property.



109. Be that as it may, it was the testimony of the witness that the report beforehand did not make a provision for the existing perimeter wall; and the gate. For good measure, the witness testified that his report still adverts to the estimates for the erection of a perimeter wall round the entire of the suit Property [Parcel of Land] and installation of a gate.
110. Whilst still under cross examination, the witness averred that the costs estimates, which are contained in the body of the report were procured from various sources. In particular, the witness averred that same utilized various manuals from the Institute of Quantity Surveyors, Architects and Building Surveyors. Furthermore, the witness pointed out that the sources of the information contained in the report have been highlighted at page 32 of the report under reference.
111. It was the further testimony of the witness that the report which has been tendered/ produced before the court speaks to various access roads which were to be constructed on the suit property. In addition, the witness averred that the access roads were meant to connect and service the various plots. In any event, it was the testimony of the witness that the report also references the material[s] that were to be utilized.
112. On the other hand, it was the testimony of the witness that same relied on various drawings to arrive at the costings which are contained at the foot of the report. In addition, the witness averred that the drawings which were referenced are also part of the report, which has been tendered and produced before the court.
113. Whilst under further cross examination, the witness stated that even though same referenced and relied on the drawings, the said drawings were not prepared by him [witness]. Instructively, the witness averred that the drawings were attached to the manuals that same relied on.
114. It was the further testimony of the witness that the costings that have been adverted to constitute estimate[s].
115. On cross examination by learned counsel for the 9th Plaintiff, the witness averred that the cost estimate[s] at the foot of the report beforehand were done in the year 2023. Nevertheless, the witness averred that same [witness] is aware that the Plaintiffs bought the suit plots in the year 1997.
116. It was the further testimony of the witness that the report before the court relates to the proposed infrastructural works. Nevertheless, the witness conceded that same is aware that the proposed sub-division scheme did not take off, or better still, collapsed.
117. Whilst under further cross examination, the witness averred that same found that there was an existing perimeter wall already in place. Nevertheless, the witness averred that same incorporated the costs estimate[s] for the erection of the perimeter wall in the Report before the Court.
118. On the other hand, the witness averred that same referenced and relied on various manuals procured from Government Department. In any event, the witness averred that the manuals which were relied upon are authentic and recognized by both the Public and Private sectors.
119. On re-examination by learned counsel for the Defendants, the witness averred that same is aware of the nature of claims that have been canvassed by the Plaintiffs herein. In addition, the witness averred that same [Witness] is aware that the plots in question were purchased/bought in the year 1997.
120. The fourth [4th] witness who testified on behalf of the Defendants was Alex Ntiwa. Same testified as DW4.



121. It was the testimony of the witness [DW4] that same is a registered physical planner. Furthermore, the witness averred that same is also a corporate member of the Kenya institute of planners.
122. Moreover, it was the testimony of the witness that same holds a Bachelor's degree in urban and regional planning from Maseno University and a Master's degree in Geographical Information Science from the University of Twente [Netherlands].
123. Furthermore, it was the testimony of the witness that same is also conversant with the facts of the instant matter. In this regard, the witness averred that same was instructed and retained by the Defendants to review the proposed sub-division scheme and thereafter to prepare a report. In this regard, the witness testified that same indeed prepared a report dated the 26th October 2023 and which report the witness sought to tender and produce before the court.
124. In the absence of any objection to the production of the report, same [report] was tendered and produced as exhibit D8 [c] on behalf of the Defendants. Furthermore, the witness averred that the report under reference relates to the elements surrounding physical planning and a sub-division scheme which was prepared in the year 2008.
125. It was the testimony of the witness that the sub-division scheme under reference was prepared during the regime of Physical Planning Act, Chapter 286 Laws of Kenya. In this respect, the witness averred that same reviewed the provisions of the said Act and established that the Act only permitted the establishment of plots of sizes 50 by 100 feet and not less.
126. It was the further testimony of the witness that the proposed sub-division scheme which underpinned the plots claimed by the Plaintiffs was undertaken contrary to and in contravention of the obtaining law. In this regard, the witness averred that the plots were smaller in size than those permitted under the Physical Planning Act, Chapter 286, Laws of Kenya; [now repealed].
127. It was the further testimony of the witness that the sub-division scheme was to provide a basis for survey. Nevertheless, the witness testified that same [Witness] also came to the conclusion that survey had not been done to facilitate the implementation of the sub-division scheme.
128. It was the further testimony of the witness that the proposed sub-division scheme which was prepared in the year 2008 lapsed before same could be implemented. In any event, the witness averred that the law as pertains to planning has since been repealed and a new Act has been enacted. To this end, the witness referenced the *Physical and Land Use Planning Act*, 2019.
129. It was the further testimony of the witness that the current planning regime does not allow any proposed sub-division scheme of plots of [sic] the size of 7 by 14 meters. In this regard, it has been stated that the sub-division scheme under reference is not capable of implementation.
130. On cross examination by learned counsel for the 1st to 8th Plaintiffs, the witness averred that the proposed sub-division scheme which was prepared in the year 2008 had been approved. Furthermore, the witness added that what was approved was in respect of the plots which were size 7 by 14 meters.
131. Whilst still under cross examination, the witness averred that the developments which were to be undertaken by the Plaintiffs were the subject of the proposed sub-division scheme, which had hitherto been approved. Furthermore, the witness averred that the perimeter wall is part of the development plan.
132. On cross examination by learned counsel for the 9th Plaintiff, the witness averred that same did not visit the land in question. For good measure, the witness testified that his mandate/instructions were to review the proposed sub-division scheme and thereafter to give an opinion in respect thereof.



133. It was the further testimony of the witness that same acted in accordance with the instructions given by the Defendants. In particular, the witness averred that same proceeded to and prepared the opinion on the legality of the proposed sub-divisions scheme which had been prepared in the year 2008.
134. With the foregoing testimony, the Defendant's case was duly closed.

Parties Submissions:

135. At the close of the hearing, the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timeline[s] for the filing and exchange of the written submissions.
136. The 1st to 8th Plaintiffs filed written submissions dated the 18th December 2024 whereas the 9th Plaintiff filed written submissions dated the 28th October 2024. The Defendants on their part filed written submissions dated the 10th December 2024. For coherence, the three [3] sets of written submissions form part of the record of the court.
137. The submissions under reference have been duly considered and taken into account by the court. In any event, the failure to reproduce and rehash the written submissions in the body of the judgment is not borne out of any contempt, or at all.
138. Finally, it is apposite to state and underscore that the court is indeed indebted to the respective advocates for the parties for the concise and precise submissions filed beforehand. For good measure, the written submissions have hugely assisted the court in arriving at the value [figure] to be affixed to the suit plots.

Issues For Determination:

139. Having reviewed the pleadings filed by and on behalf of the respective parties; having taken into account the evidence tendered [both oral and documentary] and having considered the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination:
- i. What is the reasonable value due and payable to the Plaintiffs on account of the suit plots and in lieu of Specific Performance.
 - ii. Who should bear the costs of the suit, if any.

Analysis And Determination

Issue Number 1 What is the reasonable value due and payable to the Plaintiffs on account of the suit plots and in lieu of Specific Performance.

140. The instant suit was filed/commenced by the Plaintiffs herein and wherein the Plaintiffs sought for a plethora of reliefs. In the main, the Plaintiffs herein, had sought for an order of specific performance to compel the Defendants to effectuate the transfer and ultimate registration of the designated plots in their [Plaintiffs] name.
141. Furthermore, the Plaintiffs also sought for an order to be allowed to take vacant possession of the suit plots. Besides, the Plaintiffs also sought for [sic] general damages for breach of contract as well as payment of punitive and exemplary damages.



142. Other than the main prayers, [details highlighted in the preceding paragraphs], the Plaintiffs sought for an alternative prayer for compensation by payment of compensation premised/anchored on the current market value of the suit plots.
143. Be that as it may, the parties herein entered into and executed a consent dated the 14th June 2023 and wherein the parties agreed on various terms. In particular, the parties herein agreed to have the witness statements filed by and on behalf of the various witnesses to be adopted and constituted as the evidence in chief of the witnesses. In addition, the parties agreed to forfeit the right of cross examination.
144. Moreover, the parties also agreed to have the list and bundle of documents which have been filed by and on behalf of the parties to be admitted and constituted as exhibits on behalf of the parties. However, the only exception to the consent was to the effect that the expert documents were to be tendered and produced by the experts; who were thereafter to be amenable [subjected] to cross examination.
145. Additionally, the parties agreed that the court shall only proceed and take the evidence of the expert witness[ess] and thereafter address and adjudicate upon two [2] outstanding issues. For good measure, the two [2] outstanding issues related to the determination of the fair compensation on account of the suit plots and the incidence of cost.
146. The consent under reference having been duly adopted and endorsed as a court order, the duty of the court at this juncture is therefore circumscribed and limited. In this regard, I am now disposed to address and determine the first issue which was left/reserved for the determination of the court.
147. In an endeavour to determine the fair compensation/market value of the suit plots, it is imperative to reference the four [4] sets of valuation reports that were tendered and produced before the court.
148. To start with, it is imperative to state and underscore that the 1st to 8th Plaintiffs called one witness, namely, Florence Oluoch [same testified as PW1]. It was the testimony of the witness that same is a qualified, registered and practising valuer. Furthermore, the witness testified that same was duly retained and instructed by the named Plaintiffs to undertake valuation of the suit plots.
149. Additionally, PW1 testified that upon receipt of the instructions, same proceeded to and visited L.R No. Nairobi Block 82/8760, wherein the various sub-plots were situated. Moreover, the witness testified that same had occasion to inspect the suit plots and thereafter compiled a valuation report dated the 27th June 2023; and which valuation report was duly tendered and produced before the court.
150. It is important to point out that the valuation report by PW1 has alluded to the fact that the suit plots which were the subject of valuation were un-serviced. For good measure, the witness posited that same valued the suit plots in the manner in which same stood at the time of the valuation.
151. On the other hand, it was the testimony of the witness that valuation relates to the actual process of affixing value to the designated property as it is. In this regard, the witness posited that one cannot undertake valuation and thereafter engage in the process of deductions or otherwise.
152. Additionally, the witness spoke to the methodology that was adopted and deployed by herself in the course of the affixing the value to the suit plots. Instructively, the witness adverted to and referenced the comparative approach wherein same [Witness] deployed comparable properties situate in the neighbourhood of the suit plots.
153. It is important to point out that the comparable[s] which the witness herein has availed relates to properties which are of similar size and situate in the neighbourhood of the suit plots. In particular, comparable 1 and 2 relate to the near similar -sized plot[s], which were un-developed.



154. The other witness who testified on behalf of the Plaintiffs was one Stanley Juma Muli. It was the testimony of the said witness that same was instructed and/or retained by the 9th Plaintiff herein to undertake valuation of the designated plots situate within L.R No. Nairobi Block 82/8760. In this regard, the witness testified that same duly visited the suit property but same was unable to access the suit property because of an existing perimeter wall. In addition, the witness testified that the property also had a gate manned by security officer[s]/ guards who denied same [Witness] entry.
155. Be that as it may, the witness testified that same was able to undertake the valuation exercise and thereafter prepared a valuation report dated the 13th October 2023. For good measure, the report under reference was duly tendered and produced before the court.
156. Notably, the report by PW2 documents the process/methodology that was deployed by the witness. Furthermore, the report also contains the analysis and ultimately the valuation /value that was affixed to the suit property. It is worthy to recall that the report by PW2 also deployed and adopted a comparable approach and the comparable[s] have been well delineated and alluded to in the body of the report.
157. Suffice it to underscore, that the report by PW2 arrived at a value of Kes.4, 300, 000/= only. Furthermore, it is not lost on the court that the report by PW2 is nearly commensurate to the report by PW1 in terms of the value arrived at. However, it is imperative to posit that unlike the report by PW1, the report by PW2 was subjected to peer-review and thus same accords which the practice and guidelines by the Institution Surveyors of Kenya [valuers' chapter].
158. On behalf of the Defendants, two[2] sets of valuation reports were tendered. The first valuation report was tendered and produced by Nicholas Owino. It was the testimony of Nicholas Owino [DW1] that same received instruction from the 1st Defendant to undertake valuation in respect of three properties, namely, Nairobi Block 82/9402; 943 and 9404. Furthermore, the witness averred that the said plots arose from and formed what was hitherto L.R No. 8760.
159. It was the testimony of the witness that upon receipt of the instructions, same proceeded to and prepared a valuation report dated the 22nd September 2023. However, the witness stated that in the course of preparing the report [Dw1] referenced and relied on a previous valuation done of the 4th April 2014.
160. On cross examination by learned counsel for the 1st to the 8th Plaintiffs, the witness stated that even, though same was instructed to undertake valuation of the suit property, same [Witness] did not inspect and/ or visit the Suit Plot[s] or the Land in question.
161. At this juncture, it is imperative to reproduce verbatim the answers tendered by DW1 whilst under cross examination by Learned counsel for the 1st to 8th Plaintiffs.
162. DW1 stated as hereunder:
- “ Referred to the valuation report, the witness states that I did not visit the site.”
163. On the other hand, and whilst still under cross examination by learned counsel for the 1st to 8th Plaintiff [Nicholas Owino] testified as hereunder:
- “I wish to state that a value can rely on the information availed by own client. however, the valuer cannot rely on the opinion of the client. I only value the property as it is. I utilized the comparable sales method. I have shown the method that I relied on.”



164. From evidence tendered by DW1 and more particularly, whilst under cross examination by learned counsel for the 1st to 8th Plaintiffs, it is apparent that DW1 did not visit the site. Furthermore, it is also evident that DW1 relied on a previous valuation report dated the 3rd April 2014.
165. Additionally, what is also apparent is that DW1 contends that same adopted and deployed the comparable approach. Nevertheless, there is no gainsaying that the report dated the 22nd of September 2023 does not contain or reflect the comparable[s] that were referenced or at all.
166. On the other hand, whilst under cross examination by learned counsel for the 9th Plaintiff, DW1 beat an about-turn and testified that same indeed visited the suit property and undertook inspection. In this regard, it suffices to reproduce the testimony of DW1 whilst under cross examination.
167. DW1 stated thus:
- “I do confirm that I carried out an inspection over and in respect of the suit property. I reiterate that we carried out and undertook a site visit onto the parcel of land in question. I have alluded to and indicated the facts of visitation in the report before the court
168. Whilst under further cross examination, DW1 is on record as stating thus:
- “I also wish to state that we undertook the valuation on the basis of comparable approach. The comparable have not been indicated and adverted to in the report. However, I do wish to add that the comparable were contained in our workings but the same were not extrapolated into the report”.
169. Quite interestingly, DW1 has adopted a contradictory approach. Firstly, it is not lost on the court that this witness acknowledged and conceded that same did not carry out a site inspection or visitation to the locus in quo. Furthermore, the witness is on record that same relied on a previous valuation report dated the 3rd April 2014.
170. Nevertheless, without blinking an eye; and perhaps for convenience, DW1 switches position whilst under cross examination by learned counsel for the 9th Plaintiff and purports that same indeed visited the site and thereafter prepared the valuation report. Suffice it to posit that the version of evidence tendered by DW2 whilst under cross examination by the 9th Plaintiff contradicts the initial version and thus renders DW1 unreliable and un-credit-worthy.
171. Secondly, it is imperative to recall that even though DW1 contended that same adopted and deployed a comparable approach, his report, namely, the report dated the 22nd September 2023, does not advert to or reflect any comparable[s] at all. Instructively, it is trite and established that the comparable[s] deployed by a valuer must form part of the valuation report so as to enable a court of law to appreciate and interrogate same.
172. Pertinently, a court of law can only discern and decipher that which is referenced as comparable[s] and are indeed comparable to the suit property, if and only if; the comparable[s] are placed before the court. Suffice it to say that there is no way a court of law can ascertain that what is [sic] contended to be comparable is indeed comparable, if same are not reflected in the body of the valuation report before the court.
173. Despite the significance of having the comparable[s] reflected and contained in the body of the valuation report, DW1 took a perfunctory [read, casual] approach and merely contended that it is not a standard practice to include the comparable[s] in the valuation report.



174. Surely, DW1 must be a serious pretender in the profession.
175. I say that DW1 must be a serious pretender by contending that it is not a standard practice to include the comparable[s] in the valuation report, yet his contemporaries including PW1, PW2 and DW2, respectively, have endeavoured to supply the comparable[s] in the body of the valuation reports.
176. In my humble, albeit considered view, the evidence tendered by DW1 and the valuation report dated the 22nd September 2023, are inherently contradictory and thus unbelievable.
177. The other valuer who testified on behalf of the Defendants was Robert Nzioki. Same testified as DW2. Suffice it to state that DW2 tendered and produced a valuation report dated the 6th November 2023. Furthermore, DW2 posited that in the preparation and arriving at the final values, same DW2 relied on two other reports, namely, the report by Eng. Kimweli [DW3] and Alex Ntiwa [DW4], respectively.
178. It was the testimony of DW2 that same indeed visited the suit plots and thereafter prepared his valuation report dated the 6th November 2023. Furthermore, the witness averred that same adopted and deployed the comparable approach in arriving at the values of the suit plots. Instructively, the witness posited that the average value of the plots was Kes. 2,406,000/= only.
179. It was the further testimony of the witness [DW2] that after arriving at [sic] average value of Kes. 2,406,000/= only same subjected the stated value[s] to deduction on the basis of the costs of providing the infrastructure. In this regard, the witness posited that same was guided by the costs estimates availed and prepared by [DW3].
180. To be able to appreciate the crux of the testimony by DW2, it is imperative to reproduce a segment of his testimony chief.
181. Same testified and stated thus:
- “I took into account the costs of providing the services and thereafter deducted the same from the market value of the plots. I have indicated the costs of providing the device and thereafter deducted the same from the market value.”
182. Nevertheless, and whilst under cross examination by learned counsel for the 1st to the 8th Plaintiffs the witness [DW2] stated thus:
- “I do wish to state that the actual value is determined by actual valuation.
.....the issue of valuation is one for determination by the valuer. I undertook the valuation of the suit properties. I deployed the comparable sizes.”
183. My understanding of the evidence by DW2 is to the effect that valuation is dependent on the actual exercise of valuation. For good measure, what I hear DW2 to be saying is that valuation constitutes the act of ascertaining the worth of a designated property. Moreover, I hear DW2 to be saying that the issue of valuation is one for determination by the valuer, who exercises his/her independent opinion, expertise and experience.
184. Despite acknowledging that valuation is the act of determining the value of a designated property by the valuer and the fact that valuation is undertaken on the property as it is, the same DW2 is on record as stating that after ascertaining [sic] the average of the properties, same undertook the process of deduction, namely, deducting [sic] the cost of proposed infrastructure from the average market values.



185. To my mind, the suit plots were being valued as un-serviced plots. Instructively, the values to be arrived at and affixed to the suit plots was to take into account that same were un-serviced. For good measure, there is evidence on record, that serviced plots would attract a different and higher valuation than un-serviced plot.
186. In the premises, it means that if the suit plots were serviced in accordance with the proposed cost estimate[s] alluded to by DW3, then the values thereof would be higher and not otherwise.
187. There is yet another curious perspective that flows from the valuation report tendered and produced by DW2. Notably, DW2 posited that same adopted and deployed a comparable approach. Furthermore, DW2 testified that same availed the comparable[s] that were deployed in arriving at [sic] the average market value.
188. Nevertheless, it is not lost on the court that at the foot of the valuation report tendered and produced by the witness, namely, the valuation report dated the 6th November 2023, the witness has alluded to a list of appendices.
189. For good measure, the witness has adverted to Eleven [11] appendices, namely:
- i. Current practising certificate;
 - ii. Degree certificate;
 - iii. ISK certificate;
 - iv. Valuers Registration Board Certificate;
 - v. Photographs of the subject property;
 - vi. Google maps of the property;
 - vii. Copy of the proposed subdivision scheme;
 - viii. Copy of the sale agreement;
 - ix. Engineers report on infrastructure cost estimate;
 - x. Physical planner advisory opinion dated 26th October 2023;
 - xi. Certificate of lease.
190. It is evident and apparent that the list of appendices [details highlighted in the preceding paragraph] does not allude to the inclusion of comparable[s]. In any event, there is no gainsaying that the comparable[s] do not form part and parcel of the body of the report up to and including the segment containing the signature of DW2.
191. From the foregoing, one is at liberty to deduce and infer that DW2 did not tender and/or provide a list of the comparable[s]. For good measure, no such list has been referenced in the body of the report. Neither does it form part of the list of appendices.
192. In the circumstances, this court is at liberty to and hereby finds that the report by DW2 is equally deficient for want of inclusion of the comparable[s], which are key in enabling the court to ascertain whether [sic] the comparable compared with the suit property, which is the subject of valuation are commensurate or otherwise.
193. On the other hand, and for the sake of arguments only, I wish to venture forward and reference [sic] the list of comparable[s], which magically found its way as part of the valuation report. It is important



to state that what has been [sic] referenced as comparable[s] is evidently shown to be containing plots which are either three times bigger or otherwise.

194. In my humble view, DW2 needs to re-visit the English/Oxford Dictionary to discern/decipher the true meaning of comparable[s]. Surely, DW2 cannot imagine that a plot which is 3.035 time[s] bigger than the subject plots constitutes [sic] a comparable.
195. Quite clearly, something is amiss.
196. Flowing from the analysis [details highlighted in the foregoing paragraphs], what becomes apparent is that the valuation report by Stanley Juma Muli PW2 is not only coherent and well informed, but same was also subjected to peer-review by another valuer. For good measure, the peer-review operates to authenticate, verify and cross check the reliability of the information contained in the valuation report.
197. Consequently, and in the premises, I am persuaded by the clarity and consistency adverted to and highlighted in the valuation report by PW2. In this regard, I adopt and rely on the said valuation report dated the 13th October 2023 and do hereby return a verdict that the compensatory market value of the suit plots is Kes.4, 300, 000/= only.
198. Before departing from this issue, it is instructive to adopt and reiterate the dictum of the Court in the case of Stephen Kinini Wang'ondou v The Ark Limited [2016] KEHC 3449 (KLR), where the court stated as hereunder:

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [11] Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”.⁷ It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.⁹

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.¹² A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minorities Finance Ltd. and Another[13] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report



containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.” A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

Where there is a conflict between experts on a fundamental point, it is the court’s task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

It is my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it.[14] A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative[15] or manifestly illogical.[16] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence”. An expert report is therefore only as good as the assumptions on which it is based.

199. The manner of assessing and discerning whether an expert witness report is credit worthy and thus believable was similarly highlighted by the Court of Appeal in the case of *Criticos v National Bank of Kenya Limited* (as the successor in business to Kenya National Capital Corporation Limited “Kenyac”) & another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment), where the court stated as hereunder:

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.”

200. Suffice it to underscore that the valuation report tendered and produced by Stanley Juma Muli [PW2], satisfies the threshold highlighted and elaborated in the decisions [supra]. It is thus believable and credible in contrast to the valuation reports by DW1 and DW2; the latter two which are inherently deficient and contradictory.

Issue Number 2 Who should bear the costs of the suit, if;

201. The second issue that was left for determination of this court was the issue of costs. Suffice it to state that the established and trite position of the law as pertains to costs is to the effect that costs follow the



event. Nevertheless, the award of costs is also subject to the discretion of the court. [See Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya].

202. From the foregoing position, it is common ground that a party who wins the suit [the successful party] is entitled to indemnity and/or atonement by an award of costs. Pertinently, the award of costs operates to indemnify the successful party against the expenses incurred whilst prosecuting or defending the proceedings, whichever is the case.
203. Further and at any rate, there is no gainsaying that the successful party ought and should be indemnified by an award of costs, unless the conduct of the successful party either prior to or during the proceedings brings to the fore a basis to warrant deprivation of costs.
204. Moreover, there is no gainsaying that prior to and before a court of law exercising discretion can deny and/or deprive a successful party of costs, the court must supply or provide plausible, cogent and credible basis for so doing. Notably, a successful party ought not to be denied costs without any reasonable basis.
205. In any event, the exercise of discretion to deny or deprive a successful party of costs, must not be taken lightly, arbitrary or whimsically. For coherence, such a decision must be objective, reasonable and based on cogent facts; and not whims/ caprice.
206. Based on the foregoing exposition of the law, I am minded to and do hereby decree that the Plaintiffs herein are entitled to costs. In any event, there is no gainsaying that the Plaintiffs herein were subjected to such mistreatment [deprivation] by the Defendants and even after the filing of the suit, the Defendants were still unwilling to bulge.
207. To buttress the legal principle that costs ought not to be taken away from the successful party; unless there does exist a good reasonable reasons, it suffices to take cognizance of the holding by the Supreme Court of Kenya [the apex Court] in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, where the court stated thus:
 - (22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.
208. The position as pertains to award of costs in suits/civil proceedings was similarly re-visited and elaborated upon by the Supreme Court in the case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (17 June 2022) (Judgment), where the court held as hereunder:

Rather, in my judgment, the starting point or default is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity. That starting point may be departed from for good reason; but the mere fact that the regulator has been unsuccessful is not enough. As this Court recognized in *BT v Ofcom* at [86], it is for the CAT to develop its own approach to an award of costs. The approach can, no doubt, include the degree of success or failure achieved by a party as one of the relevant factors as envisaged by rule 104 itself. It may also include consideration of what (if any) hardship would be suffered by a successful appellant if an order for costs was not made (which would not be a relevant consideration under the CPR). In considering hardship, the CAT could take into account, in an appropriate case, the level



of irrecoverable costs that the successful party had borne in the administrative stage of the investigation. The conduct of the parties would also be a relevant consideration as the rule again envisages. It may be that if the CMA were to pursue a small or medium-sized enterprise as a test case, that would justify a departure from the starting point. But whatever approach is adopted the CAT must also put into the scales the fact that the CMA is a public body carrying out functions in the public interest: and that there is a public interest in encouraging public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.” [Emphasis supplied]

209. Finally, it is also apposite to cite and reference the holding of the Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR), where the court stated thus:

As for costs, it was correctly submitted by the respondent that the discretion of the Court to grant or withhold costs is enshrined in section 27 of the *Civil Procedure Act*. It provides inter alia as follows:-

Sec.27(1)“Subject to such conditions and limitations as may be prescribed , and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such”

In the *Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013*, the High Court had this to say on the issue of costs:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

In Richard Kuloba, *Judicial Hints on Civil Procedure*, 2nd Edition, page at page 101, the author authoritatively states as follows on the issue of costs:-

“The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs- the Court has no discretion and cannot take away the plaintiff’s right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”.

In the light of the above threshold, it is our finding that the position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such



a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning (see *Githiaka versus Nduriri* [2004] 2KLR). Secondly that a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

210. Simply put, the court is obligated to decree and award costs to the successful party, unless there exists compelling reasons and/or grounds to necessitate deprivation. However, in respect of the instant matter, there are no extenuating factors/circumstances to warrant such a course.

Final Disposition:

211. Flowing from the analysis [details highlighted in the body of the judgment], it suffices to underscore that the Plaintiffs herein have duly proved and established their claim as against the Defendants.

212. In particular, it suffices to state that the Defendant who is culpable, to and in favour of the Plaintiffs, is the 1st Defendant taking into account the principle of Law in *Salomon v Salomon* [1897] AC 22; and which has been reiterated in a plethora of case, inter-alia *Omondi versus National Bank of Kenya Limited* [2021] ekr.

213. In the circumstances, Judgment be and is hereby entered in favour of the Plaintiffs as hereunder:

- i. The Market value of the suit plots be and is hereby assessed and certified in the sum of Kes. 4,300,000/= only.
- ii. Each Plaintiff be and is hereby awarded the sum of Kes. 4,300,000/= only as compensation on account of the market value of the suit plots in lieu of specific performance.
- iii. The Award in terms of clause [ii] hereof shall accrue interests at court rates [14%] per annum w.e.f date of filing the suit.
- iv. Costs of the suit be and are hereby awarded to the Plaintiffs and same shall be borne by the 1st Defendant.
- v. Any other reliefs not expressly granted is hereby denied.

214. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

OGUTTU MBOYA

JUDGE.

In the presence of :

Benson/Mutuma Court Assistant.

Mr. Keith Wesonga for the 1st to 8th Plaintiffs.

Mr. Mohammed for the 9th Plaintiff.

Ms. Muutu h/b for Mr. Sarvia for the Defendants.

