



REPUBLIC OF KENYA



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Mathia & others v Wainaina & 9 others; Muigai & 3 others (Interested Parties) (Environment & Land Case 346 of 2002) [2025] KEELC 1049 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1049 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 346 OF 2002
SO OKONG'O, J
FEBRUARY 27, 2025

BETWEEN

MATHIA & OTHERS PLAINTIFF

AND

JOHN WAINAINA 1ST DEFENDANT

JOHN GATHUMU 2ND DEFENDANT

NZAU MWALIMU NZAU 3RD DEFENDANT

FRANCIS KIRIMA M'IKUNYUA 4TH DEFENDANT

ZIMMAN SETTLEMENT SCHEME 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

CHAIRMAN, NATIONAL LAND COMMISSION 7TH DEFENDANT

ATTORNEY GENERAL 8TH DEFENDANT

PATRICK GITHINJI 9TH DEFENDANT

ROBERT WAMITHI 10TH DEFENDANT

AND

JOSEPHAT MUIGAI INTERESTED PARTY

SAMUEL KUNGU MUIGAI INTERESTED PARTY

BENEDICT HONGO ODHIAMBO (SUING FOR AND ON BEHALF OF THE MEMBERS OF GITHU-ZIMA SOCIETY) INTERESTED PARTY

NICHOLAS ORIGI INTERESTED PARTY



JUDGMENT

Pleadings

1. The Plaintiffs instituted this suit as Muigai & Others against the 1st, 2nd and 3rd Defendants through a plaint dated 26th February 2002. The Plaintiffs averred that they were a partnership comprising of 21 people. The verifying affidavit accompanying the plaint was sworn by Robert Wamithi Mutahi who deposed that he was one of the Plaintiffs and that the other Plaintiffs had authorised him to swear the affidavit verifying the averments contained in the plaint. The Plaintiffs averred that on 8th October 1977, they purchased all that parcel of land measuring 215 acres or thereabouts being L.R. No. 57/26 (hereinafter referred to as “the suit property”) from Kentiles Ltd. (in liquidation) which was registered in the names of the 21 purchasers (Plaintiffs) named in the conveyance dated 8th October 1977.
2. James Muigai, deceased, was one of the purchasers of the suit property named in the conveyance dated 8th October 1977. Josephat Mathia Muigai and Samuel Kungu Muigai through an application dated 16th August 2013 applied to be joined in the suit as interested parties. In the application, they also sought an order that Francis M’Ikunyua Kirima and Zimman Settlement Scheme be joined in the suit as Defendants. Josephat Mathia Muigai and Samuel Kungu Muigai were joined in the suit on 2nd October 2013 as the 1st and 2nd interested parties to represent the estate of their father James Muigai. Francis M’Ikunyua Kirima and Zimman Settlement Scheme on the other hand were joined in the suit as the 4th and 5th Defendants respectively. On 27th March 2014, Benedicto Hongo on behalf of Githu Zima Society was joined in the suit as the 3rd interested party on his application for joinder.
3. Josephat Mathia Muigai and Samuel Kungu Muigai filed a Notice of Motion application dated 13th November 2014 seeking orders that James Muigai, deceased be substituted in the suit by Josephat Mathia Muigai based on the confirmed Grant of Letters of Administration dated 16th December 1997 in respect of the estate of the deceased. Josephat Mathia Muigai and Samuel Kungu Muigai contended that James Muigai, deceased was a partner in Muigai & Others and as the administrators of his estate, they were entitled to represent his estate in the suit. Josephat Mathia Muigai had been appointed as one of the administrators of the estate of James Muigai. In a ruling delivered on 8th May 2015, the court held that any or all the 21 people who formed the partnership was entitled to prosecute the suit as the Plaintiff. The court allowed Josephat Mathia Muigai to be substituted in the suit in place of James Muigai, deceased to represent the interest of the estate of his deceased father James Muigai. Following that ruling of 8th May 2015, the advocates for the Plaintiffs changed the Plaintiffs’ name in the suit to Mathia & Others.
4. Patrick Githinji and Robert Wamithi who had held themselves as part of the Plaintiffs thereafter filed an application dated 10th June 2016 seeking an order that the legal representation of the Plaintiffs be severed so that the individual partners in Muigai & Others could appoint advocates of their choice to represent them in the suit. The remaining Plaintiffs on their part brought an application dated 12th September 2016 seeking leave to amend the Plaint. The two applications were heard together and in a ruling delivered on 17th February 2017, the court granted the Plaintiffs leave to amend the plaint and ordered that the names of Patrick Githinji and Robert Wamithi be struck out as Plaintiffs in the suit and the two be added to the suit as the 6th and 7th Defendants. Patrick Githinji and Robert Wamithi were directed to file their statement of defence upon service upon them of the amended plaint.
5. On 19th April 2017, the Plaintiffs applied for leave to further amend the plaint which application was allowed on 12th July 2017. In the further amended plaint dated 14th August 2017 filed on 29th August



2017, the Plaintiffs added the Chief Land Registrar, the Chairman National Land Commission and the Attorney General to the suit as the 6th, 7th and 8th Defendants respectively. Patrick Githinji and Robert Wamithi who were added to the suit as the 6th and 7th Defendants following the orders made on 17th February 2017 were not named as parties in the heading of the further amended plaint. In the further amended plaint, the Plaintiffs averred after acquiring the suit property from Kentiles Limited (in liquidation) as aforesaid, they applied and obtained approval to subdivide the property and distribute portions thereof amongst the partners or their nominees. The Plaintiffs averred that upon commencement of the subdivision process, the suit property was given a new land reference number Nairobi Block 123 in place of the previous land reference number 56/26. The Plaintiffs averred that they were paying and had continued to pay land rates due to Nairobi City Council for the suit property.

6. The Plaintiffs averred that the 3rd Defendant instituted a suit against the Plaintiff in the High Court at Nairobi being Civil Case No. 558 of 1999 (O.S) seeking title to the suit property by adverse possession. The Plaintiffs averred that by an order made on 2nd July 2001, the 3rd Defendant's suit was dismissed with costs and no appeal was preferred against the said dismissal.
7. The Plaintiffs averred that on or about November 2001, the Defendants by themselves, or their employees, agents and/or servants commenced acts of trespass on the suit property. The Plaintiffs averred that they made a complaint to Kasarani Police Station and were assured that necessary steps would be taken to arrest and prosecute the trespassers. The Plaintiffs averred that in January 2002, the Defendants by themselves, or through their employees, agents and or servants invaded the suit property and commenced excavation of building stones thereon.
8. The Plaintiffs averred that they once again reported the malicious damage of the suit property at Kasarani Police Station. The Plaintiffs averred that the police declined to make any arrest due to interference by the District Officer Kasarani Division who encouraged the invasion for reasons unknown to the Plaintiffs. The Plaintiffs averred that they subsequently learnt that the suit property had been irregularly subdivided without the knowledge of some of the Plaintiffs which subdivision resulted in the issuance of title documents for several parcels of land which included Nairobi/Block 123/43, 44, 69, 83, 125, 150, 160, 162, 163, 169, 170 and 205.
9. The Plaintiffs averred that they learnt further that the said parcels of land had been irregularly subdivided further without their authority and sold to third parties some of whom had started the construction of permanent buildings thereon without authority from the Plaintiffs. The Plaintiffs averred that the Defendants colluded to fraudulently cause the titles for the subdivisions of the suit property to be issued in the names other than that of Muigai & Others.
10. The Plaintiffs averred that the Defendants fraudulently and without any right obtained financial benefit and/or compensation from the offices of the 6th and 7th Defendants for land that was irregularly excised from the suit property and acquired for the construction Thika Super Highway. The Plaintiffs averred that they were seeking a declaration that all that parcel of land known as Nairobi/Block 123 (formerly L.R. No. 57/26) (the suit property) rightfully belonged to the Plaintiffs and any titles purportedly created from the said parcel of land were fraudulently and irregularly created and ought to be cancelled forthwith.
11. The Plaintiffs averred that despite demand, the Defendants had persisted in their unlawful acts and had indicated a desire to continue excavating building stones, murrum and red soil from the suit property contending that the property was vacant and as such they were entitled to use the same. The Plaintiffs prayed for judgment against the Defendants jointly and severally for;



- a. A mandatory (sic) injunction to restrain the Defendants by themselves, or through their agents, servants and /or employees or whomsoever from entering upon the suit property or any subdivision thereof.
 - b. A declaration that the Plaintiffs were the proprietors of all those parcels of land known as Nairobi/Block 123/1/1-279 (formerly L.R. No. 57/26).
 - c. A mandatory (sic) injunction to restrain the Defendants by themselves, or through their agents, servants and/or employees or whomsoever from committing any acts of trespass and/or excavating any building stones, murrum, removal of red soil or in any manner interfering with the Plaintiffs' quiet enjoyment and possession of the suit property or any sub division thereof.
 - d. A declaration that the title documents obtained from the irregular subdivision of the parcel of land known as Nairobi/Block 123 (formerly L.R. No. 57/26) which included but not limited to; Nairobi/Block 123/205, Nairobi/Block 123/43, Nairobi/Block 123/169, Nairobi/Block 123/160, Nairobi/Block 123/83, Nairobi/Block 123/162, Nairobi/Block 123/170, Nairobi/Block 123/163, Nairobi/Block 123/44, Nairobi/Block 123/69, Nairobi/Block 123/150, and Nairobi/Block 123/125 were illegal, null and void and should be cancelled forthwith.
 - e. Damages for trespass namely; excavation of building stones and murrum, removal of red soil and any other acts of waste committed by the Defendants or their agents, servants and/or employees on the suit property.
 - f. An order of eviction of the Defendants, their agents, servants and/or employees from the suit property and any sub -division thereof.
 - g. Costs of and incidental to the suit.
12. As I mentioned earlier in the judgment, this suit was initially brought against the 1st, 2nd and 3rd Defendants only. The 1st, 2nd and 3rd Defendants filed a joint statement of defence on 20th January 2004 through the firm of Billy Amendi & Company Advocates. The 1st, 2nd and 3rd Defendants averred that the Plaintiffs' suit was bad in law and disclosed no reasonable cause of action against them. The 1st, 2nd and 3rd Defendants termed the suit frivolous, vexations and an abuse of the process of the court. The 1st, 2nd and 3rd Defendants denied that the Plaintiffs acquired the suit property from Kentiles Limited (in liquidation) on 8th October 1977 and obtained approvals to subdivide the same. The 1st, 2nd and 3rd Defendants averred that they had occupied the suit property for over 40 years without interruption and that the Plaintiffs were strangers to them. The 1st, 2nd and 3rd Defendants denied that they had trespassed on the suit property and contended that they could not trespass on the land that was owned by them. The 1st, 2nd and 3rd Defendants denied that in January 2002, they invaded the suit property and started excavating building stones therefrom. The 1st, 2nd and 3rd Defendants urged the court to dismiss the Plaintiff's suit with costs.
13. The 1st, 4th and 5th Defendants filed an amended statement of defence on 30th January 2019 in which they denied every allegation made against them in the further amended plaint. The 1st, 4th and 5th Defendants averred that the suit property was initially known as L.R No. 57/26. The 1st, 4th and 5th Defendants averred that upon conversion of the property to the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) regime of land registration, the land reference number was changed to Nairobi/Block 123. The 1st, 4th and 5th Defendants averred that Nairobi/Block 123 was subsequently subdivided into Nairobi/Block 123/1-257 and the subplots were registered in the names of third parties who were neither members of the Plaintiffs nor parties to the suit.



14. The 1st, 4th and 5th Defendants averred that the Plaintiffs were imposters who were hell bent on hijacking the suit with a view to using the same to have themselves declared as the owners of the suit property when they knew or ought to have known that the suit property did not belong to them. The 1st, 4th and 5th Defendants averred that if there was any subdivision of the suit property undertaken by the alleged partnership, then the alleged partnership was dissolved/determined upon the conclusion of the subdivision of the suit property thereby making the alleged Plaintiffs non-juristic persons incapable of suing or being sued.
15. The 1st, 4th and 5th Defendants averred that all the rights of ownership that they had exercised over the suit property had been open without force and with the full knowledge of all the alleged registered owners of the suit property and were in any event the subject of ELC 2363 of 2007 in which they were claiming interest adverse to that of the alleged owners of the suit property which suit was pending before the court. The 1st, 4th and 5th Defendants prayed that the suit be dismissed with costs.
16. The Attorney General entered an appearance on behalf of the 6th and 8th Defendants and filed a statement of defence on 23rd October 2017. The 6th and 8th Defendants denied the allegations against them in the further amended plaint. The 6th and 8th Defendants denied that the 6th Defendant colluded with the other Defendants to fraudulently transfer the suit property to the said Defendants and third parties. The 6th and 8th Defendants averred that if any title was issued to any party then the transaction was based on documents presented to the 6th Defendant by the said party.
17. The 4th Interested Party filed a defence and a counterclaim on 7th July 2017. The 4th Interested Party denied all the allegations made in the plaint more particularly that the Plaintiff bought the suit property from Kentiles Limited (in liquidation) in 1977 and that a conveyance was registered in favour of the Plaintiffs. In his counterclaim, the 4th Interested Party averred that he had been in occupation of the suit property since 1980s cultivating the same and carrying out quarrying activities thereon.
18. The 4th Interested Party averred that he subsequently filed ELC No. 2363 of 2007 to assert his right of adverse possession and the suit was pending determination. The 4th Interested Party prayed that the Plaintiffs' suit be dismissed and an order be made for the registration of the suit property in his name having acquired the same by adverse possession. The 4th Interested Party also prayed for the costs of the counterclaim.
19. The Plaintiffs filed a Further Further Amended plaint dated 3rd December 2020. Save for formally adding Patrick Githinji and Robert Wamithi to the suit as the 9th and 10th Defendants, the Plaintiffs added nothing new in the Further Further Amended plaint. The 9th and 10th Defendants filed a statement of defence dated 30th September 2022. The 9th and 10th Defendants averred that on 8th October 1977, the 9th and 10th Defendants and others through a partnership known as Muigai and Others acquired the suit property for valuable consideration from Kentiles Limited (under liquidation) and the conveyance was registered in the names of all members of Muigai and others. The 9th and 10th Defendants averred that the partnership of Muigai and Others applied for a change of user of the suit property from agricultural to residential use which change was duly approved and effected.
20. The 9th and 10th Defendants averred that Muigai and Others (the partnership) surrendered their title for the suit property for the purposes of subdivision which was legally carried out resulting in the subdivision of the suit property into the parcels of land which were registered as title numbers Nairobi/Block 123/1-279 under the provisions of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). The 9th and 10th Defendants averred that after the registration of title numbers Nairobi/Block 123/1-279, the partnership proceeded to allocate various plots to its members after payment of the agreed fees and the remaining plots were sold to third parties for valuable consideration



- while observing all legal requirements, procedures and payment of rent and rates. The 9th and 10th Defendants averred that as members of the partnership, they acquired all those parcels of land known as Title Numbers Nairobi/Block 123/160, Nairobi/Block 123/162, Nairobi/Block 123/163, Nairobi/Block 123/43, Nairobi/Block 123/44, Nairobi/Block 123/83, Nairobi/Block 123/168, Nairobi/Block 123/169, Nairobi/Block 170, Nairobi/Block 123/205, Nairobi/Block 123/69, Nairobi/Block 123/150 and Nairobi/Block 123/125. The 9th and 10th Defendants averred that they had been paying and had continued to pay rates due to the Nairobi City County for the said parcels of land.
21. The 9th and 10th Defendants averred that they were part of the partnership and equally suffered from the acts of trespass by the 1st - 5th Defendants. The 9th and 10th Defendants averred further that they were equally affected by the excavation of building stones on the suit property by the 1st - 5th Defendants. The 9th and 10th Defendants averred that they had not enjoyed quiet possession of their properties due to repeated fraudulent and violent attempts by the 1st - 5th Defendants to forcefully, unlawfully and illegally take over ownership of the subject plots which attempts had been legally repulsed by the 9th and 10th Defendants.
 22. The 9th and 10th Defendant s averred that the government paid compensation to all the persons whose plots were affected by the construction and expansion of Thika Highway in 2008. The 9th and 10th Defendants averred that they had been personally involved in a series of litigation over all those properties known as Nairobi/Block 123/1-279 in which the courts had always conclusively established that the partnership of Muigai and Others was the rightful and legal owners of the parcels of land known as Title Numbers Nairobi/Block 123/1-279. The 9th and 10th Defendants averred that the suits included;
 - a. HCCC No. 1022 of 2006, HCC No. 2363 of 2007, HCCC O.S MISC APPL. No. 110 of 2007; Beth Wairimu Bari & Others vs John Kimuhu Gachege & Others.
 - b. Makadara Criminal Case No. 10630 of 1993; Shadrack Nzuki alias Nzau Mwalimu Nzau vs Republic.
 - c. HCCC No. 558 of 1999; Mwalimu Nzau Mwalyo (Suing on behalf of Zimman Settlement Scheme) vs Muigai and Others.
 - d. HCCC No. 1035 of 2003; Zimman Settlement Scheme vs East Africa Sisal Estates Limited and Muigai & Others.
 - e. Nairobi HCCC No. 897 of 2003, Zimman Settlement Scheme & Others vs Muigai & Others, Commissioner of Lands, and East African Sisal Estates Limited.
 - f. ELC No. 253 of 2013; Peter Kioko Nduku vs Robert Wamithi Mutahi & Others.
 - g. HCCC No. 1249 of 2005; Mwalimu Nzau Mwalyo vs Joseph Weru & Others.
 - h. HC. Pet No. 13 of 2010; Robert Wamithi Mutahi vs Republic
 - i. HC. Pet No. 461 of 2011; Francis Kirima M'ikunyua & Others (suing as the Chairman, Secretary and Treasurer on behalf of Zimman Settlement Scheme Society) vs Director of Public Prosecutions & Others & Robert Wamithi and Patrick Githinji.
 23. The 9th and 10th Defendants averred that their titles were protected by the provisions of Article 40 of *the Constitution* of Kenya, Sections 14, 27, 28 and 144(1) (b) of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) and Sections 25 and 26 of the *Land Registration Act*, 2012. The 9th and 10th Defendants averred that they were part of the partnership and should be allowed to enjoy quiet



possession of their properties. The 9th and 10th Defendants prayed that the Plaintiffs' suit be dismissed with costs.

The Evidence

24. The hearing of the suit commenced on 16th May 2016, 14 years after the suit was filed. The Plaintiffs called SAMUEL KUNGU MUIGAI (PW1) as their sole witness. PW1 stated as follows in his evidence in chief: He was the son of James Muigai, deceased. His father died in 1995. His brother Josephat Mathia Muigai and he applied to be joined in the suit as interested parties so that they could protect the interest of their deceased father in the suit. Their application was allowed, and they were added to the suit as interested parties. He was added as the 2nd Interested Party. They thereafter became Plaintiffs. He was issued with a Grant of Letters of Administration(sic) in respect of the estate of his father on 16th December 1997 in Nairobi High Court Succession Cause No. 523 of 1996. He produced the said Grant as P.EXH. 1. PW1 stated further that Muigai & Others (Plaintiffs) was a group that was formed by his deceased father, James Muigai and others. The group was not registered. In 1957, a company known as Kentiles Limited took a loan from Grindlays Bank and secured the loan with the suit property then, L.R No. 57/26 (now L.R No. 123/1-279). After independence, Grindlays Bank became Kenya Commercial Bank Ltd. (KCB). Kentiles failed to pay the loan and was put under receivership. The official receiver wanted to sell the suit property because Kentiles was unable to pay the loan. The Plaintiffs approached the official receiver and offered to purchase the suit property at Kshs. 700,000/-. The receiver accepted the offer and sold the suit property to the Plaintiffs. He produced a copy of the instrument of transfer (conveyance) dated 8th October 1997 as P.EXH. 2.
25. PW1 stated that after the Plaintiffs purchased the suit property, some of them started doing some small-scale businesses on the property. He stated that his father was about 80 years old when the suit property was purchased and he acted on behalf of his father in the transaction. He stated that on 4th November 1991, the Plaintiffs surrendered their title for the suit property to the Government of Kenya in consideration of the Government of Kenya approving the Plaintiffs' subdivision scheme for the suit property and issuing individual titles to the Plaintiffs. He stated that the Plaintiffs entered into an arrangement with the Ministry of Lands whereby they would surrender the title and thereafter the suit property would be subdivided and individual titles issued. He produced a copy of the deed of surrender dated 4th November 1991 as P.EXH. 3. He stated that after the surrender of the title for the suit property, Kamwere & Associates surveyors were instructed by his father to carry out subdivision of the suit property. He stated that the subdivision was done and the subdivision scheme presented to the Director of Surveys and approved.
26. PW1 stated that the suit property was subdivided into 279 plots. He stated that the individual Plaintiffs were supposed to contribute Kshs. 10,000/- for each plot and that was to constitute a member's shares in the group. He stated that the titles for the plots arising from the subdivision of the suit property were to come out in the name of the Plaintiffs (Muigai & Others), and the Plaintiffs were to thereafter transfer the plots to individual Plaintiffs. He stated that the titles for the plots were not issued in the name of Muigai & Others and that that had not been done as at the time of his evidence. He stated that he conducted a search on 15th August 2014 at the Land Registry. He stated that the last entry in the original title (mother title) was the registration of the deed of surrender. He produced the search as P.EXH. 4. He stated that if any title had been issued, then the same was fraudulent. He stated that the suit property was vacant and that some people came and occupied the same claiming all sorts of interests. He stated that some people were selling portions of the suit property to unsuspecting members of the public while others were excavating stones on the property.



27. PW1 stated that there was a big quarry on the suit property. He stated that the people who were on the suit property did not have valid documents that entitled them to the land. He stated that the Plaintiff was not involved in the sale of the suit property to them. He stated that after conducting due diligence, they discovered that the 4th and 5th Defendants were also on the suit property and they were added to the suit later. He stated that the 1st and 2nd Defendants were known to him and that he asked them to vacate the suit property but they refused to do so. He stated that the 1st to 4th Defendants were the officials of the 5th defendant at the time of the filing of the suit. He stated that the 5th defendant had new officials. He stated that the Deputy Registrar of Societies wrote to him a letter dated 10th March 2015 giving the names of the new officials of the 5th defendant as; James Mburu Muthiu- Chairman, Dancan Githaga Mwangi-Vice Chairman, Edwin Graham Odallo-Secretary, Peter Mwaragania-Assistant Secretary, Sophia W. Gikonyo- Treasurer, Christine Muthoni-Assistant Treasurer and Rufus Irungu- Organizing Secretary.
28. PW1 stated that the new officials of the 5th Defendant approached him and told him that they could not sustain this litigation and wished to settle the matter amicably. He stated that they entered into a consent with them and the same was filed in court on 27th July 2015. He stated that the consent was not adopted by the court because it was withdrawn on his instructions. He stated after they signed the consent, he realised that there was a dispute as to the bona fide officials of the 5th Defendant. He stated that he wanted to ascertain the bona fide officials of the 5th defendant. He stated that he made further inquiries at the office of the Attorney General on the 5th Defendant and after that office confirmed the bona fide officials of the 5th Defendant, they entered into a new consent with them. He stated that the 5th Defendant agreed to relinquish its claim over the suit property.
29. PW1 stated that members of the 5th Defendant complained to the police that the Plaintiffs had fraudulently obtained or acquired the suit property. He stated that one of the Plaintiffs, Robert Wamithi was charged in court with that offence. He stated that in Petition No. 13 of 2010, the court confirmed that the transaction between the Plaintiffs and Kentiles Ltd. was proper. He stated that the court quashed the charge that had been preferred against Robert Wamithi.
30. PW1 stated that Majanja J. also delivered a judgment in Petition No. 461 of 2011 in which he confirmed the Plaintiffs' title to the suit property. He stated that there were accusations and counter-accusations concerning the legality of the transaction between the Plaintiffs and Kentiles Ltd. He stated that the court restrained the Director of Public Prosecution (DPP) from investigating the validity of the transaction. He stated that there had never been a dispute over the ownership of the suit property. He stated that those in occupation of the suit property claimed that the property belonged to the Government of Kenya on account of the deed of surrender.
31. PW1 reiterated that the Plaintiffs had surrendered the original title for the suit property to the Government of Kenya for the purposes of subdivision so that the land could be distributed. He stated that the subdivision was approved and carried out in 1993 and the suit property became Nairobi Block 123/1-279. He stated that after the subdivision of the suit property, his father James Muigai died in 1995. He stated that his father was the principal shareholder in the Plaintiffs' partnership. He stated that they assumed that no titles had been issued for the subdivisions of the suit property. He stated that he learnt through an application that was served upon his advocate, that in 1996, various titles for the subdivisions of the suit property were issued to strangers who were not part of the Plaintiffs. He stated that he was not aware of this fact when he first gave his testimony.
32. PW1 stated that the particulars of these titles were set out in paragraph 9(a) of the further amended plaint. He stated that he suspected that there were other titles out there. He stated that the Plaintiffs did



not sanction the issuance of these titles. He stated that they expected that the titles for the subdivisions of the suit property would be issued in the name of the Plaintiffs as was the original title so that the Plaintiffs would transfer the plots to their members in accordance with their contribution. He stated that during the construction of the Thika Super Highway, the road took up 26 plots which belonged to the Plaintiffs. He stated that in the notification put in the Kenya Gazette, it was indicated that the plots that were acquired for the road construction belonged to James Muigai & Others. He stated that upon perusal of the Ministry of Land records, he discovered that the compensation money was paid to strangers who had fake titles. He stated that he reported the matter to Ethics & Anti-Corruption Commission (EACC) which did a thorough investigation. He stated that they joined the Attorney General as a party to the suit to shed light on the findings of the EACC. He stated that the EACC found that the titles he had referred to were issued fraudulently and that the people who were paid compensation were not entitled to the same. He urged the court to cancel and declare as null and void the titles referred to in paragraph 9(a) of the further amended plaint. He stated that the Plaintiffs were seeking prayers (a) to (c) of the further amended plaint.

33. On cross-examination by Mr. Kenyatta for the 1st, 4th and 5th Defendants, PW1 stated that he was first added to the suit on 2nd October 2013. He stated that he was aware that the suit was filed in 2002. He stated that he was joined to the suit based on the Grant of Letters of Administration (sic) that was issued to him on 16th December 1997 in respect of the estate of his father, James Ngengi Muigai. He stated that the Grant of Letters of Administration(sic) was based on the last will of his father dated 28th April 1994. He stated that he was familiar with the contents of the will of his father. He stated that the suit property was not listed in the will. He stated that most of the properties listed in the will had been distributed to the beneficiaries. He stated that his father did not include the suit property in the will. He stated that the group James Muigai & others was not a registered entity. He stated that, in the circumstances, there were no shares issued to the members. He stated that it was a group of friends who came together and purchased the suit property.
34. PW1 stated that in 1994, when the will was made, the suit property belonged to 21 individuals, with his father as the principal shareholder. He stated that the members of the group were still making contributions towards the purchase of the suit property. He stated that his father was not claiming ownership of the entire property at the time he was writing his will. He stated that it was not clear as to what portion of the property would belong to him. He stated that at the time his father was writing the will, he did not have a defined share in the suit property, and that explained why he omitted the same in his will. He stated that his father did not have a title deed for the suit property. He stated that they discussed the property with his father. He stated that it was his father's advocate's advice that he could not include in his will a property in respect of which he had no title.
35. He stated that the suit was filed in the name of his father, but they were not aware of the same until the court summoned them to clarify some issues. He stated that the suit property was transferred to James Muigai & Others. He stated that his father's full name was James Ngengi Muigai. He stated that James Ngengi Muigai and James Muigai referred to the same person. He stated that his father was aware of the deed of surrender dated 4th November 1992 and signed the same. He stated that in consideration of the surrender, the Government approved the subdivision of the suit property and the issuance of titles for the subdivisions of the property. He stated that there was also a change of user of the suit property from agricultural to residential and a change of land registration regime. He stated that the subdivision of the suit property was done after the surrender of the original title.
36. PW1 stated that it was agreed that each shareholder was to get his share. He stated that the members of the group had not sat down and agreed on the shares of each member. He stated that the group was to agree on sharing the land according to each members' contribution. He stated that the meeting



for the distribution of the land never took place. He stated that the meeting was to take place after the subdivision exercise was completed. He stated that the members expected all the subdivision titles to come out in the name of the group, after which the group would agree and have the same transferred to each member according to his contribution. He stated that according to the memo dated 10th December 2010 by P. K. Kahoho, the District Officer Kasarani forwarded to him a list of the beneficiaries of the suit property. He stated that whereas the suit property was owned by 21 people, the list of beneficiaries contained the names of over 200 people. He stated that the name of his father was not on the list. He stated that he was not aware that the Directorate of Criminal Investigations (DCI) also investigated the matter. He stated that he made a report to the DCI but was not called to make a statement. He stated that he was seeing the report by the DCI for the first time in court. He stated that he had no comments on the report.

37. PW1 stated that he was not called to record a statement as the complainant. He stated that the deed of surrender had the names of the members of the Plaintiffs group. He stated that John Kagai was deceased and he knew his legal representatives. He stated that he did not know Mwangi Kimanga in person. He stated that Mwangi Kimanga was deceased. He stated that he knew Gichuhi Macharia, Mwangi Githure and Mwangi Githinji who were all deceased. He stated there was a nephew of Mwangi Githinji who was coming to court claiming to be Mwangi Githinji. He stated that the advocate who filed the suit in 2002 must have obtained instructions from all the Plaintiffs. He stated that he did not have instructions in writing to represent the other Plaintiffs or other members of Muigai & Others.
38. PW1 stated that he became aware in 2010 that part of the suit property was going to be acquired for the construction of the Thika Highway. He stated that the Government published in the Kenya Gazette a notice containing the particulars of the properties that would be acquired. He stated that he did not see the Gazette Notice when it was published. He stated that the suit property was Gazetted as one of the properties, part of which would be acquired for the construction of the said Highway. He stated that it was when the construction started that he got to know that a portion of the suit property had been acquired and that strangers were compensated for the same. He stated that he had complained to the DCI about the issue. He stated that the DCI did not respond to his complaint. He stated that he did not file a suit over the acquisition of a portion of the suit property.
39. PW1 stated that no official titles for the subdivisions of the suit property were issued. He stated that the Ethics & Anti-Corruption Commission (EACC), in its investigation, found that fake titles had been issued. He stated that his father signed the surrender. He stated that he was not challenging the fact that the title was surrendered to the Government. He stated that he only had a problem with the titles that were created after the subdivision. He stated that he did not find any title in the name of his father after the subdivision.
40. PW1 stated that he did not know that the 5th Defendant was a registered society. He stated that he had never been an official of the 5th Defendant. He stated that he had never been a treasurer of the 5th Defendant. He stated that somebody must have put his name in the documents of the 5th Defendant. He stated that he had never been arrested and was not aware that a Warrant of Arrest had been issued against him concerning the suit property. When shown the Notice of Motion at page 411 of the 1st, 4th and 5th Defendants' bundle, he stated that he had never gone to court to be registered as an official of the 5th Defendant and had not attended meetings of the 5th Defendant or signed the minutes of any of its meetings. He denied that he agreed with the officials of the 5th Defendant that he be given the position of treasurer in the 5th Defendant. He denied that he decided to join this suit as an interested party after the Registrar of Societies refused to register the new officials of the 5th Defendant.



41. PW1 stated that he was not involved in any criminal litigation and that he was aware that the original parcel of land was subdivided and new titles issued for the subdivisions. He stated that he was seeking the cancellation of the new titles that were issued after the subdivision and that the titles whose cancellation he had sought were the only ones he was aware of. He stated there could be other titles he was not aware of. He stated that he was not making any claim in this suit in respect of the compensation that was paid out to the persons who held fake titles. He stated that once the titles were cancelled, he would bring a compensation claim. He stated that the 4th and 5th Defendants were still selling portions of the suit property to unsuspecting members of the public who were erecting buildings on the property claiming to be squatters. He stated that the 4th Defendant was residing on the suit property. He stated that the suit property was occupied by the 4th Defendant and his goons.
42. On cross-examination by Ms. Ndundu for the Attorney General, PW1 stated as follows: The title for the suit property was surrendered to the Commissioner of Lands for the purposes of subdivision. He had a problem with the list of the beneficiaries given by the District Officer, Kasarani since the suit property was private land and the said District Officer had no right to forward to the Ministry of Lands a list of those who were to benefit from it. This was one of the issues which was being investigated by EACC whose report was yet to be released.
43. On cross-examination by Mr. Owang for the 3rd Interested Party, PW1 stated that he had heard of the 3rd Interested Party, Githu – Zima Society. He stated that Francis Kibe Wagacha was his in-law. He stated that he knew when his father and his friends were buying the suit property. He stated that his father was old and he (his father) was doing a lot of things through him. He stated that he was the one who took the cheque for the purchase price to the seller. He stated that he was not one of the persons who purchased the suit property. He stated that it was his father who was one of the partners in Muigai & Others group. He stated that the partners took possession of the suit property but did not develop the same because the land had not been subdivided. He stated that the representatives of the 21 partners were occupying the land. He stated that the 4th and 5th Defendants entered the suit property around 2000/2001. He stated that he did not know the members of the 5th Defendant. PW1 stated that when the suit was brought, there were people occupying the suit property illegally. He stated that his father was deceased and his brother Josephat Mathia was his representative. He stated that in the group of 21, only Robert Wamithi was alive. He stated that the other partners were deceased. He stated that the children of those other partners approached him to take leadership in this suit and he advised them to go and obtain Grant of Letters of Administration in respect of the estate of their parents. He stated that the land was to be distributed according to each members' contribution. He stated that the shares of each member would be determined at the appropriate time. He stated that he was in court for the determination of the issue of ownership of the land and not the distribution of the same.
44. PW1 stated that the subdivision of the suit property was done in 1993 but the titles for the subdivisions were never issued. He stated that the Plaintiffs were to write to the Land Registrar giving instructions on how the titles were to be issued. He stated that all the titles which were issued were fraudulent and illegal including the ones issued to Robert Wamithi. He stated he was not aware of Githu-Zima Society's claim over the suit property. He stated that he was not aware that his father donated his shares in the suit property to one, Peter Kimanga.
45. On cross-examination by Mr. Mungai for Deneva Ltd., PW1 stated that Robert Wamithi was one of the partners in Muigai & Others. He stated that the deed of surrender dated 4th November 1991 was issued in exchange for approval of the subdivision scheme and issuance of individual titles for the subdivisions of the suit property. He stated that he did not know if the sale of one of the plots by Robert Wamithi to Deneva Ltd. was proper or not. He stated that he did not know where the list of



beneficiaries that was given to the Ministry of Lands by the District Officer, Kasarani, came from. He stated that letters of allotment were issued around 1994, and at that time, his father was still alive, and he could have been aware of the same but was not.

46. On re-examination by Mr. Kuria, PW1 stated as follows: He was in court as a representative of Muigai & Others, in which his father was a member. When the suit was instituted, he was not a party to the suit. The suit was filed by some of the members of Muigai & Others. He interacted with most of the 21 partners of Muigai & Others. The share of the suit property which his father was entitled to was still work in progress. The Plaintiffs were yet to determine individual shares in the property. The members of Muigai & Others had several meetings and those without letters of administration were asked to obtain the same. PW1 stated that the District Officer, Kasarani, had no right to direct the Ministry of Lands to issue titles for the subdivisions of the suit property to third parties. He stated that his father was already bedridden in 1994, and he was the one handling his affairs. He stated that he had a power of attorney. He stated that he was not aware of the allotments that were done in respect of the subdivisions of the suit property. He stated that he did not know where the list of the beneficiaries of the suit property supplied by the District Officer, Kasarani, came from. He stated that the DCI did not conclude that his father did not own any share in the suit property. He stated that the Plaintiffs did not receive any compensation for the portion of their land that was acquired by the Government for the construction of Thika Superhighway.
47. PW1 stated that the Plaintiffs did not receive any title after the surrender and subdivision of the suit property. He stated that the Plaintiffs were not aware that one of them, Robert Wamithi had transferred a portion of the suit property to a third party. He stated that if there was any transfer to be effected, it had to be done by all the Plaintiffs. He stated that a single member of Muigai & Others could not allocate to himself a portion of the suit property. He stated that he was aware of the 5th Defendant but did not personally know its members. He stated that he did not sign any document as a member of the 5th Defendant. He stated that the documents that the 5th Defendant had presented to court linking him to the group were forgeries. PW1 stated that after the suit property was acquired by the Plaintiffs, the Plaintiffs allowed their representatives to occupy the same. He stated that the said representatives of the Plaintiffs occupied the property until around 2000/2001 when they were evicted by the squatters. He stated that the 5th Defendant was not a member of Muigai & Others. He stated that the name of the Plaintiffs was changed as a result of the death of his father.
48. After the close of the Plaintiffs' case, the 4th Defendant, FRANCIS KIRIMA M'IKUNYUA (DW1), was the first to give evidence for the Defendants. DW1 stated that he was the 4th Defendant and also the Chairman of the 5th Defendant. He stated that the 1st Defendant was a member of the 5th Defendant and that he was giving evidence on his behalf and on behalf of the 1st and 5th Defendants. He adopted his witness statement as part of his evidence in chief. He stated that they were claiming the suit property by adverse possession. He stated that they had filed a suit, namely ELC No.2363 of 2007, claiming the suit property by adverse possession. He stated that he had filed a supplementary list of documents which contained the pleadings in ELC No. 267 of 2007(O.S) and ELC No. 2363 of 2007 (O.S).
49. DW1 stated that the conveyance through which the Plaintiffs claimed to have acquired the suit property was a forgery. He stated that the person who purported to be the liquidator was not the liquidator of Kentiles Ltd. He stated that the Plaintiffs claimed to have acquired the suit property from a liquidator appointed by Kenya Commercial Bank. He stated that they reported the matter to the Criminal Investigations Department (CID) which investigated the same. He stated that Kenya Commercial Bank Ltd. wrote to the CID denying that the suit property had been charged to it. He stated that pursuant to his complaint, Robert Wamithi Mutahi was charged in Criminal Case No. 199 of 2010. He stated that Robert Wamithi challenged his prosecution in High Court Petition No. 13 of



- 2010 and the High Court quashed the decision to charge him. He stated that the court declared that Robert Wamithi was entitled to peaceful and quiet possession of the suit property. He stated that the declaration meant that Robert Wamithi was the owner of the suit property. He stated that he was not a party to that suit and sought to be joined in the suit.
50. DW1 stated that he was joined in the suit and challenged the declaration of Robert Wamithi as the owner of the suit property. He stated that the court delivered a ruling reviewing the order. He stated that the judgment was reviewed and omitted the declaration that Robert Wamithi was entitled to peaceful and quiet possession of the suit property. He stated that at that time, he had not heard of the Plaintiffs. He stated that Josephat Muigai and Samuel Kungu Muigai (PW1) were joined to this suit when they claimed to be interested parties. He stated that Josephat Muigai and Samuel Kungu Muigai claimed that the suit property belonged to their late father. He stated that in their application, Josephat Muigai and Samuel Kungu Muigai attached a copy of a Grant of Probate in respect of the estate of James Ngengi Muigai. He stated that he perused that probate file and found out that the suit property was not included as one of the assets of the estate of Josephat Muigai and Samuel Kungu Muigai's father.
51. DW1 stated that the suit property was not named in the will Josephat Muigai and Samuel Kungu Muigai's father and appeared nowhere in the proceedings of the succession cause. He stated that Josephat Muigai and Samuel Kungu Muigai did not produce any document to prove that their father owned the suit property. He stated that Josephat Muigai and Samuel Kungu Muigai made a complaint to the police in respect of the property and the Director of Public Prosecution responded to the complaint stating that Josephat Muigai and Samuel Kungu Muigai's father, James Muigai did not own the suit property and that he was given two plots that he donated to Peter Kimanga. He stated that Josephat Muigai and Samuel Kungu Muigai also sought to be joined in High Court Petition No. 13 of 2010 and on the objection of Robert Wamithi, they withdrew their application.
52. DW1 stated that the relationship between Samuel Kungu Muigai (PW1) and the 5th Defendant was not rosy because at one time he made an application to the Registrar of Societies to make changes in the officials of the 5th Defendant fraudulently claiming that he was the treasurer of the 5th Defendant society. He stated that PW1 also filed annual returns for the 5th Defendant fraudulently. He stated that he reported the matter to the police and investigations were carried out and the purported officials of the 5th Defendant were charged. He stated that PW1 was not charged because the police could not trace him. He stated that he was aware that PW1 made an application to the High Court seeking to be made an official of the 5th Defendant. DW1 stated that he lodged a complaint with the Registrar of Societies on PW1's claim that he was an official of the 5th Defendant and in his ruling, the Registrar of Societies held that James Mburu Muhiu, Edwin Odallo and Kungu Muigai were not officials of the 5th Defendant when they purported to call a meeting of the 5th Defendant. He stated that the said ruling was made because PW1's group wanted their annual return registered. He stated that the Registrar of Societies rejected PW1's attempt to become an official of the 5th Defendant in 2011. He stated that when PW1's attempt to become an official of the 5th Defendant was thwarted, he came to this court and sought to be joined in this suit as a plaintiff.
53. DW1 stated that the Commissioner of Lands had made a report to the Minister of Lands prepared by P. K. Kahuho Deputy Commissioner of Lands on 10th December 2010 on the history of the suit property. He stated that according to the report, the suit property had been subdivided and allocated to third parties. He stated that the report had a list of allottees. He stated that the name of Josephat Muigai and Samuel Kungu Muigai (PW1) did not appear in the list as beneficiaries. DW1 stated that he was arrested when he filed the first complaint against PW1. He stated that he filed Petition No. 461 of 2012 and the charge against him was quashed. He stated that the court restrained the Director of Public



Prosecutions from investigating him in relation to the suit property. He stated that the Plaintiffs had not produced any document showing that they owned the suit property. He stated that the Plaintiffs' claim was an afterthought because if the suit property belonged to Josephat Muigai and Samuel Kungu Muigai's father, their deceased father would have included the same in his will. He stated that if PW1 had become an official of the 5th Defendant, Josephat Muigai and Samuel Kungu Muigai (PW1) would not have joined this suit.

54. DW1 stated that the latest position of the suit property was that it was fully occupied by over 3000 squatters. He stated that there were also government buildings on the property. He stated that it was on the basis of the said occupation that they had brought a suit for adverse possession. He stated that the Plaintiffs were not parties to the adverse possession claim because they were not the owners of the suit property. DW1 urged the court to dismiss the Plaintiffs' suit and that their claim against the Plaintiffs be allowed. DW1 produced the 1st, 4th and 5th Defendants' bundle of documents filed on 31st May 2016 as D.EXH.1.
55. On cross-examination by Mr. Kuria for the Plaintiffs, DW1 stated as follows: He was the chairman of the 5th Defendant. He was defending the interest of the members of the 5th Defendant who were squatters on the suit property and who had acquired the suit property by adverse possession. They filed ELC No. 2363 of 2007 where the 5th Defendant had sued people who claimed to have titles over the suit property. The transfer of the suit property to the Plaintiffs was fraudulent. The receiver manager named in the conveyance was not the liquidator of Kentiles Ltd. as confirmed by the Registrar of Societies in response to an inquiry made by the D.C.I.O Kasarani. He stated that he had not produced the letter of inquiry from D.C.I.O Kasarani. He stated that Kenya Commercial Bank Limited (KCB) did not hold any security in the name of Kentiles Ltd. He stated that the conveyance was done in 1977 and as at 2009 KCB did not hold any security in the name of Kentiles in respect of the suit property. DW1 stated that they were the complainants in the criminal case against Robert Wamithi. He stated that their complaint was that the conveyance between the Plaintiffs and Kentiles Ltd. was fraudulent. He stated that the criminal case was terminated by the High Court which found that the suit property was acquired by Robert Wamithi lawfully. He stated that he had not heard of Samuel Kungu Muigai (PW1) until they sought to join this suit with Josephat Mathia Muigai. He reiterated that their claim over the suit property was based on adverse possession.
56. On cross-examination by Mr. Menge for the 6th and 8th Defendants, DW1 stated that according to the memo he was referred to, the owners of the suit property were James Muigai and 20 Others.
57. On re-examination by Mr. Kenyatta, DW1 stated that: He was not a party to Petition No. 13 of 2010. He learnt of the judgment that was made in the matter and made an application to be joined to the petition and for the judgment to be set aside. In a ruling made on 15th April 2013 by Majanja J., the court reviewed the judgment and quashed the limb thereof that had declared Robert Wamithi to be the owner of the whole of the suit property. He stated that there was no evidence that the suit property was owned by James Ngegi Mungai. He stated that the suit property was subdivided and allocated to various people. He stated that the Plaintiffs were not mentioned among those who were allocated the suit property after the subdivision and that was why they did not join the Plaintiffs in their adverse possession claim. He stated that the Plaintiffs had not stated the exact portion of land they were claiming.
58. The next witness was Peter Ndungu Mutiga (DW2). DW2 stated as follows in his evidence in chief: He was running a business on the suit property. He owned a kiosk on the suit property and had been in occupation of the same for 21 years. He had never heard of the Plaintiffs nor seen them. More than 10,000 people were living on the suit property. The property was developed. There were churches,



- schools, a police post and a market in addition to the residential buildings. The suit property measured about 215 acres.
59. On cross-examination by Mr. Mungai for Deneva Ltd., DW2 stated that in addition to owning a kiosk, he also lived on the suit property. He stated that had an iron sheet house on the property. He stated that he did not have a title but was pursuing the same. On cross-examination by Ms. Muturi for 9th and 10th Defendants, DW2 stated that he was operating a kiosk and also a small bar on the suit property. He stated that his parcel of land was Plot No. D.87. On cross-examination by Mr. Kuria for the Plaintiff, DW2 stated that he was the 5th Defendant's Member No. 33. He stated that Plot No. D.87 was allocated to him by the 5th Defendant. He stated that he was given the land in 1994. He stated that the 5th Defendant had a mandate to subdivide the suit property and allocate portions thereof to its members. He stated that the 5th Defendant owned the land by adverse possession. He stated that it was the 5th Defendant which allocated the plot to him on the strength of its adverse possession claim to the suit property.
60. The next witness was the 9th Defendant, Patrick Githinji Mwangi (DW3). DW3 adopted his witness statement filed on 30th September 2022 as his evidence in chief and produced the bundle documents dated 30th September 2022 as D.EXH. 2 and the bundle of documents dated 20th October 2022 which he shared with the 10th Defendant as D.EXH. 3. He stated that some people invaded the suit property and occupied the same. He stated that he wanted the invaders removed from the property. He stated that they had had several cases with the said invaders, the details of which were set out in his statement.
61. On cross-examination by Mr. Kenyatta for the 1st, 4th and 5th Defendants, DW3 stated that the conveyance which was the basis of his claim was made in 1977 and he did not sign the same. DW3 stated that his father's name was Mwangi Kimanga and that his name was in the conveyance. He stated that his father died in 1999 and he was not the administrator of his estate. He stated that the estate had administrators. He stated that he had joined the suit on his own behalf because he had titles to the land he was claiming which he got around 2001. He stated that he got the titles after the death of his father. He referred the court to his titles in D.EXH. 2. He stated that after the subdivision of the original parcel, he acquired more than three (3) separate titles. He stated that one of his properties was compulsorily acquired by the Government and he was paid for it. He stated that he was paid Kshs. 275,425/-. He stated that he was not one of the 21 members/partners of Muigai & Others who acquired the original parcel of land. DW3 stated that there were people who got land through their fathers, some of whom were sleeping partners in Muigai & Others. He stated that he was not in possession of the parcels of land whose titles he had produced in court as they were occupied by grabbers/invaders. He confirmed that there were pending cases between him and the invaders. He stated that in ELC No. 2363 of 2007, he was the 8th Defendant. He stated that the suit was brought by land grabbers who claimed to have acquired his land by adverse possession. He stated that the suit was stayed.
62. On cross-examination by Mr. Mungai for Deneva Ltd., DW3 stated that he knew Robert Wamithi, the 10th Defendant. He stated that the 10th Defendant was one of the founding members of Muigai & Others where he was the secretary. On cross-examination by Mr. Mungania for the 4th interested party, DW3 stated that he acquired his titles in 2001. He stated that at the time, the land was vacant. He stated that there were no people on the land. On cross-examination by Mr. Kuria for the Plaintiff, DW3 stated that he was not one of the partners of Muigai & Others. He stated that his claim was through his father Mwangi Kimanga. He reiterated that he was not the administrator of his father's estate. He stated that his claim was in respect of his parcels of land for which he had titles, namely; Plot No. 123/125 (see page 34 of D.EXH.2) and Plot No. 123/150 (see page 40 of D.EXH. 2). He stated that the list of the plot owners at pages 13 to 22 of D.EXH. 3 originated from the minutes of the



- meeting of the members of Muigai & Others held on 17th May 1989. He stated that the list was signed and stamped by the District Officer, Kasarani. DW3 stated that the suit property was subdivided into 248 parcels, and members were issued with titles for the subdivisions. He stated that the titles were issued based on the list of allottees. He stated that the allocation was done through balloting, and it was his late father who balloted for the plots.
63. On re-examination by Ms. Muturi, DW3 stated that he had the titles for the other plots but he had not brought them to court. He stated that the allocation of plots was mentioned in the minutes at page 10 of D.EXH. 3. He stated that the minutes captured the discussion by the members of Muigai & Others of various issues. DW3 stated that the titles were issued to him by the Government and that he did not participate in the subdivision of the original parcel. He stated that he was allocated the plots that he owned after the original parcel was subdivided by the members.
64. The next witness was Vinecensia Juma(DW4). DW4 told the court that she was a land registrar attached to the office of the Land Registrar Court Section. She adopted her witness statement dated 28th November 2023 which was in Volume 1 of the 8th Defendant's bundle of documents at pages 1 to 22 as part of her evidence in chief. DW4 further stated as follows in her evidence in chief: They instructed their advocate to prepare bundles of documents which they had filed in court. The land in dispute was initially L.R No. 57/26. It was Government land. It was allocated to Kentiles Ltd. The company went into liquidation. Through the liquidator, the land was sold to a group of 21 people. The property was transferred to the group on 11th October 1997 which was the date when the Deed of Conveyance was registered.
65. The members of the group signed a deed of surrender of the property to the Government of Kenya on 4th November 1993 in consideration of a subdivision scheme approval and issuance of new individual titles under the Registered Land Act. The deed of surrender was booked at the Land Registry through booking form No. 300 on 4th November 1993 and thereafter registered. After the original title was surrendered the property originally known as L.R No. 57/26 was issued with a new Registered Land Act number Nairobi/Block 123. After the issuance of the new number, it was now up to the Nairobi City Council to issue new leases for the resultant subdivisions. The Nairobi City Council issued the individual leases and the same were forwarded to the Land Registry for issuance of titles. The leases were issued in respect of the subdivisions that had been done at the material time. After the leases were forwarded to the Land Registry, they prepared certificates of leases.
66. Some of the parcels of land had since been subdivided further. They prepared titles for the leases that had been submitted. The subdivision was from 1 to 255 parcels. These were individual leases in the names of individuals. She stated that she had set out in paragraph 12 of her statement the names of the owners of the subdivisions of Nairobi/Block 123. She stated that they had a deed of surrender which was signed by all the 21 owners of the original L.R No. 57/26. The surrender was duly witnessed and registered. She stated that the Plaintiffs could not turn around and claim that they did not surrender the property and that the transaction was fraudulent. She stated that the Ministry of Lands did not collude with anyone in the subdivision of the suit property.
67. DW4 stated that from their records, she had not seen the name Mathia & Others as one of the owners of the properties the subject of the suit. She stated that what she had produced was what was in their records as of the date of her evidence. She stated that where she had indicated "No record" meant that the property existed but she was not able to get the records as at the time of her statement. She stated that some records were not readily available as the registry was undergoing digitization. She produced in 3 volumes the documents attached to the 8th Defendant's list of documents dated 28th November 2023 filed on 29th November 2023 as D.EXH. 4.



68. On cross-examination by Mr. Kenyatta for the 1st, 4th and 5th Defendants, DW4 stated as follows: The conveyance had the individual names of the members of Muigai & Others. James Muigai's name was the first. He was a signatory to the conveyance at page 28 of D.EXH. 4. The Deed of Surrender dated 4th November 1991 at page 36 of D.EXH. 4 was signed by James Muigai and 20 other individuals. They had not received a complaint from James Muigai or his estate over his signature on the document. The surrender was in exchange for a subdivision approval. The subdivision was carried out. It was not possible that any member would not have been aware of the subdivision after signing the Deed of Surrender. The memo at page 296 of D.EXH.1 captured the evidence she had given. She stated that she did not know if the list at page 298 of D.EXH.1 was the basis of the allotment of the subdivisions of the suit property. She stated that she had not seen any title in the name of James Muigai.
69. DW4 stated that the titles that were issued for the subdivisions were not restricted to the names of the original 21 owners of the original parcel. She stated that there were people who were issued with titles who were not the original 21 owners. She stated that they had not received any complaint from James Muigai that he was not issued with a title. He stated that the Deed of Surrender was registered in 1993 and they had not received any complaint over the suit property. He stated that the Plaintiffs had no valid claim.
70. On cross-examination by Ms. Muturi for the 9th and 10th Defendants, DW4 stated that the suit property was registered in the name of 21 people and that its subdivision was regularly carried out. She stated that after the initial subdivision of Nairobi/Block 123, there had been subsequent subdivisions of the individual parcels.
71. On cross-examination by Mr. Mungai for Deneva Ltd., DW4 stated that, according to her statement, Nairobi/Block 123/61 was registered in the name of Deneva Ltd. She stated that the lease for this property was in the name of Robert Wamithi Mutahi and was registered on 18th February 2008. She stated that the property was registered in the name of Deneva Ltd. on 29th July 2008, and a certificate of lease in its favour was issued on the same date. She stated that on 6th October 2010, a restriction was registered against the title. She stated that restrictions had been entered against several parcels of land. DW4 stated that the CID had complained to the Chief Land Registrar about certain subdivisions that resulted in the registration of the restrictions. She stated that they did not inform the registered proprietors of the restrictions. She stated that Robert Wamithi Mutahi was one of the original 21 owners of the land in dispute. She stated that parcel number 71 was first registered in the name of Muchiri Mathenge on 3rd March 2008. She stated that she did not have a search for parcel No. 204 but the white card for the parcel showed that the property was registered in the name of John Kimuhu Gachenga (see page 608 D.EXH. 4), who was not one of the original 21 owners of the original parcel. She stated that she did not know how the allocation of the subdivisions was done.
72. On cross-examination by Mr. Kuria for the Plaintiff, DW4 stated as follows: James Muigai was not a beneficiary of any of the parcels of land that resulted from the subdivision of the suit property. The letter of consent at page 27 of D.EXH. 4 was the consent to transfer the suit property from Kentiles Ltd. to James Muigai & 20 Others. The suit property was conveyed by Kentiles Ltd. to James Muigai and others as individuals. James Muigai was one of the owners of the suit property. James Muigai was one of the persons who executed the Deed of Surrender. James Muigai was not one of the owners of the subdivisions that followed the subdivision of the suit property. She did not have the approved subdivision scheme on her record.
73. The office of the Chief Land Registrar dealt only with the registration of land. They received leases from the Nairobi City Council, and that was what they registered. She did not have a letter from the Commissioner of Lands authorising the Nairobi City Council to issue leases to Muigai & Others.



- She did not have correspondence on how the leases were forwarded to them. The initial plots were 255. There were, however, subsequent subdivisions. The titles were issued procedurally. They were not concerned with the history of the properties. Once the documents met the threshold for registration, they registered the same. They get the documents that they register from the Department of Land Administration.
74. On re-examination by Mr. Menge, DW4 stated that when they register a restriction, they need not notify the registered owner. She further stated that when leases are forwarded to them, they just consider whether they meet the registration threshold. On examination by the court, DW4 stated that the original 21 owners of the suit property had surrendered their interest in the property. She stated that the surrender was registered. She stated that the owners of the original parcel were not issued with another title but were issued with individual titles for the subdivisions under the Registered *Land Act*. She stated that in this case, the land was subdivided into Block 123/1-255. She stated that at the time, the leases were being issued by the Nairobi City Council. She stated that the Ministry of Lands was not issuing leases. She stated that that was why the leases in question were sent to them for registration from the Nairobi City Council.
75. The next witness was ROBERT WAMITHI MUTAHI (DW5). DW5 adopted his witness statement dated 30th September 2022 as his evidence in Chief. He stated that he was one of the original 21 purchasers of the suit property. DW5 stated that they were a partnership of more than 21 people. He stated that their advocate R. N. Khanna advised that if they were going to be more than 21 people then they would be considered a society. He stated that the advocate advised them to limit their number to 21 so that they could be considered a partnership. He stated that they were more than 150 people and the 21 of them were representing the others. He stated that in the partnership called Muigai & Others, one of the partners was James Muigai. He stated that Peter Kimanga was also one of them. He stated that the price of the suit property was increased by the sellers from Kshs. 500,000/- to Kshs. 700,000/-. He stated that Peter Kimanga told them that he had a friend and age mate by the name of James Muigai who could take them to the President because he was a brother to the President. He stated that the President was in Mombasa at the time. He stated that their Chairman, John Kagai Gachanga, Gichuhi Macharia and Peter Kimanga went to Mombasa to see the President with James Muigai.
76. DW5 stated that when they came back, they told them that the President talked to Mr. Gichuki, who was the Chief Executive Officer (CEO) of KCB, which was selling the suit property, and Mr. Michuki agreed to give them time to raise the purchase price of Kshs. 700,000/-. He stated that James Muigai then became a friend of the partnership, and the committee decided that since he had done a lot of work, his name should be put in the title. He stated that their advocate K. N. Khanna asked them of the name they wanted to give to their partnership and they came up with an acronym of Muigai & Kagai. The name then came to be known as Muigai & Others (Mui-Muigai and Gai-Kagai). He stated that of the original partners, only three of them were alive; Dominic Thuita Gathenge, one other partner and he. When shown the minutes produced as part of D.EXH. 3, he stated that the partners used to meet at Fig Tree Hotel which then belonged to Mwangi Kimanga who was their treasurer. He stated that Mwangi Kimanga was the one who told them that the land was on sale. He stated that Mwangi Kimanga had asked the committee to consider doing a favour to James Muigai for the services he had rendered to them.
77. DW5 stated that there were several developments to be undertaken. He stated that paragraph 3 of the minutes of the meeting held on 16th July 1987 showed that the committee met and the issue of James Muigai was considered. He stated that the committee told Mr. Kimanga that they could not give James Muigai land measuring 5 acres. He stated that page 9 of D. EXH. 3 contained the minutes of the General Meeting of Muigai & others held on 24th February 1991. He stated that most of their meetings



- regarding the suit property had to be attended by a chief or a District Officer. He stated that at page 11 of the minutes, there was a heading “Muigai’s case.” He stated that it was agreed at the meeting that James Muigai would be given land measuring 2 acres free of charge. He stated that Mr. Kimanga was asked to communicate the decision to James Muigai. He stated that at page 5 of D.EXH. 3 were minutes of the committee meeting held on 17th May 1989 which he attended. He stated that at the meeting, the committee decided that James Muigai should attend the committee meeting. He stated that at page 4 of D. EXH. 3 were the minutes of the committee meeting held on 26th May 1989 which was attended by James Muigai. He stated that James Muigai agreed that Peter Kimanga would take care of his interest in the suit property.
78. DW5 stated that James Muigai was his friend. He stated that he was the chairman of the Coffee Board of Kenya and that he used to get coffee from him. He stated that page 6 of D.EXH. 3 contained the minutes of the committee meeting held on 11th October 1990. He stated that he could see the sentence starting with “Mr. Muigai’s letter”. He stated that James Muigai wrote to the Chairman a letter dated 13th August 1990 (at page 8 of D.EXH. 3) in which he stated that he had sold all his interest in the land measuring five (5) acres to Mathew Kimani. DW5 stated that he had never met Mathew Kimani, but he was told that he was the son of Peter Kimanga Waiganjo. He stated that it was their Chairman who had proposed that James Muigai be given a portion of the suit property measuring 5 acres. He stated that this was before the committee deliberated on the matter. He stated that the land was consumed by facilities and as such they could not get for him the 5 acres he wanted. He stated that a decision was finally made that James Muigai would get land measuring 2 acres.
79. He stated that pages 13 to 22 of D.EXH. 3 contained a list of plot owners. He stated that James Muigai could not be in this list because he had already sold his two plots to Mathew Kimani. He stated that Mathew Kimani was allocated among others, Plot No. 33 in the name of Peter Kimanga Waiganjo. He stated that he was allocated Plot Nos. 33 and 37 (see the Ballot at page 34 of D.EXH. 3). He stated that Peter Kimanga Waiganjo was representing the interest of James Muigai. He stated that it was these two plots that were allocated to James Muigai. He stated that the balloting was done pursuant to these minutes at page 9 of D.EXH. 3. He stated that the Ballots were prepared by their auditor Githinji, Mukunya & Company Public Accountants. He stated that the Ballots were at pages 23 to 44 of D.EXH.3. He stated that they all balloted. He stated that James Muigai did not ballot. He stated that Peter Kimanga balloted for him. He stated that the list of beneficiaries of the suit property at pages 13 to 22 of D.EXH. 3 was prepared by their auditor after the balloting. DW5 stated that the 3rd Defendant in the suit was Nzau Mwalimu Nzau. He stated that he signed the verifying affidavit that accompanied the plaint in this suit. He stated that he brought the suit on behalf of Muigai & Others through Ngatia & Associates. He stated that he was the one who had instructed the firm.
80. DW5 stated that they came to discover that a senior person in the Provincial Administration was developing a house in Ngara, and stones were being excavated from the suit property by the initial Defendants and taken to the construction site. He stated that the 3rd Defendant was arrested, charged and convicted for trespass. He stated that the suit property was affected by Thika Highway. He stated that compensation was paid to individual partners whose parcels of land were acquired around 2008.
81. DW5 stated that there were several cases between them and those who had trespassed on the suit property. He stated that the invaders claiming the land moved from North Kariobangi where they were mining stones and invaded the suit property around the 1990s when the 3rd Defendant was charged at Makadara Law Court. He stated that the invasion of the land was investigated and at page 77 of D.EXH.5 was a report to the Director of DCI Nairobi by Nicholas Kamwende, County Criminal Investigating officer, Nairobi. He stated that the invaders even donated land to the police to put up a police post to protect them. He stated that the whole land was almost taken, and even his plots had



- been built up by the invaders. He stated that he owned Plot No. 43 and had, over the years, paid rates for the land. He stated that he was issued with the title on 20th August 2008. He referred the court to pages 38, 44, 48, 54, 58, 63 and 68 of D.EXH.5 for the copies of his titles.
82. DW5 stated that he had been unable to access his parcels of land since 1996 as there were people in occupation. He stated that the 5th Defendant sold the land to other people. He stated that he had put a caveat emptor to warn the public, and the same was circulated in the estate, but people were still building on the suit property using forged building plans. He stated that the invaders had share certificates but without titles. He stated that he had paid over Kshs. 8,000,000/- in land rates. He produced his bundle of documents dated 30th September 2022 as D.EXH. 5.
83. On cross-examination by Mr. Mungania for the 4th interested party, DW5 stated that: They visited the land before purchasing it. The land was vacant. There were only people who were grazing on the land. There was no quarry. The quarry came later. There was no activity on the land apart from those who were grazing. No people were living on the land.
84. On cross-examination by Mr. Kenyatta for the 1st, 4th and 5th Defendants, DW5 stated that he was charged by the police from Kasarani Police Station. It was found that the charge had no basis. He was charged at Kibera Law Court. The charge related to how the suit property was acquired. He challenged that charge in the High Court in Petition No. 13 of 2010. The court found that he was entitled to peaceful enjoyment of the suit property. The court issued an order of prohibition against the police from charging him. The court quashed the charges that had been preferred against him. It was the 5th Defendant who had complained against him in the criminal case. He knew that the 5th Defendant also filed an application in the same petition and got a ruling in its favour on 15th April 2013.
85. DW5 stated further that he made a complaint against the 5th Defendant, which was led by the 4th Defendant. He knew that they were charged. He was not aware that the 5th Defendant challenged the charge. In Petition No. 461 of 2012, the court quashed the criminal cases. The court also stopped Police Investigations. He had had a dispute with the people on the suit property. In the plaint dated 26th February 2002 at page 54 of D.EXH. 3, he sought orders against the Defendants in the suit. He was in court as one of the original 21 partners of Muigai & Others. He was not aware that he was also a defendant. When referred to the defence by the 9th and 10th Defendants, he stated that he did not know under what circumstances he became a defendant in the suit.
86. DW5 stated further that in the original plaint, the plaintiff was Muigai & Others. He did not know about the suit by Mathia & Others. The father of Mathia, James Muigai, did not have any interest in the suit property because he had sold his plots. The son of James Muigai could not represent the partnership in this suit because James Muigai was not one of them. James Muigai could not get land because he had sold his interest in the suit property. There was no reason why the titles issued in their favour should be cancelled. They followed the law in subdividing the suit property. Out of the 21 original partners, only 3 were alive. The partnership was not registered. The transaction was handled by their advocate. He was allocated 10 plots. There were a total of 279 plots. He had no authority to give evidence on behalf of the owners of the other plots. He had sold some of his plots. He could not access his plots because the 5th Defendant sent some people to take his photograph, which was circulated to the gangs in the area so that they could deal with him should he attempt to enter the land in dispute. He did not report to the police that his photograph was taken.
87. DW5 stated further that there was a list of the allottees that was forwarded to the Ministry of Lands and was stamped by the District Officer Kasarani. The list had everyone including the sleeping partners. The auditor had a list of the sleeping partners. Sleeping partners were represented by the partners. Each partner knew his people. One had to be cleared by the partner before getting the title. The people who



had fulfilled the conditions had to collect their titles from the Land Office. Such a person had to be in the list signed by the District Officer Kasarani and also had to have a letter from auditor confirming clearance of charges. The regulations provided that the partnership was to have a committee of 5 members.

88. On cross-examination by Mr. Kuria for the Plaintiff, DW5 stated that: They started the group in 1972. That was when they started discussing the issue of acquiring the suit property. To become a member, one had to make a payment. He could not remember how many members had joined the group in 1972. The members of the group that were approved by their advocate were 21, but there were many others. He did not have a full list of the members. Initially, Mr. Mbote was their secretary. He became the secretary after him around 1975. They used to keep records. He did not know if they kept all the records from 1972. He had no idea if the group had any other property apart from the suit property. The suit property was initially being sold at Kshs. 500,000/-. The price was increased to Kshs. 700,000/-. They got a sum of Kshs. 200,000/- from the father of the 9th Defendant, Mwangi Kimanga. They got the money from Mwangi Kimanga after the President talked to Mr. Gichuki to give them time to raise the additional sum of Kshs. 200,000/-.
89. DW5 stated further that James Muigai came into the picture when they were unable to raise the sum of Kshs. 700,000/- and Mr. Michuki had threatened to sell the land to other people. James Muigai was introduced to the group by Peter Kimanga. He came to the partnership as a friend to Peter Kimanga. James Muigai did not make any payment to the partnership for the suit property. Muigai & others and Muigai & Associates were the same group. They prepared the list of allottees and took it to the District Officer Kasarani according to the Government requirement at the time. The President had directed that the Government had to be involved in all land owned by more than 20 people.
90. On re-examination by Mr. Macharia, DW5 stated that James Muigai did not make any payment for the land in dispute. The allocation of the land to those who did not ballot was pending. There were several developments that they were to undertake, and they needed money. James Muigai attended only one meeting. He was invited to attend the meeting. He trusted Peter Kimanga with his interest. He never complained about his land having been taken.
91. The last witness was the 4th interested party, NICHOLAS ODERO ORIGI (DW6). DW6 stated as follows in his evidence in chief: He was brought up on the suit property. His father was working for a European by the name George Moore. He did not vacate the land. The European left Kenya in 1964 and never returned. They remained on the land with John Kiragu, James Origi and Mwalimu Nzau. They were occupying the houses that were put up by the European. Their work was to mine stones from the land. They continued with stone mining. They used to sell the stones. They used to cultivate the land and mine building stones. They occupied the land until 2002, when other people joined them and started mining stones. The people from KANU then started claiming the land. They did not get a title for the land. No one had come to claim the land. He did not know the people claiming the land. He was not staying on the suit property. He left due to insecurity. Their lives were threatened. The people who threatened their lives claimed to have bought the land. They reported the matter to the chief. The court should help him get the title to the land. They were also praying for the eviction of the people occupying the land who were disturbing them.
92. On cross-examination by Mr. Kenyatta for the 1st, 4th and 5th Defendants, DW6 stated that he was not occupying the suit property at the time of his evidence due to insecurity. He stated that there were people on the land, but their occupation was illegal. He stated that the land measured 215 acres. He stated that their group was not registered. He stated that he was giving evidence on behalf of the group. He stated that the 3rd Defendant, Mwalimu Nzau was deceased.



93. On cross-examination by Mr. Macharia for the 9th and 10th Defendants, DW6 stated that those who were in occupation of the suit property included Mwalimu Nzau. He stated that he was not an employee of Mr. Moore. He stated that there was also John Kiragu, and he was not aware that he was charged. He stated that Bishop Gaitho was a KANU man. He stated that he requested them to allow KANU youths to enter the land and mine stones to keep them busy. He stated that they were paying cess to them. He stated that in 1971, GEMA people came in and started clay works on the property. He stated that the people in occupation came in in 2010 after the insecurity developed. He stated that he left the suit property due to insecurity. He stated that he had brought the claim on his behalf and on behalf of the other people in ELC No. 2363 of 2007. He stated that Beth Wairimu was still alive. He stated that the parties in that suit were all alive.
94. On cross-examination by Mr. Kuria for the Plaintiff, DW6 stated that the suit property was owned by Mr. Moore, who was the owner of Kentiles Ltd. He stated that he wanted the suit property to be registered in the name of his group. He stated that his claim was based on adverse possession. He stated that the people on the land came in around the 2000s. He stated that he was claiming the land measuring 215 acres.
95. On examination by the court, DW6 stated that he vacated the suit property in 2007. When he and others vacated the suit property, the land was vacant. No people were living on the land. What they had on the land was a quarry, which they closed down in 2007. There was no other activity on the land after they left. The people in occupation of the land came in after they left the place.

The submissions

96. After the close of evidence, the parties made closing submissions in writing.

The Plaintiffs' submissions

97. In their submissions dated 2nd April 2024, the Plaintiffs framed the following issues for determination;
- a. Can the Plaintiffs be deemed to be the true proprietors of all that parcel of land now identified as Nairobi/Block 123/1/1-279 (formerly L.R No.57/26)?
 - b. Are the Plaintiffs entitled to an injunction against the Defendants, interested parties and/or third parties, restraining them from encroaching and/or interfering with the suit property identified as Nairobi/Block 123/1/1-279?
 - c. Were the titles procured from the sub-division of L.R No.57/26 to Nairobi/Block 123/1/1-279 in compliance with the legal statutory protocols?
 - d. Are any of the defendants, interested parties and third parties entitled to the orders of adverse possession prayed for?
 - e. Should the court issue an order of eviction against the Defendants, interested parties and other current occupants of Nairobi/Block 123/1/1-279 or any purported subdivisions thereof?
 - f. Who is entitled to the costs of the suit.
98. The Plaintiffs submitted that none of the parties disputed the fact that the property under dispute was registered in the name of a partnership more particularly identified as Muigai & others. The Plaintiffs submitted that on 4th November 1991, the partnership surrendered their title to the Government of Kenya in exchange for a subdivision scheme approval and issuance of individual titles to the members.



The Plaintiffs submitted that after the surrender, the land was subdivided into 279 plots, but the titles for the subdivisions were not issued in the first instance in the name of “Muigai & Others”.

99. The Plaintiffs submitted that it came out during the hearing that the Defendants concentrated on a mission to ensure that one James Muigai was not part of Muigai & others and that he had let go of his interest in the partnership. The Plaintiffs submitted that the Defendants failed in this mission. The Plaintiffs submitted that there was no evidence that James Muigai surrendered or sold his portion of the suit property measuring 5 acres to Mathew Kimani.
100. The Plaintiffs submitted that there was no evidence of how the shares that James Muigai was entitled to were eventually agreed on by the partnership. The Plaintiffs submitted that there was also no evidence on how the members made payments for their shares. The Plaintiffs submitted that the minutes produced in evidence by the 9th and 10th Defendants were not signed and were skewed to defeat James Muigai’s entitlement in the suit property. The Plaintiffs submitted that the Defendants could not separate James Muigai from the other 20 partners. The Plaintiffs submitted that James Muigai was entitled, like the other partners, to his shares in the suit property.
101. The Plaintiffs submitted that having established that the suit property belonged to Muigai & Others, it was only logical to conclude that any other person(s) occupying the suit property without the express authority of the Plaintiffs were trespassers, whether their claim was hinged on adverse possession or otherwise. The Plaintiffs submitted that they had proved their claim to the required standard.
102. The Plaintiffs submitted that according to the testimony of the Land Registrar, the suit property was subdivided into 255 plots (1-255). The Plaintiffs submitted that there was no evidence that the 9th and 10th Defendants acquired the titles in their names from the said subdivisions. The Plaintiffs submitted that from the Kenya Gazette No. 6034, Vol CX-No.53 contained in the 1st, 4th and 5th Defendants’ list of documents filed in court on 31st May 2016, it was clear that there were various plots belonging to Muigai & others which were compulsorily acquired for the construction of Thika Highway and in respect of which compensation was paid. The Plaintiffs submitted that the question for consideration was, who received the compensation money on behalf of Muigai & Others, and more importantly, how were the titles in possession of third parties transferred to them?
103. On the issue of adverse possession, the Plaintiffs submitted that from the evidence on record all the claimants of the suit property by adverse possession were not in possession of the subject property as all of them had vacated the suit property. The Plaintiffs submitted that their adverse possession claim must fail. The Plaintiffs submitted that having proved their case against all the Defendants, an eviction order must be issued against all the current illegal occupants of the suit property. The Plaintiffs submitted further that having proved that they were the registered proprietors of the suit property, they were entitled to the costs of this suit.

The 1st, 2nd, 4th and 5th Defendants’ submissions

104. The 1st, 2nd, 4th and 5th Defendants in their submissions dated 19th June 2024 framed the following issues for determination;
 - a. Who is the Plaintiff in this matter and whether the suit is a representative suit?
 - b. Has the Plaintiff proved his claim and/or interest in the suit property?
 - c. Has the Plaintiff proved its allegations of fraud in the surrender of the original title and the subdivision of the suit property?
 - d. Can the court give the 9th and 10th Defendants orders that do not form part of their pleadings?



- e. Whether the Plaintiffs are entitled to the orders sought in the further amended plaint.
105. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs initially instituted this suit by way of a plaint dated 26th February 2002 under the name of Muigai & Others. The 1st, 2nd, 4th and 5th Defendants submitted that paragraph 1 of the plaint described the Plaintiffs as a partnership comprising of 21 persons who were then represented by the law firm of Ngatia & Associates Advocates. The 1st, 2nd, 4th and 5th Defendants submitted that the verifying affidavit accompanying the plaint as initially filed was sworn by the 9th Defendant, Robert Wamithi Mutahi, who was a partner in the Plaintiffs partnership and who stated that he was authorised to swear the affidavit.
106. The 1st, 2nd, 4th and 5th Defendants submitted that the authority given to Robert Wamithi was not attached to the pleadings and was not produced in court. The 1st, 2nd, 4th and 5th Defendants submitted that Mr. Wamithi (DW5) confirmed to the court that he did not have any written authority to bring this suit on behalf of the other 20 partners of the alleged partnership. The 1st, 2nd, 4th and 5th Defendants submitted that DW5 confirmed that the partnership was not registered and that he did not have the authority of the estates of the deceased members of the alleged partnership to bring the suit on their behalf. The 1st, 2nd, 4th and 5th Defendants submitted that this suit could not be sustained as a representative suit on behalf of the members of the partnership who were deceased and, for those who were alive, had not given any authority for this suit to be filed on their behalf.
107. The 1st, 2nd, 4th and 5th Defendants submitted that for a suit to qualify as a representative suit, Order 1 Rule 8 (2) of the Civil Procedure Rules requires that each represented party must be served with a notice of institution of the representative suit. In support of this submission, reliance was placed in *Law Society of Kenya v. Commissioner of Lands & 2 Others* [2001] eKLR and *Rose Florence Wanjiru v. Standard Chartered Bank Ltd & Others* [2014] eKLR. The 1st, 2nd, 4th and 5th Defendants submitted that it was not in dispute that no notice was issued to the other alleged 20 members of the Plaintiffs to inform them that a representative suit had been filed on their behalf to enable them to elect whether they wanted to be parties to the suit or not. The 1st, 2nd, 4th and 5th Defendants submitted without the mandatory notice; they could not be deemed to be parties to this suit because Mr. Wamithi (DW5) did not produce any written authority from the alleged members authorising him to file the suit on their behalf.
108. The 1st, 2nd, 4th and 5th Defendants submitted that after the joinder of the estate of James Muigai in the suit through his sons as the administrators of his estate and the subsequent amendment of the plaint to substitute Muigai & Others with Mathia & Others, the estate of James Muigai became the sole plaintiff in this suit. The 1st, 2nd, 4th and 5th Defendants submitted that the estate of James Muigai, which was now describing itself as Mathia & Others, had failed to prove its legal ownership and interest in the suit property. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs' witness at the trial (PW1) confirmed that the suit property or any part thereof did not form part of the estate of James Muigai and was not mentioned in the succession proceedings relating to the estate.
109. The 1st, 2nd, 4th and 5th Defendants submitted that the land registrar confirmed that the surrender of the original title was procedural, legal and properly done. The 1st, 2nd, 4th and 5th Defendants submitted that the land registrar also confirmed that none of the titles issued after the subdivision of the suit property was issued in the name of James Muigai. The 1st, 2nd, 4th and 5th Defendants submitted that this was because he did not own the suit property or any part thereof. The 1st, 2nd, 4th and 5th Defendants relied on *Mohamed Guyo Boru v. Richard Mwiraria Aritho* [2022] eKLR and submitted that the Plaintiffs had not proved on a balance of probabilities that they had any interest in the whole or part of the suit property.



110. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs made allegations of fraud in the manner the original title was subdivided after the surrender on 4th November 1991. The 1st, 2nd, 4th and 5th Defendants submitted that the allegations of fraud were fatally defective for want of particulars and relied on the case of *Miira v. Mburu & Another (Civil Appeal 156 of 2021) (2023) KEHC 2945 (KLR) (30 March 2023) (Judgment)*, *Kuria Kiarie & 2 Others v. Sammy Magera [2018] eKLR* and *Demutilla Nanyama Pururmu v. Salim Mohamed Sali [2021] eKLR* in support of this submission. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs had not pointed out in their pleadings or evidence any particulars of fraud in the process of subdivision of the suit property. The 1st, 2nd, 4th and 5th Defendants submitted that the allegations of fraud by the Plaintiffs had not been proved to the standard required by law.
111. The 1st, 2nd, 4th and 5th Defendants submitted that the 9th and 10th Defendants could not be both the Plaintiffs and Defendants in this suit. The 1st, 2nd, 4th and 5th Defendants submitted that the ruling delivered on 17th February 2018 was clear on the fact that the 9th and 10th Defendants were removed as part of the Plaintiffs and joined in this suit as the 9th and 10th Defendants respectively. The 1st, 2nd, 4th and 5th Defendants submitted that the 9th and 10th Defendants did not file a counterclaim or seek a prayer for the eviction of the Defendants from the suit property. In support of this submission, the 1st, 2nd, 4th and 5th Defendants cited *Elizabeth O. Odhiambo v. South Nyanza Sugar Co. Ltd. [2019] KLR* and *South Nyanza Sugar Company Limited v. John Gituki Gomba [2022] eKLR*.
112. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs could not claim that the entire subdivision that created the 279 plots was fraudulent and then select only titles for 12 plots for cancellation without telling the court what should happen to the remaining 267 plots. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs could not approbate and reprobate at the same time. In support of this submission, the 1st, 2nd, 4th and 5th Defendants relied on *Terry Wanjiku Kariuki v. Equity Bank Limited & Another [2018] eKLR*. The 1st, 2nd, 4th and 5th Defendants submitted that the Plaintiffs were not entitled to the orders sought and urged the court to dismiss the suit with costs.

The 3rd Interested Party's submissions

113. In its submissions dated 18th April 2024, the 3rd Interested Party submitted that its representatives did not give evidence in the suit but wished to rely on the documents and witness statements contained in its bundle of documents filed in this suit on 23rd October 2014. The 3rd Interested Party submitted that Githu-Zima Society (the society) did not seek any substantive orders in this suit as it had notified the court of the pendency of its substantive suit being Nairobi ELC No. 36 of 2015 (OS) which the society filed against 21 Defendants whom the society believed were the original proprietors of the suit property. The 3rd Interested Party submitted that in that suit, it had sought orders of adverse possession against the Defendants and sought to be registered as proprietor of the suit property having been in possession of the property for a period of over 12 years and that the Defendants' rights and interests thereon had been extinguished.
114. The 3rd Interested Party submitted that its members had been in occupation of the suit property for over 40 years and they were in actual and physical possession of the same. The 3rd Interested Party submitted that its members were the descendants of their parents and grandparents who were employed as labourers on the sisal farms on the suit property by the previous white owners of the property. The 3rd Interested Party submitted that the members of the society embarked on working on the quarry sites and farms within the suit property after the collapse of the sisal industry in Ruiru-Juja area.



115. The 3rd Interested Party submitted that according to the statement of Francis Wagacha who was the chairman of the society, the Plaintiffs first appeared on the suit property in 1995 before disappearing and reappearing again in 2022 with hired goons who proceeded to destroy homes erected on the suit property by the society. The 3rd Interested Party submitted that through its officials, it obtained orders in Nairobi HCCC No. 667 of 2007 on 25th January 2013 stopping their eviction from the suit property. The 3rd Interested Party submitted that any interest and rights that the Plaintiffs had over the suit property had since been extinguished by adverse possession of the society.
116. The 3rd Interested Party submitted that there was no evidence adduced in court by the Plaintiffs in the form of a resolution and/or registration certificate as to how the Plaintiffs changed its name from Muigai and Others to Mathia and Others. The 3rd Interested Party submitted that the Plaintiff had no locus standi to institute these proceedings. The 3rd Interested Party submitted that PW1 did not tender evidence showing that his deceased father, James Muigai was one of the original 21 partners who had purchased the suit property. The 3rd Interested Party submitted that if the court found that the late James Muigai was one of the 21 partners as alleged, then his estate could only be entitled to a portion of the suit property as per the partnership shareholding which was not availed to the court. The 3rd Interested Party prayed that the suit be dismissed and its suit being Nairobi ELC No. 36 of 2015 does proceed to hearing and determination.

The 4th Interested Party's submissions

117. The 4th Interested Party submitted in his submissions dated 10th June 2024 that he settled on the suit property in 1980 and had been in occupation of the same since then. The 4th Interested Party submitted that the Plaintiffs were aware of his occupation and did not make any attempt to stop the same. The 4th Interested Party submitted that the Plaintiffs somehow managed to get themselves registered as proprietors of the suit property despite him being in occupation of the property for more than 20 years. The 4th Interested Party submitted that ELC No. 2363 of 2007 (OS) was heard and evidence finalised and the judgment was pending.

Analysis and determination

118. I have considered the pleadings, the evidence tendered and the submissions by the advocates for the parties. The Plaintiffs are 21 people namely, James Muigai (represented by Josephat Mathia Muigai), John Kagai, Mwangi Kimanga, Gichui Macharia, Mwangi Githure, Mwangi Githinji, Kanyi Gathuita, Gachau Gathanji, Kamweru Gakima, Kabui Kigera, Dominic Thuita Gathenge, E.Chege Karanja, Wambugu Churu, David Kagiri, Mwangi Kariuki, Muchiri Mathenge, Henry Gitau, Mwangi Kimani, Kahoreria Thuita, Robert Wamithi and Peter Kimanga Waiganjo who purchased land (the suit property) together. At the trial, the court was told that most of the Plaintiffs were deceased. PW1 told the court that of the initial 21 people, only one (1), Robert Wamithi(DW5) was alive. Robert Wamithi on his part told the court that three (3) people him included from the original 21 were alive as at the time of his evidence. The Plaintiffs initially referred to themselves as Muigai & Others which was later changed to Mathia & Others. Neither Muigai & Others nor Mathia & Others was registered as a partnership or a business name. These are therefore just names that the 21 people who purchased the suit property used to refer to themselves when together instead of mentioning the name of each one of them. The suit was originally brought by the Plaintiffs against those who were said to have trespassed on the suit property. The claim was purely against trespassers. There was no dispute over the ownership of the suit property amongst the Plaintiffs. There was also no dispute over the surrender of the original title for the suit property, the subdivision of the property and the distribution of the subdivisions amongst the Plaintiffs and others who had an interest in the property.



119. The suit was brought by Robert Wamithi (DW5), the 10th Defendant in the suit, who was one of 21 people who purchased the suit property. He was the one who instructed the firm of advocates who filed the suit. He was also the one who swore the original verifying affidavit. A disagreement arose between the Plaintiffs while the suit was pending when Josephat Mathia Muigai was granted leave to join the suit as one of the Plaintiffs to represent the estate of his deceased father, James Muigai, who was one of the 21 people who purchased the suit property. At that point, Robert Wamithi and Josephat Mathia Muigai became the only known Plaintiffs. After Josephat Mathia Muigai joined the suit as a plaintiff, Robert Wamithi who claimed to have been representing himself and 19 other people who purchased the suit property alleged that James Muigai whose name was among the 21 people who purchased the suit property had no share in the suit property as he had sold his share to one of the purchasers of the suit property, Peter Kimanga. Josephat Mathia Muigai on the other hand, claimed that the subdivision of the suit property was irregularly effected without the Plaintiffs' knowledge and several titles issued. Josephat Mathia Muigai claimed that amongst those who benefited from the irregular subdivision and issuance of titles in respect of the suit property; were Robert Wamithi who obtained titles for Nairobi/Block 123/43, 44, 83, 160, 162, 163, 168, 169, 170 and 205, and the 9th Defendant, Patrick Githinji who obtained titles for Nairobi/Block 123/69, 125 and 150. Robert Wamithi maintained that the subdivision that gave rise to the parcels of land that were allocated to him and Patrick Githinji was regular and that the titles issued to them were lawful. This state of affairs made the position of Robert Wamithi, and Patrick Githinji Mwangi who also held himself out as one of the 21 purchasers of the suit property, as plaintiffs in the suit untenable. In a ruling delivered on 17th February 2017, Robert Wamithi and Patrick Githinji Mwangi were struck out of the suit as plaintiffs and joined in the suit as defendants. This, in my view, left Josephat Mathia Muigai as the only Plaintiff. Josephat Mathia Muigai could only represent the estate of his father, James Muigai and no one else, as none of the other 20 purchasers of the suit property, most of whom were deceased, gave him the authority to represent them in the suit. With that background, I am of the view that the following are the issues arising for determination in this suit;

1. Whether the Plaintiffs were the proprietors of the parcel of land known as Nairobi/Block 123(formerly L.R No. 57/26) (the suit property);
2. Whether the subdivision of Nairobi/Block 123(formerly L.R No. 57/26) (the suit property) which gave rise to among others; Nairobi/Block 123/205, Nairobi/Block 123/43, Nairobi/Block 123/169, Nairobi/Block 123/160, Nairobi/Block 123/83, Nairobi/Block 123/162, Nairobi/Block 123/170, Nairobi/Block 123/163, Nairobi/Block 123/44, Nairobi/Block 123/69, Nairobi/Block 123/150, and Nairobi/Block 123/125, and the titles issued in respect of the subdivisions were illegal, null and void;
3. Whether James Ngegi Muigai, deceased had an interest in the suit property which devolved to his estate upon his death on 26th July 1995;
4. Whether Josephat Mathia Muigai, the administrator of the estate of James Ngegi Muigai, could maintain this suit;
5. Whether the Plaintiffs are entitled to the orders sought;
6. Whether the 4th Interested Party is entitled to the reliefs sought in his counterclaim; and
7. Who is liable for the costs of the suit?



Whether the Plaintiffs were the proprietors of the parcel of land known as Nairobi/Block 123 (formerly L.R No. 57/26) (the suit property)

120. From the evidence on record, Kentiles Limited (the company) was put under receivership pursuant to the orders issued by the Supreme Court of Kenya in Bankruptcy and Winding-Up Cause No. 50 of 1956 on 11th January 1957 and the Official Receiver was appointed as the liquidator of the company. On 8th October 1977, the Official Receiver who was the liquidator of the company transferred L.R No. 57/26 measuring 86.90 Hectares (the suit property) then owned by the company through a conveyance of the same date to James Muigai, John Kagai, Mwangi Kimanga, Gichui Macharia, Mwangi Githure, Mwangi Githinji, Kanyi Gathuita, Gachau Gathanji, Kamweru Gakima, Kabui Kigera, Dominic Thuita Gathenge, E.Chege Karanja, Wambugu Churu, David Kagiri, Mwangi Kariuki, Muchiri Mathenge, Henry Gitau, Mwangi Kimani, Kahoreria Thuita, Robert Wamithi and Peter Kimanga Waiganjo at a consideration of Kshs.700,000/-. James Muigai and 20 others (Muigai & Others) with whom he purchased the suit property were referred to in the conveyance only as the purchasers. The conveyance was registered on 11th October 1977. It is my finding that James Muigai, John Kagai, Mwangi Kimanga, Gichui Macharia, Mwangi Githure, Mwangi Githinji, Kanyi Gathuita, Gachau Gathanji, Kamweru Gakima, Kabui Kigera, Dominic Thuita Gathenge, E.Chege Karanja, Wambugu Churu, David Kagiri, Mwangi Kariuki, Muchiri Mathenge, Henry Gitau, Mwangi Kimani, Kahoreria Thuita, Robert Wamithi and Peter Kimanga Waiganjo (Muigai & Others) purchased the suit property at a consideration of Kshs.700,000/- and were therefore the lawful owners of Nairobi/Block 123(formerly L.R No. 57/26) (the suit property).

Whether the subdivision of Nairobi/Block 123(formerly L.R No. 57/26) (the suit property) which gave rise to among others; Nairobi/Block 123/205, Nairobi/Block 123/43, Nairobi/Block 123/169, Nairobi/Block 123/160, Nairobi/Block 123/83, Nairobi/Block 123/162, Nairobi/Block 123/170, Nairobi/Block 123/163, Nairobi/Block 123/44, Nairobi/Block 123/69, Nairobi/Block 123/150, and Nairobi/Block 123/125, and the titles issued in respect of the subdivisions were illegal, null and void

121. On 4th November 1991, Muigai & Others through a Deed of Surrender of the same date surrendered the suit property to the Government of Kenya in exchange for an approval of a subdivision scheme and issuance of individual titles “to the members thereto” under and subject to the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). The suit property was freehold. Muigai & Others surrendered their freehold title to the Government of Kenya so that the Government of Kenya could approve the subdivision of the suit property and issue individual titles for the subdivisions of the property to the members of Muigai & Others under the Registered [Land Act](#), Chapter 300, Laws of Kenya. Like the conveyance of the suit property, the Deed of Surrender was signed by Muigai & Others. The Deed of Surrender was registered on 4th November 1993.
122. Following the surrender of the title for L.R. No. 57/26, the parcel of land was given a new title number, Nairobi/Block 123. It appears from the evidence on record that the process of subdividing L.R. No. 57/26 started earlier, and preliminary approvals were obtained in 1991. After the surrender of the title, final approvals were obtained for the subdivision of the now Nairobi/Block 123. There is no unanimity between the parties as to the parcels of land that resulted from the subdivision of Nairobi/Block 123. According to the Plaintiffs, the suit property was subdivided into 279 parcels, while according to the Land Registrar, Ms. Vincencia Juma (DW4), the suit property was subdivided into 255 parcels, although the list of land parcels in her witness statement put the number of the parcels at 258. According to the list provided by the land Registrar, the subdivision of the suit property gave rise to Nairobi/Block/123/1-258. The situation was not helped by the failure by the parties to produce



in evidence the approved subdivision scheme. The approval from the Director of Surveys produced in evidence dated 10th May 1991 was only for part of L.R No. 57/26, and the approval was for New Parcels 1-248.

123. The lack of unanimity as to the number of land parcels that resulted from the subdivision of the suit property notwithstanding, I am satisfied from the evidence on record that the subdivision of the suit property was discussed, agreed upon and implemented by Muigai & Others through a licensed surveyor, James Kamwere. The subdivision of the suit property was therefore not irregular and illegal as claimed by the Plaintiffs.
124. The Plaintiffs took issue with the allocation of the subdivisions of the suit property, which they termed unauthorised, irregular, illegal, null and void. The Plaintiffs challenged in particular the titles that were issued to the 9th and 10th Defendants in respect of the parcels of land known as Nairobi/Block 123/205, Nairobi/Block 123/43, Nairobi/Block 123/169, Nairobi/Block 123/160, Nairobi/Block 123/83, Nairobi/Block 123/162, Nairobi/Block 123/170, Nairobi/Block 123/163, Nairobi/Block 123/44, Nairobi/Block 123/69, Nairobi/Block 123/150, and Nairobi/Block 123/125. According to the Plaintiffs, all the titles for the subdivisions (subplots) that resulted from the subdivision of the suit property should have been in the name of Muigai & Others in the first instance. According to the Plaintiffs, after the titles for the subdivisions were issued in the name of Muigai & Others, Muigai & Others would then allocate the same among themselves.
125. The burden was on the Plaintiffs to prove that this is the arrangement that was agreed upon by Muigai & Others. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

- “ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)



126. PW1 who testified for the Plaintiffs placed no evidence before the court in proof of his claim that Muigai & Others had agreed that the titles that were to be issued following the subdivision of the suit property would come out in the name of Muigai & Others. It is expressly stated in the Deed of Surrender dated 4th November 1991 that the suit property was surrendered to the Government of Kenya “in exchange for approval of a subdivision scheme and issuance of individual titles to the members”. It is clear from the Deed of Surrender that Muigai & Others intended to subdivide the suit property and issue titles to individual members of the group. I am persuaded by the evidence adduced by the 9th and 10th Defendants that Muigai & Others were representatives of a much larger group of people who came together to purchase the suit property and who were all entitled to a share of the property. From the evidence on record, I also agree with the 9th and 10th Defendants that Muigai & Others discussed and agreed on those who were to benefit from the suit property and in whose names titles were to be issued. There was also an agreement on how the allocation of the suit property was to be done. The 10th Defendant, who was in the group of 21 people in whose names the suit property was registered, produced minutes of the meetings of Muigai & Others held over some time. The 10th Defendant placed evidence before the court showing that Muigai & Others agreed on the beneficiaries of the suit property and, thereafter, the allocation was done through balloting that was managed and supervised by Githitu, Mukunya & Company Certified Public Accountants. A list of beneficiaries was thereafter prepared showing the parcels of land (subdivisions) that were allocated to them. The list of beneficiaries was certified by the District Officer, Kasarani Division and forwarded to the Ministry of Lands to issue titles. The list of beneficiaries was not prepared by the District Officer, Kasarani Division, as claimed by the Plaintiffs. The 10th Defendant produced in evidence the ballots and the list of beneficiaries to whom the subdivisions of the suit property were allocated. There is evidence in the form of minutes showing that PW1’s deceased father whose estate he was representing in the suit attended Muigai & Others committee meeting held on 26th May 1989 at which one of the agenda items for Muigai & Others, General Meeting which was to be held on 27th May 1989 was agreed to be balloting. PW1 placed no evidence before the court to rebut the evidence adduced by the 10th Defendant, which I find truthful given the 10th Defendant’s position in Muigai & Others (he is a former secretary of Muigai & Others) and the documents he produced in court in support of his position. The Plaintiffs have not complained that the allocation was done and titles were issued to those who were not on the list of beneficiaries that was forwarded to the Ministry of Lands by Muigai & Others. No evidence was placed before the court showing that there was any other member of Muigai & Others or their families or those referred to as the sleeping partners who were complaining about the allocation of the suit property.
127. The Plaintiffs alleged fraud and collusion against the Defendants in the subdivision and issuance of titles in respect of the subdivisions of the suit property. No evidence was however adduced in proof of the alleged fraud or collusion. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



128. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:
- “Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
129. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:
- “Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.
130. In *Kampala Bottlers Ltd. v Damanico (UG) Ltd.* [1990-1994] E.A141(SCU), the Supreme Court of Uganda stated that:
- “To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”
131. The Plaintiffs did not discharge the burden of proof that was placed upon them by law. The Plaintiffs failed to prove that the titles for Nairobi/Block 123/205, Nairobi/Block 123/43, Nairobi/Block 123/169, Nairobi/Block 123/160, Nairobi/Block 123/83, Nairobi/Block 123/162, Nairobi/Block 123/170, Nairobi/Block 123/163, Nairobi/Block 123/44, Nairobi/Block 123/69, and Nairobi/Block 123/150 which were registered in the names of the 9th and 10th Defendants, and Nairobi/Block 123/125 which was registered in the name of Lucy Mukami Ndungi who is not a party to this suit were issued fraudulently and illegally through collusion between the Defendants. I am satisfied from the evidence on record that the allocation of the subdivisions of the suit property and the issuance of the titles to the beneficiaries was lawful.

Whether James Ngegi Muigai, deceased had an interest in the suit property which devolved to his estate upon his death on 26th July 1995, and whether Josephat Mathia Muigai, the administrator of the estate of James Ngegi Muigai could maintain this suit

132. It was common ground at least between the Plaintiffs and the 9th and 10th Defendants that those who purchased the suit property contributed money for that purpose and continued to make contributions for the purposes of subdivision and development of the property. PW1 contended that his deceased father, James Muigai was one of the 21 people who purchased the suit property and, as such, had a share in the property. It was common ground that James Muigai was one of the 21 people in whose names the suit property was transferred and registered as proprietors. The 10th Defendant, who was one of the 21 people who purchased the suit property, led evidence that James Muigai was not in the initial group who sought to purchase the suit property, who were 20 in number and that he was brought in later when the price of the suit property was increased from Kshs. 500,000/- to Kshs. 700,000/- to assist the group in getting more time to pay the increased purchase price. The 10th Defendant led evidence that after they got the extension of time to pay the revised purchase price, James Muigai, who had assisted them, was included among the purchasers of the suit property. The 10th Defendant led evidence that James Muigai never paid for the suit property and, as such, had no share in the property. The 10th Defendant produced the minutes of the meetings of Muigai & Others held on 16th July 1987,



24th May 1989, 26th May 1989, 11th October 1990 and 24th February 1991, in which the share of James Muigai in the suit property was discussed. The 10th Defendant told the court that the chairman of Muigai & Others had promised James Muigai land measuring 5 acres. The 9th and 10th Defendants produced a letter dated 13th August 1990 by James Muigai addressed to the chairman of Muigai & Others in which James Muigai informed the chairman that he had sold his interest in the suit property which was 5 acres to Mathew Kimani. The 10th Defendant told the court that Mathew Kimani was the son of Peter Kimanga Waiganjo, who was a member of Mathia & Others and who was taking care of James Muigai's interest in Mathia & Others. The 10th Defendant told the court that the committee of Muigai & Others ultimately resolved to give James Muigai land measuring 2 acres, and the decision was communicated to James Muigai by Peter Kimanga Waiganjo. The 10th Defendant told the court that during the balloting and plot allocation, James Muigai was not allocated any portion of the suit property since he had already sold his interest in the suit property to Mathew Kimani through Mathew Kimani's father, Peter Kimanga Waiganjo who was allocated the land that was given to James Muigai.

133. The 4th Defendant, on the other hand, told the court that the suit property was not listed in the will of James Muigai amongst his properties and was not amongst the assets of his estate that devolved to the administrators of his estate, Ngegi Muigai and Josephat Mathia Muigai. The 4th Defendant, like the 9th and 10th Defendants, contended that James Muigai had no interest in the suit property that could be pursued in this suit more particularly because the suit property had been subdivided and titles for the subdivisions issued in the names of individuals, none of whom was James Muigai.
134. PW1 did not place any evidence before the court to rebut the evidence given by the 4th and 10th Defendants regarding James Muigai's interest in the suit property. PW1 did not deny James Muigai's role in the acquisition of the suit property. PW1 did not deny the letter dated 13th August 1990 (D.EXH.3 page 8) addressed to the chairman of Muigai & Others in which James Muigai communicated his decision to transfer his interest in the suit property to Mathew Kimani. PW1 did not explain convincingly why the suit property was not included in James Muigai's will dated 28th April 1994 if indeed he owned a share in it. There was also no explanation as to why the suit property was not among the assets of James Muigai, which were being administered by PW1 and Josephat Mathia Muigai.
135. I agree with the evidence of the 10th Defendant regarding the role that was played by James Muigai in the acquisition of the suit property and his interest in the property. I have seen a letter dated 28th September 1973 (See page 17 D.EXH.2) addressed by the Commissioner of Lands to the Secretary Nairobi Land Control Board regarding the sale of the suit property. This letter supports the 10th Defendant's contention that James Muigai joined the group of 20 who wanted to purchase the suit property later to make them 21. The letter refers to the proposed purchasers of the suit property as "John Kagai Gachenge & 19 Others". John Kagai was the chairman of Muigai & Others, and according to the 10th Defendant, the name Muigai used by the group was coined from the name of Muigai (Mui...) and the name of their chairman Kagai (...gai). PW1 did not rebut the evidence presented by the 8th, 9th and 10th Defendants to the effect that James Muigai was not allocated any of the subdivisions of the suit property. From the evidence on record, I find that James Muigai, deceased, no longer has any interest in the parcel of land known as Nairobi/Block 123 and its subdivisions registered in the names of individual members of Muigai & Others and third parties. Consequently, Josephat Mathia Muigai and Ngegi Muigai, as the administrators of the estate of James Muigai, had no locus standi to bring this suit as the sole plaintiffs. After the 9th and 10th Defendants were struck out as Plaintiffs, the only known Plaintiff that remained was Josephat Mathia Muigai, who was representing the estate of the deceased, James Muigai. This suit was not brought as a representative suit, and Josephat Mathia Muigai had no



authority to bring the suit on behalf of the other members of Muigai & Others, most of whom are deceased. With Josephat Mathia Muigai lacking the locus standi to sue, the suit has no leg to stand.

Whether the Plaintiffs are entitled to the orders sought

136. I have made a finding that the suit property was subdivided, allocated to the beneficiaries and titles issued lawfully. I have also made a finding that the remaining Plaintiff, Josephat Mathia Muigai the administrator of the estate of James Muigai has no locus standi to bring this suit. The trespass claim should have been brought by the individual owners of the subdivisions of Nairobi/Block 123 where titles have been issued in the names other than Muigai & Others and where the subdivisions remain in the name of Muigai & Others, the suit should have been brought by the members of Muigai & Others who have an interest in the said parcels of land. The court cannot make a blanket declaration that the subdivisions of Nairobi/Block 123 belong to James Muigai or Muigai & Others in the face of evidence before it showing that most of the subdivisions of Nairobi/Block 123 have been registered in the names of third parties most of whom are not before the court to defend themselves. I cannot also declare the titles for the subdivisions of Nairobi/Block 123 illegal, null and void, having found that the subdivision of the suit property was carried out regularly and titles were issued lawfully. A case has also not been made for damages. It is my finding from the foregoing that the Plaintiffs (Josephat Mathia Muigai, as the administrator of the estate of James Muigai) are not entitled to any of the reliefs sought.
137. The 9th and 10th Defendants had submitted that the orders sought by the Plaintiffs be granted in their favour. As rightly submitted by the 1st, 2nd, 4th and 5th Defendants, the 9th and 10th Defendants, having been struck out as Plaintiffs and having not filed a claim against the co-defendants, are not entitled to any relief against their co-defendants.

Whether the 4th Interested Party is entitled to the reliefs sought in his counterclaim

138. Nicholas Origi was just an interested party to the suit. I find its defence and counterclaim in a suit in which he was not sued misconceived. Even if his counterclaim was properly before the court, the court would not have granted the orders sought as he did not prove that he had acquired L.R No. Nairobi/Block 123 (formerly L.R No. 57/26) by adverse possession. The prayers in the 4th interested party's counterclaim are, therefore, not for granting.

Who is liable for the costs of the suit?

139. In Halbury's Laws of England, 4th Edition (Re-issue), [2010] Vol. 10, para 16, the authors have stated as follows:
- “The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.
140. The Plaintiff, in this case, Josephat Mathia Muigai, the administrator of the estate of James Muigai, has failed in his claim against the Defendants. He will have to bear the cost of the suit.

Conclusion

141. In the final analysis and for the foregoing reasons, I hereby make the following orders in the matter;



1. The Plaintiffs' suit is dismissed.
2. The 4th Interested Party's counter-claim is dismissed.
3. Josephat Mathia Muigai as the administrator of the estate of James Muigai shall pay the costs of the suit to the 1st, 4th, 5th, 6th, 8th, 9th and 10th Defendants.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF FEBRUARY 2025.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ajulu h/b for Mr. Kuria for the Plaintiffs

Mr. Kenyatta for the 1st, 4th and 5th Defendants

Ms. Mwanyika for the 7th Defendant

N/A for the 6th and 8th Defendants

Ms. Mwangi h/b for Mr. Macharia for the 9th and 10th Defendants

N/A for the 3rd Interested Party

N/A for the 4th Interested Party

Ms. J. Omondi-Court Assistant

