Gathondu (As Administrator of the Estate of the Late Thumbi Kariuki) & 3 others v Registrar & 7 others (Civil Appeal E505 & E519 of 2020 (Consolidated)) [2024] KECA 668 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KECA 668 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E505 & E519 OF 2020 (CONSOLIDATED)

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

JUNE 14, 2024

BETWEEN

JOSEPH NDUNG'U GATHONDU (AS ADMINISTRATOR OF THE ESTATE OF THE LATE THUMBI KARIUKI) .... 1ST APPELLANT

JANE WANJIRU NDUMIA .... 2ND APPELLANT

JOSEPH NDUNG'U GATHONDU .... 3RD APPELLANT

AND

THE CHIEF REGISTRAR .... 1ST RESPONDENT

INSURANCE TRAINING & EDUCATION TRUST .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E519 OF 2020

BETWEEN

RAJAB AHMED KARUME .... APPELLANT

AND

THE CHIEF REGISTRAR .... 1ST RESPONDENT

THE ATTORNEY GENERAL .... 2ND RESPONDENT

INSURANCE TRAINING & EDUCATION TRUST .... 3RD RESPONDENT

JOSEPH NDUNG'U GATHONDU (AS ADMINISTRATOR OF THE ESTATE OF THE LATE THUMBI KARIUKI) .... 4TH RESPONDENT

JANE WANJIRU NDUMIA .... 5TH RESPONDENT

JOSEPH NDUNG'U GATHONDU .... 6TH RESPONDENT

(An appeal against the Judgment/Decree of the Environment and Land Court at Nairobi (E.O. Obaga, J.) dated 27th October, 2020 in ELC Case No. 816 of 2012 Consolidated with ELC Case No. 47 of 2010)

JUDGMENT

Judgment Of Kiage, JA

1. Once upon a time, the holding of a title deed, that treasured document that declared the person named therein as the indisputable owner of the landed property, was a ticket to peace and proprietary security. That it was before a vile mix of greed, rapacity and fraud on one hand and corruption mischief, and tampering of records on the other, increasingly rendered many a title deed worthless papers the holding of which, without more, provided neither certitude nor assurance of safety as courts have had to step in to decipher and determine which among two contending instruments of title is genuine and efficacious. The puzzle of competing title deeds over the same property on the ground in contemporaneous existence is now becoming a contest not of dualities of claims, but, as this case shows, one of multiple contestations, each backed by a title deed. Here, a piece of land, LR No. 209/10210 in the Bellevue area of Nairobi South C, has three title deeds held by the respective claimants, with each vying for jural recognition as true and effective, to the exclusion of the others.The consolidated appeal emanates from the judgment of the Environment and Land Court at Milimani (E.O. Obaga, J.) dated 27th October 2020 in two consolidated suits namely; ELC 47 of 2010 and ELC 816 of 2012. The first suit was filed by Joseph Ndungu Gathondu in his own capacity and as the administrator of the Estate of the late Thumbi Kariuki and his co-plaintiffs Jane Wanjiru Ndumia ("Thumbi et al"). By a plaint filed on 10th February 2010, those plaintiffs claimed to be the registered owners of the suit property. They sued the Registered Trustees of the Insurance Training and Education Trust ('ITET') for trespassing on to the suit property and commencing construction of a tarmac road thereon to access its adjoining property on which is built the College of Insurance. The plaintiffs claimed that they had previously by verbal agreement allowed ITET to use a footpath upon the suit property but such permission was not legally binding and did not constitute a surrender of any part of the suit property to ITET, which had wrongfully declared ownership of the suit property in a public notice/advertisement carried on the Daily Nation Newspaper of 28th January, 2010.

2. The plaintiffs claimed that they had suffered loss and damage, for which they sought general damages. They also sought declarations that they are entitled to exclusive and unimpeded possession of the suit property while ITET was not entitled to remain thereon. They also sought a permanent injunction to restrain ITET from interfering with their ownership and occupation of the suit property as well as costs.

3. By a statement of defence dated 1st April 2010, ITET denied the appellant's entitlement to the suit property. It then denied the verbal agreement for a footpath and specifically pleaded as follows;

   " 5. The defendant was at all material times and is possessed of a Grant issued by the President of the Republic of Kenya and registered on 20th June, 1995 under entry endorsed as No. IR 66157/1 for a consideration of Kshs. 690,000 at an annual rent of Kshs. 138,000 with a term of 99 years from 1st March 1982 in

respect of that piece of land containing by measurement 2,000 hectares known as L.R. NO. 209/10210 and further delineated on Deep Plan Number 193902 surveyed by B.A. Rabuku Licenced Surveyor, and issued on 16th March, 1995 (hereinafter the defendant's property.)"

4. ITET went on to state that it did build a football pitch over that suit property for the use of its students but, following the theft of the goalposts, ceased conducting football on the suit property. It also admitted building an old road diagonally across the suit property in or about 1993 before rehabilitating it in 2000 and then building a new road thereon in 2009 but asserted that it did so exercising its rights as owner, but not otherwise. It concluded its defence by stating that;

> "In the alternative, and without prejudice to the foregoing, if the plaintiffs' grant is proved and held to be lawful, then the defendant avers that the plaintiff's right to bring an action for the recovery of land and vacant possession of the same is claimed in the plaint is barred by virtue of the provisions of section 7 of the Limitation of Action Act (Cap 22) because the original allottee gave possession of the defendant's property to the defendant in 1993. From 1993 up to 12th February, 2010, the defendant avers that it has enjoyed peaceful and quiet possession of the defendant's property without any written claim of adverse right."

5. Besides these two competing claimants to the suit property a third, Rajab Ahmed Karume ("Karume") entered the fray. By a plaint dated 8th November 2012, he cited the Chief Land Registrar, the Attorney General, and ITET claiming that he was the registered owner of the suit property "whose Deed Plan is No. 278905 pursuant to Grant No. I.R. 130791 ... issued on 2nd July 2011." He averred that he had applied for allocation of the suit land and was issued with a Letter of Allotment dated 1st October 1998, and was in possession of and had developed the suit property. He became aware of the existence of a second certificate of Title bearing the same LR. Number 209/10210 but with a different Deed Plan Number when he sought to dispose of the suit property. Upon seeking clarification, he obtained confirmation from the Chief Lands Registrar the essence of which was;

> "13. In his letter, the Director of Surveys confirmed that the Suit property the subject of the First Grant bears the Deed Plan No. 278905 and its locality in Nairobi. The Director of Surveys also confirmed that the correct land Reference Number for the Second Grant bearing the deed plan no. 193002 (in the name of (ITET) is LR NO. 7022/166 located at Kiambu Municipality."

6. He went on to claim the following;

> " 16. It is therefore clear the 1st defendant acted unlawfully in issuing the second grant to the 3rd defendant. The 1st defendant knew or ought to have known that the deed plan the subject of the Second Grant is in Kiambu Municipality and not Nairobi and its Land Reference Number ought to have been LR No. 7022/166 as confirmed by the director of surveys.
>
> 17. The 1st defendant's action of advising the plaintiff to file suit for the revocation of the Second Grant is a clear indication that the 1st defendant acted unlawfully in issuing the Second Grant to the 3rd defendant
>
> 17. The issuance of the Second Grant to the 3rd defendant was therefore irregular, unlawful land void ab initio as the locality of the land the subject of the deed plan is in Kiambu and not Nairobi. Further, the actions of the 1st defendant have resulted in the creation of two parallel titles. The Second Grant is not capable of vesting any proprietary right to the 3rd defendant.

18. The suit is brought principally against the 3rd defendant on grounds that the Second Grant issued to it is null and void.

19. The property is a major and valuable investment of the plaintiff. The plaintiff is the bona fide and legitimate owner of the suit property and holds an original certificate of title to the suit property which title is conclusive evidence of title. The plaintiff urges this honourable court to find that the Second Grant relied upon by the 3rd defendant to claim ownership to the suit property is invalid, illegal, unlawful and void ab initio."

7. He then sought judgment for;

"1. A declaration that the plaintiff is the sole and lawfully registered owner of LR No. 209/10210 whose Deed Plan is No. 278905 pursuant to Grant No. IR. 130791 ever which the plaintiff has sole and valid title.

2. A declaration that the 3rd Defendant's Certificate of Title over LR No. 209/10210 whose alleged Deed Plan is No. 193902 pursuant to Grant No. IR 66157 issued to the 3rd defendant by the 1st defendant was unlawful, irregular and void ab initio and is otherwise a double allocation of a property already alienated to the plaintiff.

3. An order directing the first defendant to rectify the relevant registers and documents accordingly and cancel the second grant LR No. 209/10210 (Deed Plan No. 193902 pursuant to Grant No. IR 66157) issued to the 3rd defendant.

4. A permanent injunction to restrain the defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever any persons whatsoever from selling, disposing of, charging, sub-dividing, processing, subtitles or leases, pledging, interfering with and/or intermeddling in any manner whatsoever with all that property known as LR No. 209/10210 (Deed Plan No. 278905 pursuant to Grant No. IR 13079) located within Nairobi in the name of Rajab Ahmed Karume.

5. A permanent injunction to restrain the defendants whether by themselves, their agents, employees, assigns, advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing of, charging, sub-dividing, processing subtitles or leases, pledging, dealing, interfering with and/or intermeddling in any manner whatsoever with all that property known as IR No. 209/10210 (Deed Plan No. 193902 pursuant to Grant NO. IR 66157) in the name of Insurance Training and Education Trust."

8. In his statement of defence for the Chief Land Registrar and himself, the Hon. Attorney General stated that "the allocation of two parcels of land bearing different Deed Plan Numbers in different localities was not in blatant disregard of the law but was an administrative mistake which can be corrected pursuant to a court order" and proceeded to plead that;

"5. Save to admit that two parallel titles were issued in respect of land reference No. 209/10210 one in the name of the plaintiff and the other in the name of the 3rd defendant and bearing difference deed plan numbers, the survey

department has clarified that the correct LR No. 193902 (sic) for the Deed Plan No. 193902 is LR No. 7022/166 located at Kiambu Municipality.

6. The 1st defendant further avers that the plaintiff has no valid claim against it since it has confirmed to him that LR Number 209/10210 belongs to him and is ready to comply with any court order directing it to rectify the title thereto."

9. In answer to Karume's suit, ITET filed what it termed "3rd Defendants' Statement of Defence By Way of Counterclaim." (the italicized words having been handwritten) dated 21st January 2013. It stated that Karume was non-suited and his plaint disclosed no cause of action and was riddled with immaterial and irrelevant facts. It asserted its ownership rights over the suit property.

10. ITET also mounted a counterclaim. It asserted that it bought the suit property from the administrators of the Estate of one Paul Kipkorir Boit for the sum of Kshs. 8.5 million vide an agreement dated 4th November 1994 pursuant to a consent to transfer, issued by the Commissioner of Lands dated 14th October 1994 for the administrators "to transfer both allotment." It obtained approval to develop the suit property, only to be served with injunctive orders issued in ELC No. 47 of 2019 filed by Thumbi et al which were later discharged on its applications.

11. ITET further averred as follows;

" 28. The plaintiff in the counterclaim sought from the 2nd defendant clarification on how the suit property could have two registered owners to which the Commissioner of Lands responded that the deed file containing the land registry copy of the Certificate of Title for LR No. 209/10210, IR No. 66157 was lost or misplaced, hence the plaintiff in the counterclaim needed to present the original title deed which the plaintiff in the counter claim deed.

29. The 2nd defendant requested the plaintiff in the counterclaim to file Deed of Indemnity upon which the 2nd defendant vide letters dated 30th July, 2010 and 25th August, 2010 and confirmed that the plaintiff in the counterclaim was the registered owner of LR No. 209/10210."

12. It stated that Karume had "hatched a wide scheme in an effort to irregularly, fraudulently and illegally acquire the suit property," which it particularized as follows;

"Particulars of fraud and illegalities

i. The 1st defendant purporting to have allocated the suit property in 1998 before the expiry of the tenure of the plaintiff in the counterclaim.

ii. That the Letter of Allotment to Paul Kipkorir Boit dated 15th February, 1985 the basis of the Certificate of Title Grant No. IR 66157 has never been cancelled/revoked.

iii. That the 1st defendant claim is based on double allocation.

iv. The 1st defendant's alleged allocation is riddled with misapprehension and material omissions which show the 1st defendant's attempts to defraud the plaintiff in the counterclaim of its title to the suit property.

v. The suit property was not available for allocation as at the time the 1st defendant purports to have been allocated the suit property.

vi. That the 2nd defendant had way back in 2010 confirmed that the certificate of Title held by the plaintiff in the counterclaim was genuine and that its letter of 9th July, 2012 is suspect, mischievous and misleading.

vii. That the 2nd defendant had no power and/or right in 1998 or at all to reallocate the suit property to any other person and thus the purported second allocation to the 1st defendant in 1998 and the subsequent title issued in the year 2011 are null and void.

viii. That the plaintiff in the counterclaim has always complied with conditions of the allotment and special conditions on the Title.

ix. That the 1st defendant's title is purported to have been registered on 7th July 2011 about 16 years after the plaintiff in the counterclaim acquired title to the suit property and 29 years after the initial allotment to the late Paul Kipkorir Boit

x. That the stamp duty and annual rent alleged to have been paid by the 1st defendant are suspiciously low in light of the purported size and location of the suit property.

xi. That the 2nd defendant is the custodian of Titles documents relating to land in Kenya and has power to make entries on Title Documents.

xii. That the purported Deed Plan No. 278905 attached to the alleged Grant No. IR 130791 and issued on 10th August, 2007 annexed to the Title of the same Grant allegedly issued the 1st defendant on 6th July 2011 is similar in material aspects to Deed Plan No. 193903 dated 16th March, 1995 annexed to Certificate of Title of Grant No. 66157 issued on 20th June, 1995."

13. ITET asserted that a certificate of Grant No. IR 66157 on the suit property inclusively evidences its rights which were protected against all future claims by dint of section 23 of the Registration of Titles Act (Repealed). It thus made prayers similar to those made by Karume for declarations, injunctions, and damages, but in respect of itself against him. Defence and Defence to Counterclaim on 5th February 2013 in which he reiterated the contents of his plaint and denied ITET's title to the suit property repeating that he was the owner thereof under Grant No. IR 130791 and Deed Plan 278905, while ITET's related to land not located within Nairobi. He denied awareness of persons who had been lawfully allocated the suit property asserting that if any such letters of allotment exited, they were invalid.

14. On 7th November 2013, ELC No. 816 of 2012 was, by consent of the parties therein, ordered to be consolidated with ELC No. 47 of 2010 with Gacheru, J. ordering the parties in the two suits to exchange pleadings and relevant documents in readiness for trial. By a further order made by consent of the parties, the status quo was to be maintained pending the hearing and determination of the suit with the three rival grants remaining as they were, with no new grant being issued.

15. The trial eventually commenced on 28th May 2014 before Gacheru, J. The first to take the stand was Karume. He stated that he was the registered proprietor of the suit property under deed Plan No. 278905- LR No. 209/10210 IR 130791. He became aware of ITETs claim based on Grant No. 19302 but the Deed Plan for it was for a property in Kiambu County. He maintained that his title was bona fide and sought to have that of ITET cancelled or revoked. He explained that he obtained a letter of

allotment and, after paying the conveyancing and other requisite fees amounting to Kshs. 444, 750, was issued with the Grant/title deed. He produced both the receipt and the title deed. He has been paying all requisite charges thereafter and also obtained approval from the City Council to put up a perimeter wall. Notwithstanding that his title's authenticity had never been called into question, he discovered the existence of ITET's title.

16. Under intense cross-examination by ITET's learned counsel Mr. Ochieng Oduol, Karume denied that he had produced documents that were fraudulent or that he was using the court process to sanctify fraud. He maintained that he was given a letter of allotment and that he paid the stand premium of Kshs. 400,000 by way of a bankers' cheque. He denied knowledge of Bellevue being an area set aside for a government institution, he insisted that his title deed was genuine and not manufactured.Answering questions from Mr. Kuria, learned State Counsel for the Attorney General, he maintained that the suit property was surveyed by the Director of Survey before his title was issued. He recalled a complaint by ITET which was handled by the Criminal Investigations Department pursuant to which he was called to shed light on the matter of competing titles. No action was taken against him by the CID. He had building plans approved on 9th December 2011 but was yet to start construction.

17. When cross examined by Mr. A.G.N. Kamau, learned counsel for Thumbi & et al, he indicated that he learnt from a friend, Mildred Mwangi, of the existence of the public land for which he applied and was allocated on 1st October 1998. He was not aware of the allocation on 21st June 1998 to Christian Project. He conceded that he did not have demand notices from the Commissioner for Lands but he did exhibit rate payments to the City Council. He denied creating the title in his possession. He also denied the suggestion that one Mohammed Sheikh Hussein and he, defrauded Thumbi Kariuki.

18. On being re-examined, though the record erroneously reads "cross-examination", Karume maintained that when he was issued with the Grant in 2011, the suit property had not been allocated to anyone else. The government never wrote to him requiring that he develop the suit property. The same is located in an area that had other residential properties and it was not a government institution. He also stated that he paid all of his land rates arrears before he was issued with the grant. He maintained ownership of the suit property and closed his case.

19. The defense to Karume's case started on 24th February 2015 and first called was one Charles Kipkurui Ngetich (DW1) a Principal Land Registrar stationed at Kwale. He was previously in Nairobi at the caveat section and was aware of the matter in dispute. He adopted the contents of his witness statement dated 3rd January 2013. He asserted the following;

> " There are three titles one title is a forgery no, IR No. 63594 issued to Thumbi Kariuki, Jane Wanjiru and Joseph Ndungu. It is a total forgery. The IR No. 63594. It was purportedly issued on 19th October 1994. The other two titles are double registration i.e IR No. 130791 issued to Rajab Hemed Karume on 7th July 2011 at 9.40 hrs. It is registered with us and it is in our records. The other one is IR 66157 issued to insurance training education trust on 20th June 1995. It is also on our record."

20. However, this witness was stood down as the documents he was to rely on had not been certified. Counsel were in agreement that this was an important witness and that the correspondence and deed files needed to be made available. On a later date being 12th May 2015, while further adjourning the case, the court ordered that in addition, the register of Deed Plan from the Director of Surveys the survey map for the other land in Kiambu and the PDP from the Physical Planning Department be served on all counsel by Mr. Mutinda from the Attorney-General's offices. After this was done, counsel applied and was allowed to withdraw the said Mr. Ngetich who was to be replaced by another witness.

21. The defence case restarted on 22nd July 2015 with Timothy Waiya Mwangi taking the stand as DW1. He worked in the Ministry of Lands and Urban Planning as a Deputy Director of Physical Planning. He adopted his witness statement and went on to state that the planned user was offices at Bellevue and not any other use. The grant No. IR 66157 issued to ITET was for light industrial purposes with ancillary offices and stores. The grant to Thumbi et al did not have the user indicated. Grant No. 130791 in respect of the suit land was issued to Karume and its user was residential. Its {{_}}PDP was dated 20th January 1981. It was forwarded on 28th January 1981 and approved on 23rd October 1981 with the user never having been changed. In cross-examination by Mr. Muchoki for Karume he reiterated that PDP had never been changed at all.

22 While under cross examination by Mr. A.G.N. Kamau, the witness stated that Thumbi et al's PDP indicated it was for Nairobi South but did not identify the suit property. It indicated "proposed site for offices" notwithstanding that after allocation a site ceases being proposed. There was no evidence that the PDP was circulated as ought. Nor was it distributed after the Commissioner's approval. Even though this PDP purported to be for office use, the area was for other uses. He could not tell if there was ever a change of user as this ought to have been initiated by the correspondence file. No user was indicated for Thumbi Kariuki.

23 Answering Mr. Oduol's questions, the witness indicated that once a title has been issued, a plot is not available for alienation. He also stated that the format on the letter of allotment to Thumbi is not one they used, and it also did not state the use. He stated he had never seen such letter as Thumbi et al presented.

Regarding the dispute at hand, he pointed out that there were three competing titles and stated, concerning the Thumbi et al title:

> "... I.R. No. 63594 is purportedly registered on the same part (sic) of land in the name of Thumbi Kariuki, Jane Wanjiru and Joseph Ndungu Gathondu issued on 19th October 1994 ... I.R No. 63594 cannot be said to belong to LR No. 209/1020 because the same is registered for land in Thika ..." (My emphasis)

And of the titles by Karume and ITET he stated as follows;

> " I availed all the numbers in the deed titles. Letter as page 94- it is dated 17th April 2012. It is to director of survey. It seeks to confirm deed plans over CR No. 209/20210. The deed plans were attached. The deed plan were no 193902 and no. 278905. There was a reply by director of survey and he said the second number no. 278905 belongs to CR No. 209/10210 that is held by Rajab Ahmed Karume and the other no, 193902 held by Insurance Training Education Trust (ITET) Corresponds to LR NO. 7022/166 which is within Kiambu Municipality."

He went on to state that there was a Deed of Indemnity on the file and he explained how one comes about as follows;

> " Deed of Indemnity is prepared by the owner of the land through an advocate when it comes to his or be it our knowledge that the deed file at the lands office is missing after a number of reasonable attempts to trace the file. We call for the copy of the title after the indemnity is approved and gazettement period of 60 days lapse. We call for photocopy of the title and adopt it as our own and keep it in our deed file. (A reconstructed one)"

24 Answering questions by Mr. Michuki for the Karume, he stated that whereas the deed of indemnity required to be published, he has not seen anything to suggest that the indemnity (by ITET) was published. The deed of indemnity was not published. He reiterated that the ITET Deed Plan was for a property in Kiambu county and that the deed plan comes first before a title.

25 In cross-examination by Mr. A.G.N. Kamau, the witness called this a case of "double registration," and that all the parties had paid all the stand premium monies to the relevant department and none had been refunded. Whereas he knew the officers who signed the letters of allotment to Thumbi et al and Karume, being Kilimo JC and Ombach J.N., respectively, he did not know the officer called S. K. Maina who signed the one to ITET. He was shown the statement by C.K. Ngetich and confirmed that the said Ngetich was senior to him and had dealt with the matter before the witness took over. He then stated that the grant in favour of Thumbi et al was a forgery because its IR Number corresponds to land in Thika. He also confirmed that the ITET grant had a deed plan for Kiambu. He stated that G.G. Gachihi, the officer who signed the grant for Karume was still in service as were officers who wrote letters he waS referred to. He asserted that "if the procedures are followed there is no room for double allocation. The officers must have created the situation for double allocation."

26 He went on to state that there was no evidence that ITET paid the requisite land rate as at the time an informal transfer was made to it. The sale agreement dated 4th November 1994 was before the grant was issued. When it was issued, the user was indicated as "Inoffensive light Industries." When the Commissioner of Lands consented to the informal transfer, he gave three conditions, among them payment and clearance of outstanding land rents. There was a letter dated 27th February 1989 demanding Kshs. 827,680 but "seven years later, no payment had been paid" (sic). Further, whereas the decreed value was Kshs. 25 million, there was "no receipt for stamp duty in respect of Kshs. 25,000,000." Regarding the ITET title he stated;

> "For a title to be a title, there was to be grant accompanied by a Deed Plan. It was self defending (sic). The title is in page 89, there is purported to be a deed plan. The deed plan is not signed in there is a name J.G. Njoroge. The deed plan is no. 193902. The deed plan relate to a parcel of land in Kiambu. A grant cannot be issued in the absence of a signed deed plan. The 3rd defendant has no grant at all. J.G Njoroge needs to come and explain why he did not sign it. There is no grant in land unless the deed plain is signed. No letters by the director of survey forwarding the deed plan. If the insurance wanted to find out where their land was, they would look at deed plan 193902." (Emphasis mine)

27 Moreover, whereas there was a letter from Thumbi et al applying for allocation of the suit property, there was no such application by ITET.

28 Cross-examined by Oduol, the witness said there was a plan indicating Plot 'C' attached to ITET's letter of allotment and that the said plot was in Nairobi. The Thumbi et al Deed Plan had initials J.G. Njoroge but not signed. He stated that it was not possible for a property to have three titles. The property allocated to Karume was not available for allocation. He referred to a banker's cheque by which ITET was paying Kshs. 1,645,062 for land rent from 1996 to 2002. There was also a receipt showing Karume paid Kshs. 86,000 land rent from year 2021. He reiterated that the IR Number issued to Thumbi was for land in Thika issued in 1994. He then added;

> " I confirm the title deed for Jemimah Njeri was surrendered in 1996 by (July 1996). The advocate who witnessed the signature was AG Kamau. The deed plan that was surrendered to No. 178/53 that is the same number on Thumbi's deed plan. The title for Jemimah Njeri

was a genuine title. She surrendered the same so that the land can be subdivided. The deed plan number was not available for use in another title. It is a surprise that the surrendered title deed has the same IR and deed plan as the title deed for Thumbi Kariuki."

29 When re-examined by Mr. Morara from the Attorney General's office, the witness gave a detailed blow-by-blow account of why and how a letter of indemnity in case of loss of a deed file all the way to the reconstruction thereof.

30 The next witness was Wilson Kibichi (DW3) a veteran officer of the Survey of Kenya with 20 years' experience. After the adoption of his witness statement, he stated the following regarding Karume's title under questioning by Mr. Michuki;

> " The property in question is LR No. 209/10210. The file reference no is CT/187/69/33. The locality is Nairobi. The surveyor is government surveyor and LR No. 209/10210 and deed plan is 278905. There was one set release. It was a new grant (N/G) I refer to page 128. It is title for Rajab Ahmed Karume No. 278908. I am able to identify the document. It has LR Number it is a title document issued to Rajab Ahmed Karume. The number is similar to what is on our record. It is LR No. 209/10210. I looked at the actual deed plan no. 278905. I refer to page 129 of the document. The document is familiar to me. It is a copy of the deed plan no. 278905. It identifies the locality and LR No. 209/10210 and IR No. 130391. The FR No. is 175/89. From my page 11. The FR No. is 175/89. The deed plan was prepared by director of surveys for the government. I can see a stamp written verified. It was confirmed as having originated from the Survey of Kenya dated 10th August 2007. There can only be one deed plan on a parcel of land."

31 As to ITET's title, he indicated that the land survey number was 193902 dated 16th March 1995. The survey was done by one B. A Rabuku, a licensed private surveyor, not a government surveyor. He referred to correspondence on the matter as follows;

> "I have seen letter dated 17th April 2012 from E.N. Gicheha. It was signed for the Chief Land Registrar. It is talking about two deed plans. The two deed plans were forwarded to the land office. I am aware of the response on the two deed plans. It is on page 96 of the consolidated bundle. It is letter dated 8th June 2012. It was addressed to Chief Land Office. The letter says confirms deed plan no. 278905 as the one meant for LR No. 209/10210. It addressed no. 193902 and stated that the deed plan was for LR No. 7022/166 which is on locality of Kiambu Municipality. That deed plan did not emanate from us. You cannot have two different deed plans for the same land reference. I have seen documents on page 97 and on page 94. The documents are deed plans. In page 97, the locality in Kiambu I.R NO. 7022/66. The survey was by B.A Rabuku licenced surveyor. The dated is 14/3/1995. The deed plan is no. 193902 (refer to page 150 too) That is the same number on page 94. They swore the same deed plan number. Different parcels cannot have some deed plan. The deed plan relating to LR No. 7022/166 does reflect in our records and the locality is Kiambu Municipality. The area is 1.384 Ha. In the order deed plan, there is 2.00 Ha." (My emphasis)

32 He also stated that the Thumbi et al Deed Plan related to land whose locality was Thika Municipality LR No. 4953/2354 whose shape was different and was prepared by one R. Omondi a licensed surveyor. Returning to ITET's grant, he stated;

> "I have seen the letter dated 8th June 2012. In that letter, director of survey says deep plan number 193902 is for a piece of land in Kiambu Municipality. The correct LR

No. is 7022/166. I have seen the grant on page 11 the LR No. 209/10210 the grant is therefore misleading. The grant therefore is for no other land apart from the one in Kiambu Municipality. I am not aware if a party had a remedy for correction of document. I have never come across an application to amend the deed plan or this grant. The grant is a false document therefore." (My emphasis)

33 Answering Mr. Oduol's questions, the witness states that whereas the suit land falls within Nairobi, the Deed Plan held by ITET reflected land in Kiambu, and LR 7022/166, and not 209/10210. He confirmed that ITET's, title came first and that a new Deed plan ought not to have been issued if there was already a title.

34 The next witness was Silas Kiogora Mburugu DW4 (though wrongly referred to as DW3) a Principal Law Administration Officer of the National Land Commission, who previously worked at the Lands Office. He recounted how the ITET title came into being. There was also an application for renewal of a title in the name of Christian Project Group which was not progressed and "did not crystallize since there was no payment to the Government. There was no acceptance of the offer and so no title deed could be prepared."

35 For Karume, there was a letter of allotment dated 1st October 1988 to plot LR No. 209.10210 surveyed plot. He paid allocation fees which was receipted for Kshs. 444,752. A Deed Plan No. 278905 was forwarded to the Director of Surveyor and the grant was registered on 7th July 2011. On 7th December 2011, he applied for consent to transfer the property to South Investment Ltd but that entry was later cancelled leaving the title in Karume's name. The unsurveyed Plot No. C allocated to O.K. Boit and Karume's land refer to the same plot and is the one the Christian Project Group was applying for save that Karume's was surveyed.

36 In cross-examination, he observed that the Deed Plan for ITET and Karume had different shapes though they should not have. Also, the ITET title preceded survey work which "is not normal". He went on to state;

> "I have seen the original file of 3rd defendant – file No. 105904. (Insurance Training & Education Trust). I wondered why the title was not in the name of the trustees. This is because the 3rd defendant is a body corporate registered under the Land (perpetual Succession Act) Cap 164 Laws of Kenya. The document here is registered under the Business name. (document No. 19) Original file. It was registered on 8th January 1991. The report for Kshs. 727,480 could not be traced in the analysis. I made the observation that the authorization ought to have been done by a land officer. It was not done. There was nowhere to show how the deed plan was collected from the director of survey. The deed plan was for a property in Kiambu LR No. 7022/166."

He later expounded on this as follows;

> "I stated that the deed plan was for a property in Kiambu. I have a bundle of documents by 1st and 2nd defendants (page 96) it is a letter dated 8th June 2012. It confirms that the deed plan 193902 was for parcel of land in Kiambu Municipality the land reference No. is LR No. 7022/166. The LR No. is 209/10210 which is land situate in South C in Nairobi. On page 97. There is a deed plan for that plot in Kiambu. The shape is of the deed plan is somehow rectangular in shape. The deed plan represents an area of 1.384 Ha (approximately) the deed plan was drawn by BA Rabuku, licenced surveyor. Page 13 of the bundle. I have seen the reverse of the same-deed plan. It is for LR No. 209/10210. The area is 2.00 Ha (approval). It was drawn by BA Rabuku a licensed surveyor. It is signed on 16/3/1995 AG Njoroge

director of surveys. A better copy is on page 150. It is dated 14th March 1995. There is a signature of director of survey with no name on it. It is different from the one on page 13. The two deed plans have different shapes and come different areas of land and were signed on different dates they purport to be deed plans for LR No. 209/10201 and LR No. 7022/166. The number for the title deed plans are the same i.e 193902."

37 He was categorical that the deed plan number in respect of ITET's tile "cannot lead us to the location of the land ie suit land. The correct Plan is No. 278905 for the suit land. It is not 193902 as indicated in the Deed Plan." While it is possible for one to seek rectification of a title deed, ITET had not sought such rectification in their counterclaim. Its letter of allotment showed the user to be light industries and it took 7 years from the letter of allotment for it to pay the money called for by the Commissioner of Lands and even then without any authorization. It never accepted the letter of allotment issued on 15th February 1982 but issued a banker's cheque on 8th November 1994 which was over 12 years later. Indeed, there was a note in the title dated 20th December 1998 indicating the letter of allotment was not accepted yet, despite a reminder for payment dated 27th February, 1989. He also noted that the letter of allotment to Karume called for a lesser sum of Kshs. 444,750 where the earlier one to ITET sought Kshs. 827,480, while P. K. Boit had been asked for Kshs. 727,480.

38 He added that once the suit properly was alienated to ITET, it ceased to be public land available for allocation as happened to Karume and Thumbi et al. He refuted that ITET's land was in Kiambu county. He admitted that it was not always the case that payments were made on the due date. He could not commit himself that fraud had occurred, as what happened was double allocation. He stated that the office should have embarked on looking for a second property for Karume upon finding out the land had been registered in ITET's name. The grant to Thumbi Kariuki was rejected as a forgery that did not emanate from the Lands Office.

39 He confirmed that Karume made the payments that were required of him while repeating that the title held by Thumbi et al was a forgery with details from land in Thika Municipality, and was conducted on a temporary cover that was a fraudulent proceeding.

40 ITET called Zablon Agwata Mabeya former Commissioner of Lands as its first witness. He stated that a letter of allotment ought not be issued over private land unavailable for alienation. He claimed that the signature on Karume's letter to the Commissioner of Lands was a forgery because "I used to put a full signature on the documents." He said that it was not possible to initiate the process of allocation and issue a new title deed if one was already issued as "that would be fraud in terms of RTA on double allocation."

41 Cross-examined by Mr. Muchoki, the witness first admitted that he was not privy to the documents and records maintained in the bundle that was produced in court and that "[he] had legal leave and would not know what was happening." He also made the following concessions;

> "I visited Mr. Ochieng's office twice. He is my advocate in two other matters are (sic) met once and he showed me the title. I offered to swear the affidavit. I told him that it was forgery. I am not aware of the deed plan in this matter. I do not keep records. On page 91 I stated that no other title that could issue if a title existed. I am not aware of the deed plan number in the title deed by the 3rd defendant is for land in Kiambu. That brings a new dimension. The director of survey is supposed to explain that. I did not discuss the matter with the commissioner of lands. On page 83 that is not my signature. I have not filed my signature. I was charged in Mulili Ranch Matter-offence of stealing by 2014. I did not report to the police any complaint over this matter. I was the commissioner then. From the documents

the signature is not mine. I met Mr. Ochieng in his office and he showed me the signatures. I confirmed that it was not mine. I did not report the matter to the police. On page 74: I express reservations on the dates. I do not write dates the way they have been written herein. (Emphases mine)

42 He was to repeat under Mr. Kamau's cross examination that even though the suit started in 2012, he did not file a witness statement and that it was only when Mr. Oduol started acting for him "about 3 months ago." that he signed an affidavit even though he knew Mr. Oduol even while he was still in office. He said he swore an affidavit but did not know where it was. He did not produce specimen signatures to contrast with the ones he disputed. He went on to state;

> " People forge signatures and documents all the time. The process of alienation of land is very complex and requires a lot of process (sic). There are many cases where mistakes are made either rightly or fraudulently.There were many officers involved. There were many professional involved. There was possibility of mistakes which are made. There are cases of double allocation which can be real mistake. The court can determine the authenticity of such like. The court is vested with authority to determine the authenticity of the documents of ownership."

43 He then referred to an undated letter from Karume seeking authority to make payment. The authority was granted under witness' name but he disowned the signature. He then stated that he did not know who authorised it but "would not be surprised if the payment was made." He added, when answering questions from Ms. Koech for Attorney General, that there were many cases filed against the Commissioner. He did not testify in all of them as he had officers dealing with those issues. And that "It is not uncommon that my signatures are forged. I am not aware of all the matters where my signatures are forged."

43 ITET next called Gordon Odeka Ochieng (DW2) a Senior Assistant Director of Land Administration. He referred to a letter from the firm of Letangule & Co. dated 26th November 2010 referring to another title No. 66157 LR No. 209/10201 (the Thumbi et al title) and one R.N. Mule a Senior Registrar in the Central Registry stated that the same was a forgery. He maintained that the ITET title having been issued earlier in time should prevail and there was no land to be allocated thereafter to any of the other parties.

44 Cross-examined by Mr. Muchoki, he stated that before a title is issued a lot of documentation takes place and that, in particular, the title describes the deed plan, which comes first, adding;

> " There is only one title genuine for any piece of land. To determine the genuineness of the title you have to go back to the deed plan. The title is a result of a process and the deed plan despite (sic) the actual location and size of the law described by the title deed."

He later repeated that title is generated from the deed plan. Answering Mr. Kamau, he stated that he had seen a letter for allocation of land signed by Thumbi Kariuki as Chairman of Christian Project Group for surveyed plot No. 209/2010, a plot which had been lying vacant from time of allocation. He was to repeat in re-examination that he did send staff to the land in question and it was lying vacant, though that did not mean it was not titled. While agreeing that "a title deed can be mistakenly issued on top of other titles," he stated that the first registration ought to take procedure. However, "[he] would not call the allocation to [Kamau] fraud because [he] could not tell if the person who registered the title knew of the existence of another title by (sic) College of Insurance (ITET)."

45 ITET next called Rosina Ndila Mule who previously worked as an Assistant Commissioner of Lands. She wrote a letter to the firm of Ndungu, Njoroge & Kwach Advocates indicating that the suit property was on 20th June 1995 registered as IR No. 66157/1 in the name of ITET. She also wrote to the firm of Letangule & Co. Advocates restating the same and indicating that IR 63594, quoted in the same title, was in respect of LR 4958/2359, a suit property in Thika. The said IR No. 63594 had been surrendered to the Government of Kenya on 24th July 1996 in consideration of scheme approval. The property was subdivided and the IR Number died with the surrender as the property ceased to exist. I concluded that the grant No. IR No. 63594 in possession of Letangule's client (Thumbi et al) was a forgery and did not exist in the lands office."

46 Referring to a letter she wrote and signed on 9th July 2012 to Issa & Co. Advocates for Karume, she stated;

> " I said that according to survey on record, the correct deed plan was No. 278905 and that the said deed plan is the one annexed to grant no. IR 130791 held by Rajab Ahmed Karume. According to the survey record deed plan no. 193902 is in respect of 7022/166. The said deed plan is annexed IR 66157 registered in the name of the Insurance training and education trust. I advised the parties to move the court and apply for the cancellation of the grant IR 66157. I attached the survey report to my letter. I wrote the report on the basis of the survey report I do not work for the survey of Kenya. My letter was not in error. I advised the parties to move to court. The police cannot cancel a title the court is the only institution that can cancel a title."

47 Cross examined by Mr. Muchoki, the witness indicated that she was in charge of approving indemnities and that the process involving the one given by ITET took 8 days from 4th July 2020 to 29th July 2010. She referred to a letter dated 8th December 2012 from the Director of survey;

> " That is the report that I am alluding to. He referred to two deed plans. He stated one deed plan was in Nairobi and the other deed plan was for land in Kiambu municipality. I did not have reasons to doubt the information from the director of survey. Based on this report, I advised parties to go to court. There was a problem."

48 As is apparent from the number of witnesses who testified whose lengthy testimony I have endeavoured to summarize so far in this judgment, the case was well-advanced when, on 16th February 2017, it was listed before Obaga, J. On that occasion, Mr. Kamau indicated that they preferred that the case proceeded to conclusion before Gacheru, J. as it had advanced much and was to proceed with the defence of the 2nd defendant in ELC 816 of 2012. This proposal was, however, opposed by counsel for the other parties with Mr. Oduol indicating that the case was based on documents and should proceed from where it had reached before the new learned judge, with Mr. Michuki and Mr. Terer agreeing with him. In an order which I think, significantly, if not fatefully, impacted the decision that was to follow, Obaga, J. directed that the proceedings be typed and the case proceed before him from where it had reached. The next witness was Dr. Ben Kajwang (PW5) the Chief Executive officer and a director of ITET. He came to produce the grant registered on 20th June 1985 which bore IR No. 63594, Deed Plan Number 193902. On cross examination, he stated that he was not involved in the purchase or transfer of the suit land, had no document to show ITET had been constituted as a Trust, and never met Priscilla Jellel Boit and James Cheruiyot Boit. He stated that the land reference number in the allotment letter was handwritten. He stated from documents that the surveyor involved was B.A. Rebuku but could not tell whether that was a Government Surveyor. Nor could he remember when the property was surveyed. He denied that ITET's land was in Kiambu.

49 He answered Mr. Kamau that he did not have any letter by P.K. Boit seeking to be allocated the land. The allottee was required to pay Kshs. 827,480 within 30 days of the letter of offer but this was not done. The plot was allocated for inoffensive light industrial purposes with auxiliary offices and store. He did not agree that the location of the plot was in Kiambu and that Rabuku was not a licensed surveyor in 1993. He concluded that the Kshs. 827,680 was not paid until 12 years after the letter of allotment and the amount.

50 The case for Thumbi et al opened with Thumbi Kariuki testifying on 24th May 2017. He said he was a businessman who operated a shop in South C and was Chairman of a Christian Group. He applied for land and obtained a Letter of Allotment. However, this witness was stood down before he completed his evidence in chief as he needed to go take his medicine. The case was adjourned to 31st May, 2017 but on that day the trial court was informed that he had died.

51 The next witness for Thumbi et al was Benjamin Mukoro Giro a Senior Cartographic Assistant at the Ministry of Lands, whose duties included the preparation, checking, and verification of deed plans who adopted his witness statement. Cross examined by Mr.Oduol he said he was not in the office as of 1997. He stated that "the same land cannot have two Deed Plans. If there are two Deed Plans, one must be authentic and the other fake". He denied the suggestion that he was part of a cartel that was falsifying documents at the Lands office.

52 The second witness for Thumbi et al was the much-mentioned Bibiana Achieng Rabuka a licensed surveyor who got her license in 1991. Mr. Muchoki for Karume did not cross examine her on her witness statement which she adopted. In that statement dated 31st May 2017, and important to the unraveling of the puzzle of the deed plans, she stated as follows;

> "I have been shown a copy of a deed plan at page 56 of consolidated bundle which is dated 18th March 1995 and is Deed Plan Number 193902. The Deed Plan purports that the survey was carried out by B.A Rabuku who is shown to be a licensed surveyor. That Deed Plan attached to a Grant registered in the name of Insurance Training and Education Trust as IR No. 66157, LR 209/10210 and purportedly registered on 20th June 1995 (the grant is shown at pages 55,56 and 57 of the consolidated bundle.) I wish to state that the Deed Plan at page 10 of the consolidated bundle, is based on Survey Plan FR No. 175/89 reflecting a survey done sometimes in 1984 by a licensed surveyor R.O. Opuodho and this survey was authenticated in October 1985.I further state that in the year 1985 I had not started practicing survey and I could not therefore had carried out the survey as indicated in the Deed Plan 193902 attached to the Grant IR No. 66157 No. 209/10210 registered in the name of Insurance Training Education Trust. That is all I have to state." (My emphasis)

53 She maintained, while under cross examination by Mr. Motari for the Attorney General, that she did not prepare the survey plan and the Deed Plan. She did not know how the Deed Plan came to bear her name. And, in answer to Mr. Oduol, she stated that she did not undertake the survey and deed plan in question (for ITET). In re-examination, she repeated that the survey plan which bore her name were not done by her. The plan referred to in ITET's letter of allotment did not appear on the Part Developed Plan.

54 At the end of that witness testimony a debate arose between counsel with Mr. Oduol wishing to have her recalled to answer some question on the location of the land on the ITET documents, while the other counsel were opposed. Mr. Oduol stated in support of his position that; "The Government Surveyor came to court to mislead. This witness (B. A. Rabuka) is truthful". It would seem that the application for her recall was allowed.

55 The next witness was Mahat Adan Abdirahman, who dealt with real estate. He adopted his statement. He recalled how he met Thumbi Kariuki, the chairman of Christian Project Group and entered into a sale agreement to purchase land from them "after its registration". He was "only giving money for pursuing the title". In cross-examination he claims not to have had money to facilitate processing of titles, as Thumbi Kariuki wanted him to do so, he referred the latter to one Mohammed Sheikh Hussein. He did not know that Thumbi had title from 3rd October 1994 as indicated in an affidavit sworn on 3rd June 2010 by Thumbi Kariuki.

56 Next on the stand for Thumbi et al was George Gichimo Gichihi, a state counsel who was a Registrar of Titles based at Ardhi House. He stated that Karume's title purports to have been registered by him on 2nd July 2011. The stamp on it read 7th July 2011 but he said there is no way the date of booking should have been different from the date of resignation. He then claimed that "the date of booking suitable the same day as date of registration on 7.7.2011 was a Saturday whereas 2.7.2011 was a Sunday" both not being working days. He stated that the signature of the person registering the grant was not his.

57 In cross-examination he stated: "I have had my signature forged a number of times. We do not normally report the forgery to police". He reiterated that the date of presentation was 7.7.2011. The grant was extended on 23rd June 2011 and the acreage was 2000 hectares. The details on the Memorandum of Registration were the same as in the title. Stamp duty was paid by Karume on 6.7.2011. He referred to various other documents used and leading to the registration of Karume's title including the receipt evidencing payment of Kshs. 444,750 and a letter confirming the records.

58 Cross-examined by Mr. Motari for the Attorney-General, the witness stated as follows;

> "The signature on page 130 and the one in my witness statement looks the same. I was using number 018 when I was at the lands office. The date of 7.7.2011 was on a Thursday. The date of 2nd July, 2011 was on a Saturday. If a civil servant comes to work on Saturday, then it is to clear work which had already been started. An error committed by a Registrar cannot invalidate a document. I did not go back to check on the signature which was purported to have been appended by me. I recorded a statement before Mr. Njogu a CID officer. Mr. Njogu is not an associate in the firm of A.G.N. Kamau advocates. I cannot recall if I prepared a statement before the CID in 2015. I am not aware that what I said in 2013 is different from what I have said in the current statement."

59 In cross-examination Mr. Oduol put it to the witness that he recorded a statement to deny a signature he had appended which he denied, but admitted that he had been accused of fraud. He stated that the Thumbi et al title was probably a fraud as they were asking for allotment of the same plot on a later date. He denied that he came to confuse the court over the two title and that he was transferred from the Ministry of Lands for interfering with records. During re-examination he gave this curious evidence;

> " I changed my signature after I left the lands office. I changed the signature because there were numerous incidents where my signature was forged while at lands office."

60 The next witness was Elizabeth Gicheha, Advocate, who was previously a Registrar of Titles in the Ministry of Lands. She was referred to a new grant No. 66157 LR No. 209/10210 (to ITETI) purported to bear her signature, which she denied as a forgery. Moreover, besides not signing the Grant, her designated number 010 was nowhere in the grant. Cross-examined by Mr. Oduol, she was resolute that she did not sign ITET's grant. While aware that there were cartels who tampered with government documents, she denied that she was "procured to come and give false testimony." She could not remember whether she forwarded the contested signature to a document examiner and denied the

suggestion that she was "one of the cartels who are falsifying documents at lands office." Stating she was an officer of the court with a fundamental duty to assist the court to get to the truth of the matter in controversy, she reiterated in re-examination that the signature on ITET's grant purported to be hers was a forgery.

61 The next witness was Hassan Nunow Lakicha who said he was approached by Thumbi et al and one Mahat Abdirahiman who wanted him to prepare a sale agreement. Cross-examined by Mr. Muchoki for Karume he said they had a letter of allotment dated 6th January 1999 with the total amount payable being Kshs. 513,100. The second letter of allotment he was shown by Mr. Muchoki was dated 1st October 1993. He asserted that Thumbi et al never disclosed to him at the time they had a title deed. Answering Oduol's questions and on being shown Jane Wanjiru Nduma's national identity card, he conceded that it was not possible for her, who would have been 16 years old at the time, to have been allotted land. Further, the title of Thumbi et al held bore no date, which was an impossibility. In re-examination he indicated that "Thumbi

> Kariuki was unable to pay for the allotment letter, that is why Mahat came in."

The last witness called in the long drawn out, 6-year trial, was Joseph Ndumu Gathondu owner of Thumbi et al and a brother of the departed Thumbi Kariuki, whom he also substituted. He adopted his statement and in cross-examination by Mr. Muchoki, first stated that they "did not have any relationship with Christian Project Group. It is Thumbi Kariuki who came up with the name for purposes of looking for land." He claimed that the suit property was allotted to them in 1970 when he was about 20 years old and they started tilling the land in 1970 and were "given the allotment" in 2007.

62 Later, he revised this to say the allotment was on 1st October 1999. He then stated "we have not been given a title. I am not aware of this title", when shown their title deed and added "this is a title in the name of Thumbi Kariuki, Jane Wanjiru Ndume and myself. I have no idea about the title ... I still maintain that our land does not have title. He also repudiated and rejected the title issued in their three names on 19th October 1994 repeating, "our land has never had title". He then claimed that Karume "stole [their] papers and processed documents in his name". And on re-examination by Mr.Kamau he stuck to his guns: "Our land has no title. All the titles which have been shown to me are forgeries. The titles were prepared with a view to defraud us of our land". And with that Thumbi et al closed their case.

63 The parties thereafter filed submissions and Obaga, J. delivered his Judgment challenged herein on 27th October 2020 in which he disposed of the consolidated suits as follows;

> "60. From the analysis hereinabove, I find that the plaintiffs in ELC 47 of 2010 and the plaintiff in ELC 816 of 2012 have failed to prove their cases. On the other hand, I find that the plaintiff in ELC 816 of 2012 by way of counterclaim has proved its case. I therefore make the following orders;
>
> 1. The plaintiff case (Thumbi et al) in ELC 47 of 2010 is dismissed with costs to the defendant.
> 2. The plaintiff's case in ELC 812 of 2012 (Karume's) is dismissed with costs to the defendants.
> 3. A declaration is hereby given that the plaintiff in the counterclaim (ITET) is the sole and lawfully registered owner of LR No. 209/10210.

4. A declaration is hereby given that the certificate of title held by the 1st defendant in the counter-claim (Karume) over LR No. 209/10210 is illegal, irregular, and void ab initio and should be cancelled.

5. An order of permanent injunction is hereby given restraining the 1st defendant in the counter claim (Karume) whether by himself his agent's servant's employees, invitees, advocates and/or otherwise from trespassing in, dealing in, alienating, occupying, managing, letting or otherwise using LR No. 209/10210 or otherwise interfering with the plaintiff in the counter claim's quiet and peaceful enjoyment of the suit property.

6. An order is hereby given directed at the Chief Land Registrar and the survey department to rectify and mistake which may have occurred in the course of preparation of the deed plan held by the plaintiff (ITET) in the counter- claim and proper entries be effected in the register.

7. Costs of this counter-claim to be paid to the plaintiff by the defendant."

64 I have gone to great lengths to carefully, if painstakingly, set out all the evidence on record, albeit in great summary, over a period of days in obedience to our duty as a first appellate court to proceed as a re-hearing of the case with a view to making our own inferences of fact and arriving at independent conclusions after a fresh and exhaustive re-appraisal and analysis of the entire evidence. We do so with the caveat that we did not have the benefit of seeing the witnesses in live testimony so as to make an assessment of their credibility. That would mean that we would ordinarily make allowance for that handicap and pay due homage to the findings of fact of the trial judge who had that advantage, departing therefrom only when they were based on no evidence or on a misapprehension of that evidence or when plainly wrong. See Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.

65 The unique aspect of this case, however, is that, as we alluded to earlier in the judgment, the learned Judge himself took over the hearing of the case when the bulk of the witnesses had testified. He, therefore, did not enjoy much of an advantage over us. In addition, given the sheer enormity of the task of going through the testimony of each witness and all the documents produced, I dare say we probably have had the better benefit of time and multiple perspectives as the analysis and conclusions hereafter will make plain.

66 That decision grieved the appellants now before us. Counsel for Thumbi et al lodged a memorandum of appeal in which they raised some thirty-seven (37) grounds, by any standards way too many and repetitive. If one has to craft that many grounds, they are likely to be insubstantial as appeals often turn on a point or two, at most three. These numerous grounds herein are devoted to mainly showing how the learned judge was wrong to hold that ITET was the bona fide owner of the suit property. The grounds, which they later grouped into six clusters but hardly lessening their length, they complained, in summary, that the learned judge was wrong not to find that the letter of offer to the late Boit was not accepted within time: payments required were not by the time he died nearly 11 years later; and should have lapsed or abated; the lapsed letter of allotment was not part of the estate of the deceased, so no property could be passed to ITET, no survey was done to generate a deed plan and the one relied on by ITET was not only disowned by the alleged maker but related to land in Kiambu County; the grant for ITET was a forgery so that ultimately its grant was acquired fraudulently, irregularly and illegally; the learned judge selectively analyzed the evidence to sanitize ITET's title for whom he was clearly biased, and that he was wrong to hold without evidence that they and Karume conspired to defraud ITET. They therefore prayed that the judgment of the ELC be set aside and their suit, being ELC No. 47 of 2010 be allowed. They also sought costs.

67 In his 18-grounds of appeal, Karume complained that the learned judge erred by; ignoring the totality of the evidence and erroneously assuring his title was fraudulent; ignoring overwhelming evidence that ITETs Deed Plan was for property in Kiambu, not Nairobi and that his deed plan No. 278905 was the genuine one; ordering rectification on the basis of mistake without evidence; ignoring the fact that Boit's letter of allotment was for a different unsurveyed plot; finding that Bibiana Rabuku prepared ITET's Deed Plan; ignoring evidence that Deed Plan 278905 released on 10th August 2007 was genuine and would not form basis for ITET's 1995 title; finding collusion between Karume and Thumbi el al without evidence, and merely on basis of alleged similarities between their letters of allotment; finding, without evidence, calling or impleading of one Mohamed Sheikh, that he received documents from Thumbi et al and used them to register Karume's grant; and, by denying Karume a fair hearing by an impartial and neutral arbiter by being biased against him. He accordingly prayed for the setting aside of the judgment, allowing of his, ELC 816 of 2012 suit and the dismissal of ITET's counterclaim therein as well as Thumbi et al's suit in ELC No. 47 of 2010.

68 In preparation for the appeal, respective parties filed written submissions together with their case digests which were orally highlighted before us by counsel.

69 At the hearing, learned counsel Mr. A.G.N Kamau appeared for Thumbi et al while Mr. James Ochieng Oduol appeared for ITET in both appeals. Learned counsel Mr. Peter Muchoki Gichuru and Ms. Asli Osman appeared for Karume. There was no appearance for the Chief Land Registrar and the Attorney General, and neither had they filed any documents before this Court.

70 By consent of the parties, Civil Appeal No. E505 of 2020 and Civil Appeal No. E519 of 2020 were consolidated with the former designated the lead file.

71 Mr. Kamau solely relied on his filed written submissions. He submitted that the learned Judge failed to comply with Order 21 rule 4 and 5 of the *Civil Procedure Act* by not addressing the issues for determination as framed by Thumbi et al, instead, choosing to formulate his own issues. It was contended that the questions that were raised by Thumbi et al went to the root of the dispute and the learned Judge's failure to settle them showed that he was biased. The said questions were; was the process of the issuance of the letter of allotment to the late Paul K. Boit (Mr. Boit) valid? Were the terms and conditions of the said letter of allotment complied with? What was the effect of the death of Mr. Boit on the validity of the letter of allotment initially issued to him? Was a valid and proper survey carried out upon the suit property in favour of the 3rd respondent herein? Did the 2nd respondent issue a valid grant to the 3rd respondent? Has the 3rd respondent proved the particulars of fraud pleaded by way of evidence? Can the remedies sought by the 3rd respondent in its amended statement of defence and counterclaim avail it? Did the 3rd respondent summon such witnesses as were capable of proving his case to such standard as it required in law?

72 In place of the forgoing issues, the learned Judge found the following concerns as appropriate for disposal of the case: Who between the three disputants has a genuine grant? Was there a case of double allocation of the suit property? Are the parties therein entitled to the reliefs to their respective claims? Which order should be made as to costs?

73 It was argued that the learned Judge erred in law and in fact in treating the letter of allotment as a title and failing to appreciate that it is merely a transient and conditional right or offer to take up the property. To buttress this argument counsel cited two decisions, Stephen Mburu & 4 others vs. Comat Merchant Ltd & another [2012] eKLR and Commissioner of Lands & another vs. Kithinj Murugu N'Agere [2014] eKLR. It was submitted that the fact that the conditions stated in the letter of allotment were not accepted within 30 days and, payment was made 12 years after issuance of the letter

and long after the death of the Mr. Boit, the allottee, the letter of allotment had already lapsed and could not be used to generate the impugned grant in favour of the ITET. Counsel contended that the issue of the validity of both the letter of allotment and the impugned grant to ITET was not addressed by the learned Judge.

74 The learned Judge was criticised for finding that the suit property vested in the ITET on the basis of an 'informal transfer instrument'. To counsel, there was no evidence that the 'informal transfer instrument' was registered in the appropriate registry and therefore, no transfer could have been validly effected in favour of the ITET, from administrators of the estate of Mr. Boit, who themselves had no capacity to deal with the property contained in the letter of allotment. Moreover, counsel drew our attention to the fact that the impugned grant contained Deed Plan Number 193902 which is for property L.R Number 7022/166 located in Kiambu Municipality. That location is different from that of the suit property which is in Nairobi South C, designated as L.R Number 209/10210 whose Deed Plan is number 278905. Mr. Kamau continued that the impugned Survey and Deed Plan for ITET were not signed by the alleged maker of the documents, one B.A Rabuku. Consequently, counsel charged that the ITET's impugned grant was acquired fraudulently, irregularly, and illegally. It was further argued that the ITET having failed to specifically plead for an order of rectification of the register, it was not open for the learned Judge to so order. For this argument, counsel cited this Court's decision in David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others [2014] eKLR where the Court observed;

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

Further, the learned judge was faulted for disregarding the evidence tendered in favour of Thumbi et al by PW3 to PW8 which was uncontroverted. In the end counsel urged that their appeal is merited and ought to be allowed with costs.

75 For Karume, Mr. Muchoki began by indicating that the issues that they had raised in their memorandum of appeal were largely similar to those of Thumbi et al. Mr. Muchoki asserted that according to uncontroverted evidence of various witnesses who testified before the trial court, Deed Plan No. 278905 is the correct Deed Plan in relation to the suit property. Moreover, there was communication from the Ministry of Lands dated 8th June 2012, clarifying that Karume's grant was the genuine one.

76 Counsel contested the imputation of fraud on Karume by the trial court. He argued that although allegations of fraud were made against Karume by the ITET, no cogent evidence was placed before the court to support it. He added that none of the witnesses called on behalf of the 1st and 2nd respondents, who were the custodians of the land records, discredited Karume's title to the suit property. Counsel drew our attention to the fact that ITET's allotment letter dated 15th February 1982, related to unsurveyed plot C, and the allotment was made to one Mr. Boit, who passed away on 28th of September 1992. He noted that all the alleged payments that were processed under that allotment letter were done in the name of the late Mr. Boit. Mr. Muchoki contended that no evidence was presented to the trial court suggesting that the allotment had moved from the deceased to the administrators of the estate, and neither did the allotment embody any transferable rights in the suit property.

77 Counsel referred us to the testimony of Mr. Mburugu, DW3, who in his testimony spoke about the letter of allotment that was subject of the grant of ITET. He indicated that the letter of allotment was erroneous because it contained wrong details. Mr. Muchoki questioned the fact that while ITET's grant was dated 19th June 1995, the Deed Plan upon which it was premised was dated 10th August 2007, some years later.

78 Next, it was argued that although the grant that ITET relied upon showed that the deed plan was prepared by one Ms. Rabuku, the same witness testified and intimated that she did not undertake that survey. The learned Judge was criticized for disparaging Karume's title on the basis that the he had colluded with Thumbi et al to swindle the suit property from ITET, yet no evidence was presented before the court to suggest that there was any such collusion. In conclusion, counsel urged that the deed plan upon which ITET title is premised, was obtained in an irregular manner, it was fraudulent, and the court was wrong in sustaining it.

79 Ms. Asli, counsel for Karume drew our attention to the Supreme Court decision in Torino Enterprises Limited vs. Attorney General (Petition 5 (E006) of 2022 [2023] KESC 79(KLR) (22 September 2023) ("The Torino Case"). Counsel informed us that although the decision was rendered after they had filed their submissions, it was still relevant and portends a turning point for this case. In that case, the Apex Court interrogated the question of whether an allotment letter can pass a good title and came to a finding that as settled law, an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. Counsel was emphatic that this decision was crucial to this matter because ITET, whose title the court upheld, acquired its grant through an alleged purchase of a letter of allotment from Mr. Boit. She urged that for the allotment to be valid, it is only the allottee, Mr. Boit, who could have accepted the conditions in the letter yet evidence was led to the effect that he never accepted those terms during his lifetime. Ms. Asli contended that while the *Law of Succession Act* prescribes the procedure for transmitting the property of a deceased person to a beneficiary, the documents presented did not show that there was transmission of the suit property, if at all it constituted the estate of Mr. Boit after his death.

80 In conclusion, counsel urged that a deed plan is what underpins a title, and since the deed plan in support of ITET's title is for a property that is located in Kiambu, it was defective and consequently the title was imperfect. In support of this point, Macfoy vs. United Africa Ltd [1961] 3ALL ER 1169. was cited; "…If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity, which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting

aside: and the court has discretion whether to set it aside or not. It will do so if justice demands it but not otherwise...”

81 Ms. Asli contended that the trial court having found glaring defects in ITET’s title, it could not then go ahead and uphold it. She asserted the Supreme Court’s position in Dina Management Limited vs. County Government of Mombasa & 5 others, (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), to the effect that a court of law should not on the basis of indefeasibility of title sanction an illegality or give a seal of approval to an illegal or irregularly obtained title holding as follows;

> 108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:
>
> > “...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”
>
> 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.”

82 Moreover, the learned Judge could not direct that the erroneous deed plan can be rectified as no party had sought its rectification in their pleadings. For this proposition, Counsel cited this Court’s decision in Charles C. Sande Vs. Kenya Co-operative Creameries Limited, Civil Appeal Number 154 of 1992 where the Court reasoned;

> “ We would endorse the well-established view that a judge has no power to decide an issue not pleaded before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a judge. In our view, the only way to raise issues before a judge is through pleadings and so far as we are aware, that has always been the legal position. All the rules of pleadings and procedure are designed to crystalize the issues which a judge is to be called upon to determine and the parties are the themselves made aware well in advance as to what the issues between them are.”

83 In response to both appeals on behalf of ITET, Mr. Oduol began by imploring that each party had to discharge the burden of proving that its title was genuine. He submitted that the case that was made for Karume before this Court was not the same case that was before the High Court as there was no challenge to the letters of administration then and neither was there a protest to the informal transfer that was effected. Counsel argued that if the appellants wanted to contend that there was no proper transmission of property pursuant to the agreement between the estate of Mr. Boit and the ITET, the right place to do so would have been before the Succession Court, which would have determined whether or not the administrators of the estate had the power to transfer the suit property. Mr. Oduol lamented that the issue was being raised for the first time in the Court of Appeal, 40 years after the agreement and the informal transfer registered.

84 Counsel asserted that the grant to Karume was signed on 2nd July, 2011 and the letter of allotment is dated 1st October 1998, a time when there was already a title registered on 19th June 1995, in favour of ITET. He insisted that nobody has the power to allot land that is already titled and that is already private. He cited the Supreme Court decision in the Torino Case for this contention. The Court observed as follows in that case;

> "55. In view of these dealings, could the suit property retain the status of "unalienated government land"? The answer to this question must be in the negative considering the fact that once an individual or entity acquires any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from "public" to "private" land. Article 64(a) of *the Constitution* defines private land as consisting of 'registered land held by any person under any freehold tenure'. In Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others, Civil Appeal No 79 of 2007; [2015] eKLR, the Court of Appeal held:
>
> > "... the legal effect of registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated land with the consequence that the suit property became private property and moved out of the ambit and confines of the Government *Land Act*. ..." [Emphasis Added].
>
> We consider the foregoing statement to be an accurate illumination of the meaning of "private land.'"

85 Mr. Oduol urged that the title in favour of ITET was the first one in time having been registered on 19th of June, 1995. He continued that, ITET called 4 witnesses in support of their case. Dr. Kajwang', who produced all the documents related to the allotment, the sale agreement, and evidence of the payments, all which were authenticated by the court. Mr. Agwata Mabeya a former Commissioner of Lands gave evidence that the titles of the appellants were forgeries, Mr. Ronald Ochieng', the Director of Land Administration at the time stated that the only documents that are in their custody were the documents relating to ITET. Further, Mr. Gachihi who was the then Registrar of Lands denied signing the title in favour of Mr. Karume.

86 Concerning the location of ITET's property, Mr. Oduol refuted claims that it was based in Kiambu County. He attributed the same to a mistake in documentation. Counsel referred us to the Part Development Plan (PDP) at page 302 of the record in Civil Appeal No.519 of 2020 which showed the property to be in section 2. He indicated that the same was erroneous. Counsel instead drew our attention to page 57 which, to him, showed the property to be in Central Nairobi, reference map SUB-A37. The plot Reference Number is LR.209102/10, and the Deed Plan Number is given as 193902. While partly blaming Mr. Kamau for the confusion in the locality of the property, counsel submitted that the learned Judge was right in following and accepting the documents presented by the public officers. In this respect Mr. Oduol adverted to pages 92, 93 and 397 of the record. On page 92 is a letter written to ITET, signed by R. N Mule for the Chief Land Registrar and referenced L.R No. 209/10210. ITET is notified that, "This is to inform you that Deed File No. 66157 in respect of the above captioned property has been placed in our registry safe as per your request." The letter on page 93 has the same reference and is from the same R. N. Mule. It informs Ndungu Njoroge & Kwach Advocates that, "According to our records the above property was on 20th June 1995 registered as IR Number 66157 in the name of Insurance Training and Education Trust which is still the registered proprietor." The letter on page 397 referenced L.R No. 209/10210 – IR No. 63594, is signed by the same person and among other things it informs Letangule & Company Advocates that, "After the

dispatch of the said letter to you, I discovered that there is in existence another title in respect of L.R No. 209/10210 that is IR No. 66157."

87 We probed Mr. Oduol concerning the fact that the record bore accusations and counter-accusations of forgeries in obtaining titles to the suit property and indeed some parties claimed not to have signed documents in question while others claimed the signatures were valid. We sought to know whether perhaps there was need for a document examiner to clarify some of the issues. Mr. Oduol's reply was that it was upon the appellants to submit a request for signatures. We asked counsel to comment on the Torino Case and whether it was good law. Counsel's view was that the case was not good law because there have always been informal transfers which were registered by the Commissioner of Lands. He argued that most letters of allotment could be issued to individuals and the property would be transferred by way of informal transfer. Mr. Oduol, however, added that each case must be decided on its own facts. He contended that the issue in the Torino case was never raised at the High Court.

88 Counsel submitted that Karume had conceded that he never obtained a copy of the PDP at the time of allocation to him, and given that he had not obtained a PDP, the suit property was not available for allocation to him as it had already been allotted to somebody else. To buttress this point, Mr. Oduol cited the Supreme Court decision in Dina Management Limited (Supra) where the Court cited with approval the Environment and Land Court decision in Nelson Kazungu Chai & 9 Others Vs. Pwani University [2014] eKLR and stated;

"104 […] "…It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed…"

105. This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

89 Counsel submitted that if we analysed the letter of allotment, the PDP, the payment made by ITET, the sale agreement, the registration of the informal transfer and the serial numbers to the various titles, they all indicated the discrepancies that the learned Judge noted. He urged us to confirm the decision of the High Court because the appellants were relying on documents that had been manufactured.

90 In reply to the foregoing submissions, Mr. Kamau for Thumbi et al submitted that there was no application by the late Mr. Boit to be allocated any land, and therefore it was surprising that he was issued with a letter of allotment. To him, that is a red flag for land grabbing. Counsel contended that by the time the administrators of the estate of Mr. Boit allegedly entered into an agreement with the ITET, the suit property was not part of the estate as there was no confirmation of grant on record showing that the property was part of the estate of Mr. Boit. Counsel reiterated that PW6, who is said to have signed the grant of ITET, gave evidence in court and denied having signed it. Similarly, PW5 contested signing Karume's grant.

91 Mr. Kamau challenged the allegation by Mr. Oduol that he was involved in drawing a document which brought about some confusion on the location of the suit property. He contended that the proper deed plan which is the basis of the authentic title for the suit property belonged to his client who approached Mr. Karume to assist in processing the documents but instead, Mr. Karume went ahead and used that title to compose his own title, then produced forged documents bearing the name of Thumbi et al. He did not point to evidence of this. We questioned counsel about the 3 titles that were found to be forgeries, whether he knew to whom they belonged to. Mr. Kamau admitted that the said titles bore his clients' names, that is Thumbi et al, although they were forged by Mr. Karume. We sought to know from Mr. Kamau whether evidence was given in court to show that the titles were forgeries. His answer was, "Well, there is some evidence on record to show they were actually forgeries and even in the High Court I indeed indicated that we share that position that they were forgeries."

92 We pointed out to counsel that from his submissions, it seemed like none of the parties complied with the terms and conditions of the allotment letter. Counsel agreed that from the record that was the case, and therefore none of the parties obtained a valid grant, considering also that the Registrars who allegedly signed both the title of Karume and ITET disowned them.

93 In reply to the submissions by his counterparts, Muchoki rejected the claim that Karume allegedly used documents from Thumbi et al to process a title in his favour, charging that no credible evidence was adduced to support that accusation. Counsel contended that Mr. Kamau went to the High Court with the hope that no one should get the property. Mr. Muchoki opposed the submission that two witnesses namely, Mr. Gachihi and Mr. Mabeya disowned their signatures on the title documents of Karume. He contended that the two did not testify in their official capacity. Further, no sample signatures of both witnesses were presented before the court, and no comparison was done. There was also no forensic document examiner called to discount any of those signatures on the titles. While acknowledging that Karume's title had some errors, counsel pointed out that the same were attributable to the Ministry of Lands and did not invalidate the grant because there was a clear path showing how the title and the grant were processed in favour of Karume.

94 Next, Mr. Muchoki argued that although the title issued to ITET was first in time, in the presence of the underlying circumstances which show that the documentation was irregular, illegal and fraudulent, then that title cannot be fronted as a first title in time. Counsel maintained that the Torino case was good law because it speaks to the propriety of the transaction between ITET and the estate of Mr. Boit. He submitted that although they did not accept the offer in the allotment letter within 30 days as stipulated, money was tendered to the Ministry of Lands and it was accepted. Subsequently, the Ministry proceeded and processed a grant in favour of Mr. Karume.

95 I have carefully and anxiously considered this complex, confusing and convoluted matter and endured the mindboggling, nay excruciating mental journey of unravelling it after going through numerous documents, weighing conflicting testimony, and interacting with the authorities cited and lengthy submissions by the contending parties. Whereas it is possible to distil numerous issues for

determination given the assertions and counter-assertions made herein, I think it convenient and capable of dealing with all relevant issues to simply adopt the issues the learned judge identified. But I will go further and reduce them to a single issue. I do so aware of, but not agreeing with the complaint by Thumbi et al. that those issues were essentially a short cut and did not address all that needed to be addressed. I take the view that it is not necessary to project as an issue every single point on which parties take divergent positions. It is sufficient to identify and directly answer only those matters that have a real bearing on the outcome of the dispute. Thus, in my considered view, what needs to be answered is the one all-important question: Who between the three disputants has a genuine, valid and effective title?

96 It is, to my mind, a question of the greatest importance because, like 'Eneke', the bird in Chinua Achebe's Things Fall Apart, who learnt to fly without perching because men had learnt to shoot without missing, Kenyan courts can no longer content to perch on the branch of simply accepting titles as conclusive, incontestible and indefeasible; or the concomittant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities from our superior court such as Munyu Maina vs. Hiram Gathiha Maina (supra) and Funzi Development Ltd & others vs. Country Council of Kwale [2014] eKLR, by this Court; Esther Ndegi Njiru & another vs. Leonard Gatei (supra) by the Environment Court (Mutungi, J.) and by the Supreme Court in its authoritative and all-binding decision of Dina Management & County Government Of Mombasa & 5 others [2023] KESC 30 (KLR).

97 A sequential consideration of the three claims will thus provide the answer to the conundrum that now faces us. I start with the claim by Thumbi et al as encapsulated in Civil Appeal No. 505 of 2020 which was the first in time before this Court and ELC No. 47 of 2010 which was the first filed in the court below. The learned judge also began his analysis with a consideration of Thumbi et al's claim and he had no difficulty dismissing it in four paragraphs as follows;

> "27. On the first issue, there is no doubt that the grant held by the Thumbi group is not genuine. To begin with, the Thumbi group contend that their grant originated from a letter of allotment which was issued on 1st October 1993. The Thumbi group has already denounced the letter of allotment dated 6th October 1999. These two letters of allotment did not indicate on behalf of which municipality they were being made. The two allotment letters did not also show how the plan number pursuant to which they were issued.
>
> 28. The grant which has already been denounced by the Thumbi group as a forgery was traced to a property in Thika whose grant had been surrendered to the government in return for a subdivision scheme. This Thika property belonged to Jerusha Njeri Mwangi and had been given deed plan No, 178153. This is the same deed plan which the Thumbi group were using to claim the suit property. The title for Jerusha Njeri Mwangi was surrendered on 24th July 1996 and incidentally the surrender was witnessed by the current Advocate for the Thumbi group.
>
> 29.. This being the case, and the lands registry having confirmed that the title held by the Thumbi group was a forgery and the Thumbi group themselves having said it was indeed a forgery, I find that the grant attributed to the Thumbi group is not genuine."

98. From my own exhaustive consideration of the documents that were tendered before the trial court as well as the testimony of the witnesses, I think, with respect, the learned judge was fully justified

in arriving at that conclusion. Indeed, such a conclusion was inevitable the moment Joseph Ndungu Gathondu in his testimony wholly repudiated the very grant and grounds on which their case was hinged. They came to court claiming to be registered owners with titles in the form of grants but the said party denied and disavowed the title documents as dramatically, and repeatedly, as Peter did Jesus one Judean night, calling them forgeries and insisting both in cross and re-examination that all they had was a letter of allotment, and were seeking the court's help to obtain title. This was a classic case of scoring an own goal and he literally demolished the case of Thumbi et al, of whom he was one. Had he been merely a witness he might have been termed 'hostile' but, being a party he threw in the towel without intending or knowing he was by his repentance, repudiation, retraction and recantation of the case. The damage to his own case is writ large in one of the excerpts of his testimony that I set out earlier in this judgment and I need not rehash it.

99. I note that whereas the plaint filed by Thumbi et al very carefully avoided mention of the Grant, content to simply state at paragraph *2* that they were the "duly registered owners" of the suit property, they did hold Grant IR No. 63594 dated 11th October 1994 purporting to be LR No. 209/10210 for land situate in the City of Nairobi. The trio were grantees as joint tenants. But this is not the only grant they held. There was another, under the same IR 63594 for a term of 99 years from 1st October 1993. Regarding this latter grant, their then advocates Letangule & Co. by a letter dated 21st June 2010 addressed to the Principal Registrar of Lands, sought to have that officer's confirmation of this title and to have an official search to confirm its status.

100. By a letter dated 26th November 2010 addressed to those advocates, which superceded an earlier one dated 13th July 2010, the Ministry of Lands advised as follows;

> "Investigations carried out have revealed the following;
>
> That the I. No. 63594 quoted in the title in the possession of your clients is in respect of LR Number 4958/2359, a property situated in Thika. The said IR 63594 was surrendered to the Government of Kenya on 24th July, 1996 in consideration of a subdivision scheme approval.
>
> The correspondence file number quoted on the Grant, CF 171591 is in respect of Land Reference Number Nairobi Block 76/914.
>
> <u>The said Grant Number IR 63594 in the possession of your clients is therefore a forgery and the same did not originate from this office.</u> (My emphasis)

101. Indeed, there is in the bundle of documents filed in the court below indisputable evidence of the veracity of the aforesaid statement. The Grant related to land situated in Thika Municipality which belonged to one Jerusha Njeri Mwangi, more particularly described as LR 4953/2354 and had been surrendered to the Government in consideration of sub-division scheme approval on 24th July 1996. With such surrender and subdivision, that Grant ceased to exist – only to resurface as one of the titles by which Thumbi et al laid claim to the suit property. This was thus a case of forgery pure and simple and I do not see the need to punch any holes in the other grant, which was equally a forgery, given their rejection of these Grants by the testimony of Joseph Ndungu Gathondu. It is worth recalling that the witness, in an inadvertent lifting of the lid over the nefarious and adventuresome activities of the Thumbi Group, did indicate in testimony that there really never existed any entity by the name Christian Project Group. It was just a creation of Thumbi Kariuki as a vehicle for seeking land, for themselves. It was a pretense from the get go, with nothing Christian in the activities I have recounted or prayerful, as Thumbi had described their activities on the suit land to be.

102. I need only add that I found it most strange and odd, bizarre even, that while the suit property was the subject of double litigation to determine the true owner thereof, Thumbi et al somehow, and with the aid of an Advocate of the High Court of Kenya, purported to enter into an agreement for the sale of the same to Mas Construction Ltd. That agreement which is dated 12th June 2015 contained a clause, Recital B, expressly stating that title was in contest in court with the two cases named. I search in vain to understand how any party would be willing to buy it, unless they were being defrauded openly, or, in the alternative, the agreement was just another convenient sleight of hand as part of an elaborate scheme of smoke and mirrors.

103. Be that as it may, and with no need to say more, the claim by Thumbi et al to the suit property was false and fraudulent, was based on contradictory and repudiated evidence, and, being wholly unworthy of belief, Case No. 47 of 2010 was well and properly dismissed as unmeritorious, and I would dismiss the appeal against said dismissal.

104. As it is ITET that Thumbi et al had sued in Case No. 47 of 2010, it is apposite that I should next examine the case it presented in its defence both in that case and in ELC 816 of 2012 interwoven with the counterclaim it mounted in the letter cases, essentially that it was the bona fide lawful owner of the suit property by virtue of Grant No. IR 66157 issued on 20th June 1985 over the same. ITET's case was that since its grant was first in time, every other rival grant held by the other parties herein is subservient to its own which is therefore indefeasible. The antecedents to its own which is therefore indefeasible. The antecedes to its obtaining of the title are that the suit property has adjacent to its premises in South C, Bellevue Area where it has the College of Insurance. On 4th November 1994, it entered into a Sale Agreement whereunder it purchased the suit property from Priscilla Jelel Boit and James Cheruiyot at the agreed sum of Kshs. 8.5 million. The vendors were the administrators of the Estate of the late Paul Kipkorir Boit who died on 28th September 1992. The deceased had been allotted the said land by a letter of allotment dated 15th February, 1982, which was nearly 11 years before his death, and more than 12 years before the date of the agreement. Under clause 'C' of the recitals in the agreement, the vendors warranted that "the allotment was genuine and valid and that the vendors have or will obtain all the necessary powers and authorizations to sell the Plot."

105. Eventually, on 19th June 1995, Grant Number IR 66157 was issued to ITET over a 2 Hactares piece of land situated in the City of Nairobi in the Nairobi Area for a 99-year term from 1st March 1982. The user was indicated as "inoffensive light industrial purposes with grilling offices and stores" and the consideration for the grant was stand premium of Kshs. 690,000 paid on or before execution. ITET eventually made various payments to the Commissioner of Lands including a payment for Kshs. 1,645,062.45 forwarded on 24th October 2002 on account of land rent for the years 1996 to 2002. It later applied for change of use from light industrial to education, and obtained approval of development permission.

106. All seems to have been well until sometime in 2010 it became aware of a claim to the same land based on a rival grant by Thumbi et al leading to an enquiry, through its advocate Mr. Paul Ndungu of Ndungu & Njoroge & Kwach on 14th July 2010, requesting the Principal Registrar of Titles to "clarify as to which of two Grants is the correct one. You will no doubt take whatever action is necessary to get the incorrect Grant withdrawn from the land registration system". By a letter dated 30th July 2010, ITET itself requested that Deed File No. 66157 in respect of the suit property be kept in safe custody at the Ministry of Lands, which request was advised to be acceded to by the letter from the Chief Land Registrar dated 2nd August 2010. This request was shortly after ITET had on 21st July 2010 filed at the

Lands Registry a Deed of Indemnity signed by Lydia Thithi Nganga, its secretary, in respect of Title No. IR 66157, in the following terms;

> " Having been advised that the Deed File containing the Land Registry copy of the Certificate of Title is lost or misplaced in the Land Titles Registry at Nairobi And having requested the Principal Registrar of Titles to open a new Deed File hereby indemnify the government of kenya against my actions claims demands proceedings that may be made or instituted against the said Government of Kenya arising out of loss of the said Deed File."

107. It is apparent, therefore, that the deed file that was being placed under safe custody is the New Deed File but there is much contention in this matter as to why the deed of indemnity was necessary in the first place, as there is no evidence of the loss or misplacement of the original deed file. Nor is there evidence that ITET was advised of such loss or misplacement.

108. Now, the Deed Plan attached to ITET's grant aforesaid is signed by J.G. Njoroge for the Director of Survey on 16th March 1995 and bears Deed Plan No. 193902. The same is indicated to have been prepared by B.A. Rabuku, a licensed surveyor.

109. The genuiness of this Deed Plan has been at the heart of this protracted dispute. Indeed, both Thumbi et al and Karume have raised a number of what they call defects and irregularities surrounding the Deed Plan and implicating the efficacy and legality of ITET's title to the suit property. The positon taken by Thumbi Kariuki in support of the first suit was that the Commissioner of Lands falsified documents to enable ITET to obtain a title in the face of Thumbi et al's pre-existing title with a view to defrauding them of the suit property.

110. As the process of interrogating and unraveling ITET's title will necessarily invite a consideration of various letters, documents and testimony of witnesses who refer to Karume's title to the suit property, it is inevitable that the sequential path I have taken hitherto should at this point cede to a more merged and concurrent consideration of the two competing claims to ownership.

111. I consider it significant that the letter of allotment that was issued to the late P.K. Boit on 15th February 1982 expressly indicated that it was for 'nairobi-belle Vue Area – Unsurveyed Plot "Clearly typed out in the upper case as the deference. What is interesting, however, is that above "unsurveyed Plot C" is handwritten "LR 209/10210" but with no countersignature to indicate who wrote the Land Reference which is the subject of this litigation, and when it was written. By way of juxtaposition, and comparison, the letter of allotment issued to Karume on 1st October 1998 is to "LR No. 209/102010 City of Nairobi" all typed out.

112. By a letter dated 27th February, 1989, again with the reference "unsurveyed Plot C", Miss D.W. Kago, signing for the Commissioner of Lands referred to the letter of allotment to Boit issued more than seven years earlier and noted with concern that the sum of Kshs. 827,680 had been outstanding. She asked him to arrange to remit the same to initiate preparation of the title document. That is the sum that the late Boit was required to pay as advised in the letter of offer comprising stand premium Kshs.690,000, annual rent of Kshs. 115, 000 and stamp duty Kshs. 22,080, as well as conveyancing and registration fees coming to Kshs. 400.

113. In apparent reply to that letter, a letter was written on behalf of Boit apparently forwarding a cheque and this led to receipt No. D051826 dated 9th November 1990. Tellingly, though, the total amount of that cheque is Kshs. 727,480 which is Kshs. 100,000 less than what was required. Indeed, the receipt shows that stand premium paid was Kshs. 590,000 instead of Kshs. 690,000 a discrepancy that is unexplained. The mystery of this payment is deepened by the fact that ITET does not make mention

of it and it is not in its filed bundle of documents. But it does not stop there. In answer to a file memo of "Accounts" dated 18th May 2015 requiring confirmation of the authenticity of various payment receipts made pursuant to the letter of allotment to Boit and the subsequent Grant of ITET, one N. Kiarie an Accountant at Lands, wrote a letter dated 19th May 2015 to the Chairman, National Lands Commission. In it he stated that two fee receipts including No. 051826 aforesaid, "do not appear in our records." He also stated that their records did not date back to 30th March 1983 and he could not, therefore, confirm receipt Number C566231 of that date. From my own reading of the receipt, it would seem it is dated 30th March 1993, but the bottom line is that Accounts could not confirm it.

114. The relevance of this absence for receipt the stand premium and other charges is relevant, to my way of thinking, because it goes to raise doubt whether the conditions were met that would have led to the issuance of a valid and effective title flowing out of the letter of allotment.

115. Again, by way of comparison, and contrast, the Letter of Allotment issued to Karume on 1st October 1998 required him to pay stand premium of Kshs. 400,000 and other charges making a total of Kshs. 444,750. There is on record an undated letter by Rajab A. Karume addressed to the Commissioner of Lands forwarding cheque Number 055753 amounting to Kshs. 444,750 "being payment for the above offer." The exact sum sought is forwarded for the specific purpose. The letter has an instruction dated 10th June 2010 to the Cashier to "Accept payment." There has been no complaint that this money was not paid.

116. The picture that emerges from the records made available to the court is that the late P.K. Boit does not seem to have applied for allotment of land. When he, nonetheless, obtained a letter of allotment, he does not seem to have formally accepted it. In fact, a note or memo from the Records Department at the Ministry of Lands and addressed to the Senior Legal Officer (SLO) on 20th December 1988 is indicative of that unusual and untenable situation.

> "Please note that the offer at (1) has not been accepted by allottee to date. Seven (7) years ago. You may wish to get in touch with the allottee for the same."

117. There is no record that such acceptance ever came from the late Boit, which, coupled with the palpable doubts whether he made the requisite payments, persuades me that the prerequisites for the issuance of a grant had not been met. It seems to me to be basic contract law that when an offer is made but the offeree fails to accept it, there can be no contract. And I also doubt that, even giving it the most generous interpretation, such offer can remain open and unaccepted in perpetuity. I would accordingly hold that, as at the time of P.K. Boit's death on 28th September 1992 without having accepted the letter of allotment issued to him ten and half years previously, there was no subsisting offer capable of acceptance. It had lapsed by effluxion of time and it would be unreasonable to hold otherwise. If one cannot enforce a claim in contract after six years, how can it be said that an invitation to enter into contract can still be legally effective more than a decade later? Such a scenario, to my mind, is an absurdity and cannot be countenanced at law.

118. But even if I were wrong to find that such passage of time extinguishes a letter of allotment, which is essentially on offer conditioned upon acceptance and payment, I am quite certain that the offer would be extinguished by the death of the offeree. The offer was personal to P.K. Boit and upon his death sans acceptance and payment, the offer also expired. I would think that absent express intent to the contrary, the offer comprising the letter of allotment must have been conditioned upon the allottee remaining alive.

119. I do not think that a letter of allotment, and an unaccepted one at that can be said to be property transmissible to the estate or beneficiaries of the deceased allottee. Neither the letter of allotment, nor

the land describes therein, can be said to be properly owned by the estate of the deceased, and therefore capable of being sold by such estate. The law on this subject, which I accept, has been settled by the Supreme Court's binding precedent in the Torino Enterprises Case (Supra), cited to us by Ms. Asli that an allotment letter, being nothing more than an offer awaiting conditions stipulated therein, is incapable of conferring interest on land and therefore cannot pass a good title. I would have to hold as I now do, that the Sale Agreement between the Administrators of the Estate of the late Boit was a document devoid of legal force and it did not pass any title to ITET. The parties may have labored under a misconception that it would although, on a proper reading of it, the sense is unmistakable that they knew the vendors were merely hopeful owners, their right and title to the land being inchoate and still future. They could not pass on title before it had crystallized. Both on the basis of nullity and the principle of nemo dat quod non habeat, not having had a matured title, they could not pass anything better to ITET, no matter how hopeful both parties were. As far as effecting ownership goes, the allotment letter amounted to a barren mirage, void in law, and it was incapable of passing a viable title to ITET. See Merit Development Ltd Vs. Lenanan Investment Ltd & 2 Others [2018]eKLR; Katana Kalume & Anor Vs. Minicipal Council Of Mombasa & Anor [2019]eKLR, and the oft cited Macfoy Vs. United Africa LTD [1961] 3 ALL ER 1169.

120. After the sale agreement and in furtherance of it, specifically in fulfilment of clause 2 that provided that "the purchaser shall pay through the vendor's advocates such amounts as shall be required by the Commissioners of Lands in respect of stand premium land rent and other charges due under the said letter of allotment." ITET, on its own showing, in a letter dated 1st November 2002, "advanced Kshs. 3,422,355 to Mr. Boit's estate to enable executors (sic) to pay land rents par the period 1982 to 1995." ITET proceeded to pay Kshs. 1,645,062045 for years 1996 to 2002 land rent. They believed they did not owe any more rent or penalties but complained that a further Kshs. 4,362, 957.20 was required of them for 1982 to 1995. This, to my mind, raises serious questions whether the monies advanced to the vendors ever were paid to the Commissioner of Lands, and it would seem likely, in the circumstances of this case, that ITET had fallen prey to an elaborate scheme to scam it of money on the hopeful illusion of owning the land.

121. Regardless, ITET did come to be in possession of Grant No. IR 66157 for LR reference 209/10210. It is difficult to decipher and state with certainty when the survey was carried out, given the letter of allotment and much of the correspondence therefore referred to "unsurveyed plot C." The Deed Plan that presumably gave rise to the Grant was attached thereto, bearing the Number 193902 and dated 16th March 1995. ITET's entire case is founded on this certificate of title, stating at paragraph 32 of the Counterclaim that "Grant No. IR 66157 on the suit property conclusively evidences its rights pursuant to section 23 of the Registration of Titles Act (now repealed) [and] is protected from subsequent claims."

122. It is common ground that a title to land is the culmination of an elaborate process. The witnesses called from the Ministry of Lands gave cogent and generally consistent evidence as to the process which highlighted in particular, the role of the Surveyor and the centrality of the Deed Plan which must always precede the preparation and issuance of a title or Grant. In the Grant held by ITET, the surveyor named therein is R.N. Rabuku, licenced surveyor. The implication must be that it is she that did the survey work. One Bibiana Rabuku Achieng a private surveyor was categorical that she did not conduct the survey that led to the issuance of the Grant. She denied knowledge of Deed Plan Number 193902. It is interesting that this witness was not called by ITET on whose deed plan her name appeared. From my own reading of her testimony, she was firm, resolute, cogent and consistent that she did not do the survey. In fact, she swore that at the time the survey was purported to have been done, she was not a licensed surveyor. This leaves the lingering question: who is it that did the survey if any was done? Indeed, Survey Plan No. 30188/X1/81A which might have shown connection between the

unsurveyed Plot C and the suit property was not produced by ITET or any other party. Why would the name of a surveyor who did not carry out the survey be on the Deed Plan unless for the sole purpose of deceit?

123. But this is not the only document that was disowned by the alleged maker. The Grant itself is said to have been signed by Wilson Gachanja the then Commissioner of Lands. He was not called as a witness. Elizabeth Gicheha, part of whose testimony is set out earlier in this judgment, was categorical that she did not sign the transfer of the land to ITET on 20th June 1995 as shown in the aforesaid Grant. Nor did she sign it at any other time. She maintained the position that the signature purported to be hers on the grant was a forgery even when subjected to searching cross-examination by learned counsel for ITET who suggested that she was part of a cartel of Lands officials who falsified records. She was firm that she was an advocate who fully understood her duty to be candid and assist the court in arriving at the truth.

124. It is interesting that the learned judge in a half a paragraph of his judgment rejected the evidence of these two witnesses as follows;

> "PW6 Elizabeth Gicheha is the one who registered the grant in favour of ITET. This witness was called as a witness for the Thumbi group. This witness just as PW3 Bibiana Achieng Rabuku casually denied ever registering the grant. It is not surprising that these two witnesses were called by the Thumbi group which was hell bent on acquiring the suit property by hook or crook."

125. With great respect, I am unable to find a basis upon which the learned judge, without a more thorough and exhaustive analysis of the totality of the evidence presented by these two witnesses, concluded that they "casually denied" the roles the ITET Grant assigned them, when their position was that they did not sign or register the transfer and conduct the survey as indicated in the Development Plan, respectively. It is a surprise to me that the learned judge did not observe from the record that they remained unshaken when subjected to intense cross examination, which ought to count for something. I also do not think there was a firm basis upon which the learned judge could insinuate that these witnesses were somehow out to aid Thumbi et al to execute a land grab.

126. The attack on the integrity of these two witnesses is repeated in the written submissions filed before us on behalf of ITET, with the suggestion they were paid by Thumbi et al, but, as I indicated, even after being subjected to the most exhaustive cross-examination, the two witnesses maintained the positions they had taken in their witness statements. I need only add that having looked carefully at the record, I cannot but conclude that the learned judge misdirected himself in making the finding that Bibiana Rabuku admitted under cross examination by Mr. Motari for the Attorney General that she is the one who prepared the Deed Plan for the Kiambu property. There is no such admission on record and I apprehend that this finding without evidence may have negatively and prejudicially coloured the learned judge's appreciation of the witness' evidence.

127. It seems to me that despite the competing and conflicting narratives presented by the parties through the witnesses they called, it is possible, by a close examination of the documents that were presented, being the records at the Ministry of Lands and the correspondence files thereat, to arrive at a fair and accurate appreciation of the true state of things with regard to the titles held by Karume and ITET. I have already quoted excerpts of the evidence of a number of officers from the Ministry of Lands, present and past, that expounded on the process of title acquisition and who spoke to the centrality and crucial place of Deed Plans, without which no valid title can issue. It is the actual conduct of a survey on the solid ground that converts land ownership from being mere paper declarations to being actual, real property. I think that the most authoritative document on the legal efficacy of the competing Deed

Plans is pronounced by R.N. Mule, an Assistant Commissioner of Lands vide her letter dated 9th July 2012 to Issa & Co. Advocates, then acting for Karume. Replying to the advocate's inquiry by letter dated 5th April 2012, as to the correct Deed Plan, she replied as follows;

> " According to survey records the correct deed plan for LR No. 209/10210 is No. 278905. The said deed plan is annexed to grant registered as IR 130971 in the names of RAJAB AHMED KARUME.
>
> Also according to survey records deed plan No. 193902 is in respect of LR No. 7022/166. The said deed plan is annexed to grant registered as IR 66157 registered in the names of Insurance Training And Education Trust.
>
> In view of the above you are hereby advised to filed a suit in court, for cancellation of grant No. IR No. 66157."

128. That unequivocal letter was copied to ITET, its then lawyers Ndungu Njoroge & Kwach Advocates, Letangule & Co. Advocates, as well as The Survey of Kenya.

129. Another letter dated 8th June 2012 was written to the Chief Land Registrar by the Director of Survey under the Title "Confirmation of Deed Plan for LR No. 209/20210 – Nairobi and in it he stated that;

> "I have seen the different Deed Plans for that title and confirmed from my records that LR No. 209/10210 bears Deed Plan No. 278905 and locality is City of Nairobi County contrary to the other copy being Deed Plan No. 193902 whose correct LR No. should be 7022/166 and locality Kiambu Municipality as per my records see attached copies of Caveat Deed Plans."

130. This same position is confirmed by a letter from the Directorate of Criminal Investigations dated 21st March 2013 which was filed in Court by the Attorney General on 26th July 2013. The said letter was addressed to the Director of Public Prosecutions following an inquiry into an alleged offence of forgery of titles following a complaint by ITET. The findings of the inquiry were as follows;

> "1. All elements are laying claim to parcel of land number LR 209/10210 under different Inward Registry (IR) number which in law and fact cannot be the true position hence only one among the three should be a genuine registration and the rest a forgery.
>
> 2. In an attempt to prove which title is genuine, the investigation officer endeavored to establish the deed plan which in a view of assisting to know the exact locality of those generation it was established that:-
>
>   a. Deed plan 193902 on whose title number LR 209/102010 in favour of Insurance Training and Education Trust is for LR No. 7022/166 located in Kiambu Municipality.
>
>   b. Deed plan No. 178153 on which Thumbi, Jane Wanjiru Dumba and Joseph Ndungu Gathondu are laying claim in title number LR 209/10210 has confirmed to be for LR No. 36/VI/438. The IR number quoted 63594 in the tile is in respect of LR No. 4958/2359 whose locality is in Thika. The history of that IR shows that the same parcel was surrendered to Government of Kenya in 1998 for subdivision of a Settlement of Sarah Maina D7.

c. Deed plan 278905 in which Rajab Ahmed Karume uses to lay claim in title number LR 209/20210 IR 123079 as per the exhibit B22 shows that the parcel of land in question is located in Nairobi."

131. Several witnesses spoke to the documents in possession of the Ministry of Lands which all indicated that the Deed Plan in which ITET's title was founded was for land situated in Kiambu Municipality. They included Timothy Waiya Mwangi; Wilson Kibichi and Silas Kiogora Mburugu called by the Attorney General, whose relevant evidence I have captured earlier in this judgment. These were officers still serving in the Government and who testified out of their vast experience in land administration as well as the documents that were kept at the Ministry of Lands. I did not find their evidence to be in any way suspect and any, therefore, led to accept as factual that the Deed Plan No. 193902, which ITET held was for a piece of land in Kiambu Municipality whose correct LR No. is 7022/166. That it should have been tied to LR No. 209/10210 in Nairobi can only be the result of mischief, irregularity, or fraud and, however such a mismatch concurred, the inevitable result is that ITET did not produce a Deed Plan that could effectively have formed or founded the basis for the Grant that it held.

132. The conclusion is thus inescapable, even as I arrive at it without joy, that ITET was holding onto a Deed Plan and a Grant that could not be the basis of a valid title to the suit property. The law now being that it was incumbent upon it to go beyond and behind the instrument of title and to show that the said title was acquired legally, formally and procedurally, I am afraid ITET did not satisfy these prerequisites. It has not demonstrated a viable and effective root of its title as the journey preceding the title is shrouded in falsities, doubts, contradictions and irregularities that a court of law cannot in conscience overlook or gloss over.

133. This brings me to the title held by Karume. I have already set out how Karume obtained a letter of allotment over LR No. 209/10210 situated in Nairobi. It may be safe to say from a practical stand point, and bearing in mind the Supreme Court's decision in DINA MANAGEMENT (supra), that one must trace a clear line backwards up to, at least the letter of allotment, in order for him to have tried to establish the root of title. This has to be so because the letter of allotment is the offer that becomes the foundation of any legal rights to follow upon its acceptance.

134. After obtaining the letter of allotment, Karume made the payments required of him. After the payment, which to my mind amounted to an acceptance of the offer, Grant No. IR 130791 was issued to him. This was issued as a 'New Grant' and indicated that it was for LR No. 209/10210 measuring 2.000 Hectares. The piece of land's dimensions, abuttals and boundaries were delienated on the annexed Land Survey Plan No. 278905, (the Deed Plan).

135. It is a matter of significance that the Attorney General, in the Defence filed on behalf of the Chief Land Registrar and himself took the position, informed no doubt by all the documents availed from the Ministry of Lands, that Deed Plan No. 193902 (which ITET held) belonged to LR No. 7022/166 located in Kiambu. Accordingly, he went on to plead at paragraph *6*, which I quoted earlier, that Karume had no valid claim against the Chief Registrar, "since it has confirmed to him that LR No. 209/10210 (the suit land) belongs to him (Karume) …" The Chief Land Registrar, the custodian of land records in Kenya, essentially entered a no contest and conceded that Karume's title was valid and effective. His officers who testified in court relied on the documents and confirmed that a letter of allottment did issue to Karume, he paid stand premium and other charges required of him, which were accepted, and the suit land was well and properly transferred to him after all the necessary steps such as surveying and preparation of the Deed Plan.

136. ITET on the other hand has not acknowledged and does not recognize Karume's title, which it argues is a forgery and part of the fraudulent scheme to defeat its rights over the suit property. It has based its

strident non recognition of Karume's title, notwithstanding the weight of evidence in the documents availed by the Chief Registrar through the Attorney General, largely on the fact that it holds a valid title which predated Karume's letter of allotment. Without a doubt, that argument by ITET would be impregnable were its title valid. I agree with the law as we stated it while sitting in Nyeri in Mbau Saw Mills Vs. Attorney General & Anor (supra) and has been stated in many other cases besides, that once what was formerly public land has been alienated and a grant issued to an individual, it becomes private land and ceases being public land available for allocation to another party. I would say, however, that where as here, it is shown that the first purported alienation was never effective or lawful and was rendered still born or sterile by reason of the procedural infirmities that show the root of title to be inefficacious, then the protection afforded valid titles does not apply and a title or grant suffering such fatal infirmities is as good as non- existent.

137. Whereas what I have said so far ought to suffice to dispose of this matter, I need add that the other basis for the attack on Karume's title is the alleged fraud and illegalities by which it was procured. At paragraph of 31 of its Defence and Counterclaim, which I cited earlier, ITET pleaded that Karume had "hatched a wide scheme in an effort to irregularly, fraudulently, and illegally acquire the suit property LR No. 209/10210." As I have already shown, from my reading of the record, the documents availed by the Chief Registrar through the Attorney General, the letter of allotment, payment, Deed Plan No. 278905 and Grant No. IR 130791 appear to me to be, facially and on a balance of probabilities, valid, lawful and effective. Moreover, they are acknowledged so by the Chief Registrar and the Attorney-General.

138. The law is, and has always been that he who alleges must prove, which finds statutory expression in sections 107(1), 108 and 109 of the *Evidence Act*. In this case, ITET alleged fraud and illegality against Karume in a bid to defeat the latter's title. I have gone through the dozen particulars of fraud and illegality stated in ITET's contention and I must observe that several of the matters alleged cannot, if given their natural meaning, amount to either fraud or illegality. But even assuming they did so, it is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See Magutu Electrical Services Ltd Vs. Miriam Nyawira Ngure & Anor [2019] eKRL.

139. In the present case, I am not at all persuaded that whatever attacks were directed at Karume and witnesses called by the Attorney General during cross-examination in any way demonstrated that Karume had been involved in illegalities and fraud. He was offered land vide a letter of allotment which he accepted by making payment of what was required to be paid. Survey was thereafter conducted by the Director of Survey or his officers whereafter he obtained his title. His case was that straight- forward. I see not an iota of evidence of collusion. I think it little matters that Karume did not accept the offer and pay, strictly within 30 days. He did eventually pay and within way much shorter period than Bitok was presented as having done in the ITET case, as I have already discussed. Like Kimondo, J. in Stephen Mburu & 4 Others Vs. Comat Merchant Ltd & Another [2012]eKRL, I would say of Karume; "it may well be true that [he] did not pay the stand premium and other charges within the prescribed time in a letter of allotment. But payment was accepted. A registrable interest has been created and title issued. The registered interest ranks higher than the transient rights in the letters of allotment."

140. ITET called Zablon Agwata Mabea as a witness. He had retired as Commissioner of Lands and did not testify in official capacity. The circumstances of his coming to testify have already been set out

herein. He was Mr. Oduol's personal client. He, somehow, became aware of this case on a visit to Mr. Oduol, whereupon he decided to volunteer evidence. His testimony was simply to deny that he signed the Grant to Karume. He claimed the signature said to be his was a forgery. In so doing, he was alone in denying that signature. Nowhere in the records at the Ministry of Lands did any officer ever doubt the authenticity of the Commissioner's signature on Karume's Grant. And it is for this reason Mr. Muchoki for Karume contends, and not with some justification, that this witness came in merely to muddy the waters. He never once complained that his signature had been forged. In fact, his position was that his signature was routinely forged but no reports were made to the police. Therein, in my estimation, is one of the maladies effecting land records administration in Kenya: forgery and falsification of records are seen as normal fare, not the felonies they are that bring the whole system into disrepute and allowing officer and former officers to shift at positions and will on the question whether the disputed signatures are genuine or fake. ITET made no effort to obtain an expert witness to compare Mr. Mabea's known signatures with the disputed one so as to establish whether the signature on Karume's Grant was forged. That failure to call such witness means as it must, that the allegation of forgery remains just that, an allegation.

141. As was stated in Jennifer Nyambura Kamau Vs. Humphrey Mbaka Nandi [2013]eKLR;

> "If an expert witness is necessary, the evidential burden was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side." I think, with respect, that ITET's attempt to impeach Karume's title by raising allegations of fraud fails because the requisite evidence in proof of the fraud to the required standard was not made available.

142. It must follow that, in my respectful view, the learned judge erred in holding that "evidence which was adduced through documents clearly show (sic) that Karume's title was fraudulently obtained. There is overwhelming evidence of falsification of documents which were all intended to aid Karume. All these (sic) was apparently being done to exploit a mistake in the grant by (sic) ITET." As I have endeavored to show, the overwhelming documentation at the Ministry of Lands brought to court by the Attorney General spoke clearly and unmistakably to the correctness and validity of Karume's documents. The only mistake which is clearly recognizable is in the date of the registration of the Grant as 2nd July 2011 which, given the presentation and payments (which come before or concurrently with registration) occurred on 6th and 7th July 2011, can only mean that the date of 2nd July 2011 was inadvertent clerical error as was argued by counsel for Karume.

143. It is, however, ironical that the learned judge was prepared to import and apply the notion of mistake to sanitize the entire corpus of grave errors, irregularities and allegations that afflict ITET's title. As I have indicated before, ITET's entire case was premised on the correctness of its Grant Number, which is IR No. 66157, with Deed Plan No. 193902. Those are the documents they produced. That was their submission through and through. Nowhere did ITET suggest that there was a mistake and it did not plead one. I think, with respect, that it is not permissible for a judge to so radically alter the case of a party at the judgment stage. It is trite law that parties are bound by their pleadings, which is a cardinal facet of the adversorial system of justice such as our own, so as to avoid the spectre of the case one confronts being a moving target, a now-you-see-now-you- don't, and also to avoid claims of bias and an attempt by the court to aid none party, as have been made against the learned judge. Mistake was not pleaded by ITET and its case never proceeded, nor was resisted, on the basis of mistake. Therefore, as a jurisdictional question, the learned Judge had no power to decide the case on the basis of that unpleaded issue. See Charles C. Sande Vs. Kenya Cooperative Cremeries Ltd, Civil Appeal No. 154 of 1992.

144. I have said enough, perhaps more than enough, though in a case as voluminous as this one, one doubts whether one has said enough, to show that of the three titles, the one that is correct, valid and legal, consistent with the position taken by the Chief Registrar and the Attorney-General from the records kept by the former, is Grant Number IR 130791 over LR No. 209/10210 as shown in Deed Plan No. 278905, held by Karume. Accordingly, all the others herein are irregular, unlawful, null and void.

145. Being of that mind, the dispositive orders I would propose are as follows;

a. Civil Appeal No. E505 of 2020 be and is hereby dismissed with costs.

b. Civil Appeal No. E519 of 2020 be and is hereby allowed.

c. The judgment and decree of the Environment and Labour Court at Milimani, Obaga, J., dated 27th October 2020 be and is hereby set aside save as it dismisses ELC No. 47 of 2010.

d. In substitution therefor, ELC Case No. 816 of 2012 is allowed as prayed, and the counterclaim therein is dismissed.

e. The appellant in Civil Appeal No. 519 of 2020 shall have the costs of this consolidated appeals and of the consolidated suits at the Environment and Land Court.

As Ali-Aroni & Achode, JJ.A agree, it is so ordered.

Judgment Of Ali-aroni, JA

1. I have had the privilege of reading in draft the well-crafted and reasoned judgment of my brother Kiage, JA.

2. Indeed, days are gone when a title deed was sacrosanct and assured one of ownership of a property. For now, a title deed is but just a piece of paper with information that has to be verified with the Office of the Chief Land Registrar, and even then an official search may not re-assure one that the title is authentic, one has to dig deeper to get to the root of the title.

3. The circumstances that befell the three respective parties in this matter speak to the situation currently facing our country as regards ownership of land. Joseph Ndungu Gathondu and others, Insurance Training and Education Trust (ITET), and Rajab Ahmed Karume, all claimed ownership of the suit property as each had a title. In the end, the court interrogated the process of how each title was acquired including the root of the said titles. That is indeed the position this Court and the Supreme Court have required of parties who claim ownership of land where there are a multiplicity of titles.

   The Supreme Court in Dina Management Limited v County Government of Mombasa & 5 Others [2023] eKLR stated; -

   > "As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge, <u>it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."</u> (Emphasis added)

4. In this case for Gathondu and Co. they disowned the title in their possession and as observed by the trial court in paragraph 29 of its judgment the title was a forgery, which they admitted, stating that they are yet to acquire a title and claiming that Karume had taken their documents which he used to

process his title. The deed plan used by them to process the fake title belonged to land in Thika, which could not have entitled them to a title in Nairobi.

5. ITET on its part bought a letter of offer from one Paul Boit (deceased). From the evidence on record Paul Boit had not accepted the letter of offer nor paid the requisite fees before he died. No succession proceedings were placed before the court as proof that his estate had the mandate to deal with the land subject matter. Nevertheless, the administrators of his estate sold the offer letter to ITET, which paid the requisite premium. However, evidence on record shows that the deed plan used for purposes of processing ITET's title belonged to land in Kiambu. The surrounding circumstances leading to the issuance of the title dated 19th June 1995, to ITET are suspect. Further, in the case of Torino Enterprises Limited vs. Attorney General (Petition 5 (E006) of 2022 [2023] KESC 79 KLR the Supreme Court stated inter alia that an allotment letter is just but an offer not capable of passing any interest.

6. On the other hand, Rajab Ahmed Karume a latecomer produced a letter of offer, deed plan No. 278905, and a title for LR No. 209/10210 which was issued to him having paid the stand premium and met all the requisite conditions. The evidence placed before the court from the Chief Land Registrar's Office supported the process of acquisition of title by Rajab Ahmed Karume.

7. As Kiage, JA has gone to lengths to interrogate the root of the competing titles, I need not restate the evidence placed before us suffice it to add that I fully agree with his findings.

Judgment of L. Achode, JA

1. I have had the advantage of reading in draft the judgment of Hon. P. Kiage JA. I am in full agreement with his reasoning and conclusions and, therefore have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

....

JUDGE OF APPEAL

K. ACHODE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR