



**Wamunyoro Investments Limited v Ohas & 2 others (Environment & Land Case E242 of 2022) [2024] KEELC 1553 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E242 OF 2022**

**JO MBOYA, J  
MARCH 14, 2024**

**BETWEEN**

**WAMUNYORO INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**JOHN MICHAEL OHAS ..... 1<sup>ST</sup> DEFENDANT**

**COLUMBUS TWO THOUSAND LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The dispute beforehand touches on and concerns ownership of a property otherwise known as L.R No. 209/12077 [I.R. No. 90923] [hereinafter referred to as the suit property], which is being contested between the Plaintiff herein on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, on the other hand.
2. For coherence, the instant suit was commenced and originated vide Plaint dated the 20<sup>th</sup> of July 2022 and in respect of which the Plaintiff herein has sought for the following reliefs: [verbatim]
  - i. A declaration that the Plaintiff is the lawful registered absolute owner of all that parcel of land known as L.R No. 209/12077 [ I.R. No. 90923].
  - ii. A permanent injunction restraining the 1st and 2nd Defendants whether by themselves, their employees, servants, agents or any other person(s) whosoever and however acting in connection with and/or under their instructions from excavating, carrying out any construction works, building any structures, carrying out any subdivisions, transferring, trespassing, encroaching, alienating, interfering with and/or dealing in any manner whatsoever and howsoever with the Plaintiff's parcel of land known as L.R No. 209/12077 [ I.R. No. 90923].



- iii. A declaration that the Defendants' activities and actions on the official documents and records at the Lands Registry on the Plaintiff's parcel of land known as LR. No. 209/12077 [I.R No. 90923] were irregular, fraudulent and therefore illegal and that the same be and are hereby nullified and cancelled accordingly.
  - iv. A declaration that the 2nd Defendant's Title known as LR. No. 209/12077 [IR. No. 90923] was obtained fraudulently, irregularly and illegally and that the same is therefore invalid, null and void.
  - v. An order directing the 3rd Defendant to rectify the register in the land's office to cancel all unlawful entries on behalf of the 1st and 2nd Defendants and indicate the Plaintiff as the lawful and proper registered proprietor of all that parcel of Land known as LR. No. 209/12077 [IR. No. 90923].
  - vi. An order directing the 3rd Defendant herein to cancel the Title known as LR. No. 209/12077 [I.R No. 213651] in the name of the 2nd Defendant.
  - vii. General and punitive damages.
  - viii. Costs of the suit.
  - ix. Interest in (g) and (h) thereon at court rates from the date of filing suit until payment in full.
  - x. Such other and further relief that this Honourable Court may deem just and fit to grant.
3. Upon being served with the Plaint and Summons to enter appearance, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant[s] herein duly entered appearance and thereafter filed a Statement of Defense and Counterclaim dated the 10<sup>th</sup> of November 2022 and in respect of which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought for various reliefs as hereunder:
- i. A declaration that the 2nd Defendant is the lawfully registered and absolute owner of all that property known as LR. No. 209/12077 [I.R No. 213651].
  - ii. A declaration that the purported Title known as L.R No. 209/12077 I.R No. 90923; was obtained fraudulently, irregularly and illegally and that the same is invalid, null and void.
  - iii. A permanent injunction restraining the Plaintiff whether by itself, its servants or agents or otherwise however from remaining on or continuing in occupation of the suit property, LR. No. 209/12077 I.R No. 213651.
  - iv. A permanent injunction restraining the Plaintiff whether by itself, its servants, or agents or otherwise however from subdividing, selling, further charging, transferring and/or in any manner whatsoever and howsoever interfering or dealing with the suit property LR. No. 209/12077 [I.R No. 213651].
  - v. An order directing the Plaintiff to deliver vacant possession of the suit premises being property known as LR. No. 209/12077 [I.R No. 213651].
  - vi. An order of eviction directed against the Plaintiff to be evicted and removed from the suit property being property known as LR. No. 209/12077 [I.R No. 213651].
  - vii. An order directing the 3rd Defendant to rectify the Land register and cancel all the illegal and fraudulent entries made by and on behalf of the Plaintiff, and reflect the 2nd Defendant as the duly registered and absolute owner of the suit property known as LR. No. 209/12077 [I.R No. 213651].



- viii. An order directing the 3rd Defendant to cancel the purported Title known as L.R No. LR. No. 209/12077 [I.R No. 90923] registered in the name of the Plaintiff.
  - ix. The OCS Embakasi Police Station to ensure compliance with Orders (c), (e) and (f) above.
  - x. General damages for trespass
  - xi. Punitive and exemplary damages.
  - xii. Costs of the suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
  - xiii. Any such other or further relief as this Honourable Court may deem appropriate.
4. Subsequently, the Plaintiff herein filed a Reply to Defense and Defense to Counterclaim dated the 1<sup>st</sup> of December 2022. For clarity, the Plaintiff herein disputed the averments contained and/or alluded to at the foot of the counterclaim.
  5. On the other hand, the 3<sup>rd</sup> Defendant similarly entered appearance and filed a Statement of Defense dated the 26<sup>th</sup> of October 2022; and wherein the 3<sup>rd</sup> Defendant contended inter-alia, that even though the suit property was hitherto allocated to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the said Defendants failed to comply with the terms of the Letter of allotment, which thereafter lapsed and/or stood extinguished by operation of the law.
  6. Other than the foregoing, the 3<sup>rd</sup> Defendant also contended that the suit property was subsequently allocated to and in favor of Karandi Farm Limited, Peter Nduati Mbugua and Pauline Muringe, respectively , vide Letter of allotment dated the 30<sup>th</sup> of April 1999, issued by and on behalf of the Commissioner of Lands.
  7. Be that as it may, the subject matter came up for pretrial directions on the 21<sup>st</sup> of June 2023, whereupon the respective Parties confirmed to the court that same had filed and exchanged all the requisite pleadings, List and Bundle of documents and witness statements. Furthermore, the advocates for the Parties also confirmed that the subject suit was ready for Hearing.
  8. Arising from the foregoing position, the Honorable Court proceeded to and certified the matter as ready for hearing, culminating into the matter being set down for Hearing on various dates.

**Evidence by the Parties:**

**a. Plaintiff's case:**

9. The Plaintiff's case gravitates and revolves around the Evidence of one witness, namely, Sammy Silas Komen Mwaita, who testified as PW1.
10. It was the testimony of PW1 that same is currently a Principal officer of the Plaintiff's company in charge of the management of the company properties, inter-alia the suit property. Furthermore, the witness averred that by virtue of being the designated/principal officer pertaining to the management of the Plaintiff's properties, same [witness] is conversant with and knowledgeable of the facts pertaining to and concerning the subject matter.
11. On the other hand, the witness also averred that in respect of the instant matter, same [witness] has since recorded two [2] sets of witness statements dated the 26<sup>th</sup> of October 2023 and 27<sup>th</sup> of October 2023, respectively. Besides, the witness herein sought to adopt and rely on the contents of the two witness statements.



12. Suffice it to point out that the witness statement dated the 26<sup>th</sup> of October 2023 and the 27<sup>th</sup> of October 2023, respectively, were thereafter adopted and constituted as the evidence in chief of the witness.
13. Other than the foregoing, the witness also averred that the Plaintiff herein has filed a List and bundle of documents dated the 20<sup>th</sup> of July 2022; containing a total of 31 documents and which documents the witness sought to tender and produce before the court as Exhibits on behalf of the Plaintiff.
14. There being no objection to the production of the documents at the foot of the List dated the 20<sup>th</sup> of July 2022, the named documents were thereafter produced and admitted as Plaintiff's Exhibit P1 to P31, respectively.
15. Additionally, the witness herein adverted to the Plaint dated the 20<sup>th</sup> of July 2022, and sought to adopt and reiterate the contents thereof. Instructively, the contents of the Plaint and the Verifying Affidavit attendant thereto were thereafter adopted and constituted as further evidence on behalf of the Plaintiff.
16. Other than the foregoing, the witness implored the Honourable court to find and hold that the suit property lawfully belongs to and is registered in the name of the Plaintiff company.
17. On cross examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness pointed out and reiterated his averment[s] that same is indeed a principal officer of the Plaintiff company and thus by virtue of being such a principal officer, same [witness] is conversant with and knowledgeable of the facts pertaining to the instant matter.
18. Furthermore, the witness averred that by virtue of being the person in charge of the management of the properties belonging to the Plaintiff company, same [witness] is therefore conversant with the ownership status pertaining to and concerning the suit property.
19. In any event, it was the evidence of the witness that the suit property belongs to and is registered in the name of the Plaintiff company and in this regard the witness alluded to a Certificate of Title/Grant bearing the name of the Plaintiff company.
20. On the other hand, it was the testimony of the witness that what constitutes the suit property was lawfully allocated to Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, respectively, who thereafter complied with the terms of the letter of allotment culminating into the issuance of a Grant executed on the 31<sup>st</sup> of December 2002.
21. Whilst under further cross examination, the witness averred that the Grant which was executed on the 31<sup>st</sup> of December 2002 was indeed executed by him [witness], during his tenure as the Commissioner of Lands. At any rate, the witness added that the Grant over and in respect of the suit property was registered at 16.58hrs and that the registration of same was sanctioned by a Registrar of Titles bearing number 031.
22. It was the further testimony of the witness that the Grant which was issued and executed on the 31<sup>st</sup> of December 2002 indicated that the land at the foot thereof bore survey Plan number 192966.
23. Besides, it was the testimony of the witness that the Grant relating to the suit property has a copy of the Deed Plan duly annexed thereto.
24. Furthermore, the witness testified that the Grant in question also contains entry number two [2], which entry is stated to relate to and/or concern the transfer of the suit property to and in favor of the Plaintiff company.



25. Additionally, the witness averred that the Grant which was ultimately transferred to and in favor of the Plaintiff has never been revoked and/or rescinded. Similarly, the witness also testified that the transfer to and in favor of the Plaintiff herein has also never been revoked.
26. Whilst under further cross examination, the witness averred that the documents at pages 30 of the Plaintiff's bundle of documents relates to the Deed of Indemnity pertaining to and concerning I.R No. 90923, which was booked at the lands office on the 26<sup>th</sup> of April 2011.
27. Be that as it may, the witness testified that upon examination of the Grant and the attendant Deed Plan, it was evident that the grant in question touched on and/or concerns land reference numbers which are synonymous and/or same. However, the witness averred that even though the land reference numbers are the same, it was not possible for two [2] Titles/Certificate of Titles to share the same deed plan number.
28. Whilst under further cross examination the witness referred to the document at page 31 of the Plaintiff's bundle of document and identified same as a copy of the Kenya gazette dated the 17<sup>th</sup> of July 2017. In any event, the witness averred that item 41 on the face of the said Kenya gazette notice relates to L.R No. 209/12077 (I.R No. 90923). Furthermore, the witness averred that the item alluded to, namely, item 41, touches on and/or concerns the parties/disputants before the court herein.
29. Be that as it may, it was the testimony of the witness that the gazette notice which has been alluded to, relates to the determination that was made by the National Land Commission and wherein National Land Commission declared that the suit property belongs to the Plaintiff. Instructively, the witness clarified that the Title in favor of the Plaintiff was upheld.
30. Other than the foregoing, it was the testimony of the witness that the same gazette notice also alludes to the fact that the Title in favor of the 2<sup>nd</sup> Defendant, pertaining to and concerning the suit property was revoked.
31. Additionally, it was the testimony of the witness that same [witness] is not aware of any court order or at all that has challenged, impugned and/or revoked the gazette notice in question.
32. To the contrary, the witness averred that the Certificate of Title/Grant in the name of the Plaintiff company remains lawful and valid.
33. Furthermore, it was the testimony of the witness that the suit property was transferred and registered in the name of the Plaintiff's predecessor on the basis of a Deed plan number 192966. At any rate, the witness herein pointed out that the Deed plan number which was utilized to register the Title in favor of the Plaintiff's predecessor could similarly be deployed for purposes of registration of a Certificate of Title in favor of the 2<sup>nd</sup> Defendant herein.
34. When pressed further, the witness herein averred that it would not have been possible to register a second [2] Grant/Certificate of Title over the same piece of land on or about the 11<sup>th</sup> of September 2019.
35. Suffice it to point out that the witness contended that the registration and issuance of the second [2] Grant over and in respect of the suit property was irregular, illegal and unlawful.
36. On cross examination by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness averred that same [witness] was previously the Commissioner of Lands. For coherence, the witness averred that same was the Commissioner of Lands between the years 1993 to 2003.



37. Additionally, it was the evidence of the witness that by virtue of having been a Commissioner of Lands, same [witness] was therefore privy to and knowledgeable of the procedures attendant to the allocation of unalienated Government land.
38. Besides, it was the testimony of the witness that the suit property was previously allocated to Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe respectively and same were issued with a Letter of allotment.
39. At any rate, it was the testimony of the witness that prior to issuance of a Letter of allotment, it behooves the allottee [Applicant] to make an application for allotment of land in writing. At any rate, the witness averred that the application for allotment of land could be addressed to various Government agencies including the local authority concerned, the Provincial administration, the Commissioner of Lands or to the President of the Republic of Kenya, as it was during the tenure of the Government *Land Act*, Chapter 280 Laws of Kenya.
40. Nevertheless, the witness testified that irrespective of the addressee of the application letter, the application letters seeking for allotment of land, would converge at the offices of the Commissioner of Lands, who would handle the issue of allotment.
41. Whilst under further cross examination, the witness averred that the Letter of allotment which was issued to and in favor of Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, respectively, bore a Land reference number, namely, L.R No. 209/12077 (I.R No. 90923) – Nairobi.
42. Furthermore, it was the testimony of the witness that the parcel numbers would ordinarily be generated by the Director of Survey and that the land reference number would be contained in the survey plan; also known as F/R. In any event, it was the testimony of the witness that the survey plan would be kept by the office of the Director of Survey.
43. Upon being referred to the witness statement of one Gordon Ochieng, who is the Director of Land Administration, Ministry of Lands, Public Works, Housing and Urban Development, the witness averred that the statement of Gordon Ochieng has duly captured and enumerated the process attendant to the allocation of land.
44. However, it was the testimony of the witness that even though the witness statement of Gordon Ochieng has substantially captured the process pertaining to allocation of land, the said witness statement has however omitted a few pertinent aspects. In this regard, the witness averred that where the land subject to allotment has already been surveyed and has a parcel number, then the letter of allotment would not ordinarily be accompanied with a Part Development Plan [PDP].
45. It was the further testimony of the witness that the letter of allotment which was issued to and in favor of Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, respectively did not allude to a Plan number on the face thereof.
46. However, the witness added that there was no plan number alluded to because the property which was being allocated had already been surveyed and assigned a land reference number.
47. Whilst under further cross examination, it was the testimony of the witness that the Letter of allotment to and in favor of Karandi Farm Ltd, Peter Nduati and Pauline Muringe also bore the authority reference number 102749/31/GA/X, which confirms that the Letter of allotment was lawfully issued by and on behalf of the Commissioner of Lands. In any event, the witness added that the authority in respect of the allocation herein is traceable to file volume [x].



48. On further cross examination, the witness averred that the authority in question would be discernable on the face of the letter forwarding the letter of allotment. Nevertheless, the witness added that even though there is the authority which has been alluded to at the foot of the authority letter, same [witness] has never seen the letter showing the authority.
49. On the other hand, the witness testified that the suit property which was subsequently allocated to and in favor of Karandi Farm Ltd, Peter Nduati and Pauline Muringe was allocated on the basis of a survey plan which was prepared on the 25<sup>th</sup> of January 1995. In any event, the witness added that the survey plan/deed plan also bore the number which was assigned thereto by the Director of Survey.
50. Be that as it may, the witness testified that the survey in question which gave right to the Survey plan was undertaken by one Mr. [now Professor] G O Wayumba.
51. Whilst under further cross examination, it was the testimony of the witness that the preparation of the survey plan by Professor G. O. Wayumba was undertaken in the presence of the allottees.
52. On the other hand, it was the testimony of the witness that the suit property had hitherto been allocated in favor of the 2<sup>nd</sup> Defendant vide Letter of allotment reference number 88767/IV/142. Besides, the witness averred that the letter of allotment was dated the 3<sup>rd</sup> of February 1994 and same bore/referenced Plan number 42149314.
53. Notwithstanding the foregoing, the witness averred that same is also aware that at the time when the 2<sup>nd</sup> Defendant was allocated the suit property, the allocation was done alongside other plots which were abbreviated as plots A, B, C, D and E, situate at Embakasi Area.
54. While still under cross examination, the witness averred that the Part Development Plan [PDP] which was attached to the initial Letter of allotment issued in favor of the 2<sup>nd</sup> Defendant did not contain a duly approved PDP. In particular, the witness clarified that the attached PDP did not have the signature of the Commissioner of Lands.
55. Other than the foregoing, the witness averred that the 2<sup>nd</sup> Defendant herein generated a letter addressed to the Commissioner of Lands and wherein the 2<sup>nd</sup> Defendant was signifying the acceptance of the allotment dated the 3<sup>rd</sup> of February 1994. Besides, the witness averred that the letter in question also alluded to a bankers cheque which was enclosed towards and in payment of part of the stand premium contained in the body of the Letter of allotment.
56. In any event, the witness added that vide the said letter of acceptance, the 2<sup>nd</sup> Defendant was also intimating to the Commissioner of Lands that same [2<sup>nd</sup> Defendant] had also put in place certain arrangements to procure a banking facility to facilitate the payment of the balance of the statutory levies at the foot of the letter of allotment.
57. Other than the foregoing, it was the testimony of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein indeed procured and obtained an indent from the Office of the Commissioner of Lands. Furthermore, the witness averred that the indent was in respect of L.R No. 209/12077.
58. Other than the foregoing, it was the testimony of the witness that subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein wrote a letter requesting for a certified Deed plan for purposes of preparation of a new grant. In this regard, the witness alluded to the letter which is contained in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' bundle of documents.
59. Whilst under further cross examination, the witness averred that as a principal officer of the Plaintiff company, same [witness] is privy to and knowledgeable of the directorship of the Plaintiff company.



60. In any event, the witness further averred that the current directors of the Plaintiff company are H.E [Hon] Rigathi Gachagua and Dorcas Gachagua, respectively. Additionally, the witness also averred that same is also privy to and /or knowledgeable of the directorship of Karandi Farm Ltd.
61. As pertains to the request for a certified copy of the Deed plan, it was the testimony of the witness that same was applied for by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Furthermore, the witness averred that subsequently a certified copy of the Deed plan number 192966 was duly issued and it is the Deed plan which was utilized for purposes of registering the new Grant in favor of the 2<sup>nd</sup> Defendant in the year 2019.
62. Other than the foregoing, the witness averred that the suit property, which was hitherto allocated in favor of Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively, was ultimately transferred to and in favor of the Plaintiff company. In this regard, the witness clarified that the Plaintiff company was not the allottee of the suit property, but same [Plaintiff company] was a purchaser for value in respect of the suit property.
63. On the other hand, it was the testimony of the witness that the Grant to and in favor of the 2<sup>nd</sup> Defendant which was registered in the year 2018, was registered long after the suit property had been registered in the names of Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively and thereafter transferred to the Plaintiff company. In this regard, the witness testified that the registration of the Grant in favor of the 2<sup>nd</sup> Defendant, was undertaken on the face of an existing Grant/Certificate of Title.
64. According to the witness, it was not legally possible to undertake the registration and issuance of a new Grant in favor of the 2<sup>nd</sup> Defendant herein, when the Grant in favor of the Plaintiff company was still in existence and had not been revoked.
65. On examination by the court, the witness herein stated that during his tenure as the Commissioner of Lands, same [witness] was the one who would approve the allocation of public land upon receipt of the application letters. Furthermore, the witness averred that the application for allotment would come from various Government agencies, inter-alia the Local authorities, Town clerks and even the Provisional administration.
66. On the other hand, it was also the testimony of the witness that the Letters of allotment would ordinarily contain terms and conditions on the face thereof; as well as special conditions, which included the intimation that the stand premium/statutory charges contained on the face of the letter of allotment, would be payable within 30 days from the date of issuance of the letter of allotment.
67. Additionally, it was the testimony of the witness that even though the payments as pertains to the statutory charges could be done in installments, nevertheless, the witness clarified that the installments would have to be completed [finalized] during the 30- day period and not otherwise.
68. Other than the foregoing, the witness also averred that where the acceptance and payment of the statutory dues were never made and/or paid within the set timelines, the term of the letter of allotment would lapse and hence same would cease to exist.
69. With the foregoing testimony, the Plaintiff's case was closed.

**b. 1<sup>st</sup> and 2<sup>nd</sup> defendants' case:**

70. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case revolves around the Evidence of two [2] witness namely, John Michael Ohas and Professor Gordon Okumu Wayumba, who testified as DW1 and DW2, respectively.



71. It was the testimony of the witness [DW1] that same is the 1<sup>st</sup> Defendant and similarly a director of the 2<sup>nd</sup> Defendant. In this regard, the witness averred that same was therefore conversant with and knowledgeable of the facts pertaining to the instant matter.
72. Furthermore, the witness also averred that in respect of the instant matter same has recorded a witness statement dated the 10<sup>th</sup> of November 2022 and which witness statement, the witness sought to adopt and to rely on as his evidence in chief. Instructively, the witness statement dated the 10<sup>th</sup> of November 2022, was thereafter adopted and constituted as the evidence in chief of the witness.
73. Additionally, the witness herein also adverted to a further witness statement dated the 6<sup>th</sup> of March 2023, which the witness also sought to adopt and rely on as his further evidence in chief.
74. Suffice it to point out that the witness statement dated the 6<sup>th</sup> of March 2023 was thereafter adopted and constituted as the further evidence in chief of the witness.
75. On the other hand, the witness also alluded to a supplementary witness statement dated the 4<sup>th</sup> of July 2023; and similarly sought to adopt and rely on same as additional evidence in chief. For good measure, the supplementary witness statement dated the 4<sup>th</sup> of July 2023 was adopted and constituted as the evidence in chief of the witness.
76. Other than the foregoing, the witness alluded to the List and bundle of documents dated the 10<sup>th</sup> of November 2022, containing 31 documents and which the witness sought to tender and produce before the court. However, an objection was taken to and in respect of various documents, namely, documents number 4, 6, 7, 10, 11, 14, 16, 18, 19 and 25 respectively.
77. Arising from the objection pertaining to and concerning the various documents, the court was called upon to render a Ruling and whereupon the court proceeded to and upheld a segment of the objection. For coherence, documents numbers 4, 6, 7, 10, 11, 14, 16, 18, 19 and 25 were marked for identification.
78. On the other hand, upon the delivery of the Ruling, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants intimated to court that same would not be desirous to produce and/or utilize documents number 19 and 25 and thus Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought to have the said documents expunged from record.
79. Arising from the request and application by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, documents number 19 and 25 at the foot of the list dated the 10<sup>th</sup> of November 2022, were thereafter expunged from the record of the court.
80. Be that as it may, the rest of the documents save for document[s] numbers 4, 6, 7, 10, 11, 14, 16 and 18, were admitted as Exhibits.
81. On the other hand, the witness herein also alluded to the List and bundle of documents dated the 4<sup>th</sup> of July 2023; and containing 14 documents, which the witness sought to tender and produce before the Honourable court.
82. Suffice it to point out that an objection was therefore taken to the admissibility of documents numbers 2, 3 and 11 at the foot of the List of documents dated the 4<sup>th</sup> of July 2023; culminating into yet another Ruling being rendered by the court whereupon the impugned documents were marked for identification as DMFI 33, 34 and 41. However, the rest of the documents at the foot of the list and bundle of documents dated the 4<sup>th</sup> of July 2023; were duly produced and admitted as exhibits.



83. Furthermore, the witness herein [DW1] also alluded to a further list of documents dated the 4<sup>th</sup> of March 2023, containing seven [7] documents and which the witness sought to tender and produce before the court.
84. Be that as it may, another objection was taken by Learned counsel for the Honourable Attorney General pertaining to and concerning documents numbers 1, 2, 3 and 4, respectively.
85. Arising from the foregoing objection, the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought to have the impugned documents marked for identification. In this regard, the named documents [documents numbers 1, 2, 3 and 4] at the foot of the List dated the 4<sup>th</sup> of March 2023, were therefore marked for identification.
86. Other than the foregoing, the witness alluded to the statement of defense and counterclaim dated the 10<sup>th</sup> of November 2022; and sought to adopt and rely on same.
87. On cross examination by learned counsel for the Plaintiff, the witness herein stated that the 2<sup>nd</sup> Defendant was issued with a Letter of allotment which contained various terms and conditions. In particular, the witness stated that the letter of allotment intimated that the payments in respect of the statutory levies, were to be made within 30 days.
88. Besides, the witness also stated that there was also a requirement that the allottee [namely the 2<sup>nd</sup> Defendant] was also to issue a letter of acceptance within 30 days of the post mark.
89. Whilst under further cross examination, the witness averred that the 2<sup>nd</sup> Defendant indeed made part payments in the sum of Kes. 50,000/= only, which was made after two years from the date of issuance of the Letter of allotment. In any event, the witness averred that the payment of Kes. 50,000/= only was made towards and in part payments of the statutory levies.
90. It was the further testimony of the witness that same also made a further payment of Kes. 814,560/= only, which was the balance of the statutory levies due and payable to the Commissioner of Lands. However, the witness admitted and acknowledged that the payment of Kes. 814,560/= only was equally made out of time.
91. Whilst under further cross examination, the witness averred that even though the payment of Kes. 814,560/= only was made vide bankers cheque, same [witness] has conceded and admitted that the copy of the bankers cheque has neither been tendered nor produced before the court.
92. Other than the foregoing, the witness also averred that even though same [witness] was issued with a receipt, the receipt in question however, neither bears a serial number on the face thereof nor the date of issuance.
93. Further and in any event, the witness stated that the receipt which was issued to and in favor of the 2<sup>nd</sup> Defendant (sic) on account of the payment of Kes. 814,560/= only, similarly has no authentication.
94. Additionally, it was the evidence of the witness that though same [witness] and the 2<sup>nd</sup> Defendant did not pay the statutory levies within the designated statutory period, same [witness] however has reasons for the failure to pay within the set timelines.
95. Furthermore, it was the testimony of the witness that the sum of Kes. 50,000/= only which was alluded to vide the letter of acceptance, was clearly indicated to be towards part payment of the statutory levies.
96. Whilst under further cross examination, the witness averred that currently neither the 2<sup>nd</sup> Defendant nor himself is in occupation of the suit property. In any event, the witness stated that a dispute arose concerning and in respect to ownership of the suit property.



97. As pertains to whether same [witness] was privy to and knowledgeable of the determination that was made by the National Land Commission, the witness averred that same is indeed aware of the said determination. However, the witness added that same was never represented before the National Land Commission.
98. Whilst under further cross examination, the witness averred that he lodged a complaint with the National Land Commission. However, the witness ventured forward and stated that same is not aware of the decision of National Land Commission. In any event, the witness added that same never followed up to ascertain the outcome of the complaint that was mounted with the National Land Commission.
99. On further cross examination, the witness stated that same is neither privy to nor aware of the allocation of the suit property to and in favor of the Plaintiff herein. Furthermore, the witness also averred that same is not aware whether the Plaintiff herein has a Certificate of Title in respect of the suit property.
100. Be that as it may, when referred to the contents of the letter dated the 2<sup>nd</sup> of October 2014, the witness indicated that the letter in question came from the Ministry of Lands and that the contents thereof indicate that the suit property lawfully belongs to the Plaintiff.
101. On cross examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness herein [DW1] testified that same is before the court to testify on behalf of the 2<sup>nd</sup> Defendant as well as himself. In any event, the witness averred that the 2<sup>nd</sup> Defendant has three [3] directors namely his [witness wife], Hilary Ohas and himself.
102. It was the further testimony of the witness that though the 2<sup>nd</sup> Defendant was duly allocated the suit property; the Certificate of Title was never issued. In any event, the witness averred that same [witness] has never seen a Certificate of Title in favor of the 2<sup>nd</sup> Defendant.
103. Whilst under further cross examination, the witness averred that ordinarily survey is carried out by the Director of Survey or under his supervision. Further and in addition, the witness averred that same is knowledgeable of one, namely, Bernard Ogechi. In any event, the witness averred that same [witness] had issued a Power of Attorney in favor of Bernard Ogechi.
104. Additionally, the witness averred that the power of attorney in question was issued to and in favor of Bernard Ogechi to enable same to follow up the issuance of a Certificate of Title in favor of the 2<sup>nd</sup> Defendant.
105. Be that as it may, the witness stated that even though same has never seen the Certificate of Title in respect of the suit property, he [witness] was however made aware that a Certificate of Title had been issued in favor of the 2<sup>nd</sup> Defendant.
106. Other than the foregoing, the witness averred that same applied for allotment of land on or around the year 1993. For coherence the witness stated that the application for allotment of land was made to the Commissioner of Lands.
107. When pressed further, the witness stated that same did not apply for allotment, and to the contrary, the witness averred that the allotment in respect of the suit property was a direct Grant from the President/ Head of State.
108. With respect to whether or not same [witness] made payments as pertains to the statutory levies within 30 days, the witness averred that the payments were never made within 30 days.



109. In any event, the witness stated that same wrote a Letter dated 15<sup>th</sup> May 2012 and in respect of which same intimated to the Commissioner of Lands [ now defunct], that he would be making payments in bits and pieces.
110. Whilst under further cross examination, the witness averred that by the 15<sup>th</sup> of May 2012, same [witness] had not concluded payments on account of the stand premium and in any event same was still making payments.
111. Other than the foregoing, the witness testified that same was not aware of the Gazette Notice that was published by and on behalf of National Land Commission.
112. While under further cross examination, the witness averred that even though there is a statutory declaration which is purported to have been executed by him [witness], same averred that the statutory declaration was never executed by him. At any rate, the witness added that same was seeing the statutory declaration for the first time.
113. On further cross examination, the witness averred that same [witness] has never paid any land rates to and in respect of the suit property. Further and in addition, the witness averred that same was issued with the letter of allotment in the year 1994. Nevertheless, the witness clarified that same only made one payment upon the letter of allotment.
114. The second witness who testified on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein was one Professor Gordon Okumu Wayumba. Same testified as DW2.
115. It was the testimony of the witness that same is a Professor of Land Survey and Land Administration at the Technical University of Kenya [TUK]. Besides, the witness has also averred that same is also a licensed and registered surveyor. In any event, the witness added that same has practiced as a licensed and registered surveyor for more than 30 years.
116. Furthermore, the witness averred that same is conversant with and knowledgeable of the facts pertaining to the instant matter. Besides, the witness also testified that same has since recorded a witness statement dated the 10<sup>th</sup> of November 2022 wherein same articulated the facts pertaining to and concerning the subject matter.
117. Pursuant to and at the instance of the witness, the witness statement dated the 10<sup>th</sup> of November 2022; was thereafter adopted and admitted as the Evidence in chief of the witness.
118. Other than the foregoing, the witness herein also adverted to assorted documents contained at the foot of the List and bundle of documents dated the 10<sup>th</sup> of November 2022; and in particular, document number 5 thereof. For good measure, the witness herein sought to tender and produce before the court document number 5.
119. There being no objection to the production of document number 5, same was duly tendered and produced before the court as an Exhibit.
120. Furthermore, the witness also averred that same was also instructed by and on behalf of, inter-alia, the 2<sup>nd</sup> Defendant herein to undertake survey in respect of assorted plots which had been allocated to the named allottees.
121. On the other hand, the witness also testified that subsequently, the 2<sup>nd</sup> Defendant herein also instructed same to apply for a certified copy of the Deed plan in respect of the suit property, for purposes of generation of a new Grant.



122. To this end, the witness also ventured forward and produced the application for a certified copy of the Deed plan.
123. It was the further testimony of the witness that in the year 1994, same [witness] received formal instructions from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to undertake survey of the plot in question, which at the material point in time was still un-surveyed.
124. To facilitate the execution of the instructions, the witness testified that same was issued with a copy of the Letter of allotment in favor of the 2<sup>nd</sup> Defendant and which letter of allotment was dated the 3<sup>rd</sup> of February 1994. Thereafter, the witness averred that same proceeded to and undertook the designated survey in accordance with the instructions. Besides, the witness added that after the survey exercise, same [witness] generated a survey plan which was submitted to the Director of Survey for purposes of authentication and approval.
125. Additionally, the witness averred that the survey plan which was prepared by himself albeit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was thereafter approved and authenticated culminating into the issuance of a Deed plan, namely, Deed plan number 192966, dated the 25<sup>th</sup> of January 1995.
126. On the other hand, the witness averred that subsequently, the Deed plan which had been issued as a result of the survey plan was reported to have been lost and/or misplaced. Consequently, the witness averred that same was thereafter retained and instructed to apply for a certified copy of the Deed plan.
127. Whilst under further cross examination, the witness averred that the Deed plan is a critical document insofar as same is the document that binds the Government to proceed and issue the Certificate of Title. In particular, the witness testified that in the absence of a Deed plan, no lawful Certificate of Title/Grant can issue or at all.
128. It was the further testimony of the witness that the letter of allotment to and in favor of Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, respectively, alludes to and makes reference to a Deed plan that was generated as a result of the survey undertaken by the witness. However, the witness averred that same was never instructed to undertake any survey by and on behalf of the M/s Karandi Farm Ltd or at all.
129. On cross examination by learned counsel for the Plaintiff, the witness herein averred that same has indeed recorded a witness statement over and in respect of the instant matter. In any event, the witness added that the survey exercise which was undertaken by himself was done on the instruction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
130. Other than the foregoing, the witness testified that prior to and before undertaking the survey, same [witness] was issued with a copy of the letter of allotment by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In any event, the witness added that the letter of allotment which was handed over to him contains certain terms and conditions, which the allottee [read 2<sup>nd</sup> Defendant] was obligated to comply with.
131. Whilst under further cross examination, the witness testified that same was instructed and retained by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to apply for a certified copy of the Deed plan. In any event, the witness added that the application for a certified copy of the Deed plan was to facilitate the issuance of a new Grant.
132. It was the further testimony of the witness that towards and in a bid to procure a certified copy of the Deed plan, same obtained a statutory declaration duly executed by the 1<sup>st</sup> Defendant and which statutory declaration same [witness] attached to a copy of a letter addressed to the Director of Survey and which sought for the issuance of a certified copy of the deed plan.



133. Whilst under further cross examination, the witness averred that by the time when same [witness] made the application for a certified copy of the Deed plan, a Grant/Certificate of Title had already been issued to and in favor of Karandi Farm Ltd.
134. Be that as it may, the witness averred that the issuance of the Certificate of Title/Grant in favor of Karandi Farm Ltd was irregular, illegal and invalid.
135. On cross examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness averred that even though same was issued with a copy of the letter of allotment in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, same did not write to the Director of Land Administration to ascertain and/or authenticate the status of the letter of allotment.
136. Nevertheless, the witness added that upon being availed a copy of the letter of allotment, same [witness] proceeded to and undertook the survey pertaining to and concerning the suit plot.
137. Other than the foregoing, the witness averred that prior to and before allotment of land, it is imperative for a Part Development Plan [PDP] to be generated and issued. In any event, the witness pointed out that a Part Development Plan [ PDP] is necessary to authenticate whether the plot intended to be allocated is available or otherwise.
138. It was the further testimony of the witness that though there was a letter of allotment to and in favor of Karandi Farm Ltd, the said letter of allotment does not alludes to any Part Development Plan [PDP].
139. Whilst under further cross examination, the witness averred that the document at page 18 of the 1<sup>st</sup> Defendant's List and bundle of documents relates to a Survey plan/Cadastral plan. However, the witness clarified that the document in question was re-drawn by the Director of Survey.
140. On further cross examination, the witness averred that once a Letter of allotment is issued, the issuance of same denotes the completion of the process of allocation. In any event, the witness added that such allocation is final and cannot be revoked.
141. On cross examination as to whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants duly complied with the terms and conditions of the letter of allotment, the witness pointed out that same did not interrogate whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants duly complied with the terms of the letter of allotment.
142. Other than the foregoing, the witness testified that same [witness] is the one who applied for a certified copy of the Deed plan. However, the witness clarified that when same applied for a copy of the Deed plan, same [witness] did not realize that the statutory declaration had not been executed by the 1<sup>st</sup> Defendant.
143. As pertains to the usage of the Deed plan arising from the survey by himself [witness] to generate a Certificate of Title in favor of Karandi Farm Ltd, the witness averred that the said Deed plan could not have been used to generate the Grant/Certificate of Title in favor of Karandi Farm Ltd. In this respect, the witness testified that the said usage was illegal.
144. Furthermore, the witness herein testified that the transfer of the suit property to and in favor of the Plaintiff was fraudulent.
145. Upon being referred to the contents of paragraph 12 of the witness statement, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant duly followed and complied with the terms of the Letter of allotment. However, the witness clarified that same was neither privy to nor party to the payments of the statutory levies at the foot of the Letter of allotment.



146. Whilst under further cross examination, the witness stated that it is himself who made the request for a certified copy of the Deed plan. In any event, the witness has added that the request/application for a copy of the Deed plan was made vide letter dated 20<sup>th</sup> June 2017.
147. Other than the foregoing, the witness averred that same has since written to the Director of Survey to complain over the usage of the Deed plan arising from his [witness survey] towards the preparation and issuance of a Certificate of Title in favor of the Plaintiff.
148. Nevertheless, the witness herein averred that a Deed plan once duly approved and authenticated by the Director of Survey is statutorily required to be released directly to the Commissioner of Lands. In any event, the witness added that if the Deed plan was ever released to him [witness] then such a process would be irregular.
149. With the foregoing testimony, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' CASE was duly closed.

**c. The 3<sup>rd</sup> Defendant's case:**

150. The 3<sup>rd</sup> Defendant's case revolves around the evidence of five [5] witnesses, namely, Gordon Odeka Ochieng, Wilfred Muchai Kabue, Nyandoro Davis Nyambaso, Godffry Mburungo and Geoffrey Chania, Commissioner of Police, who testified as DW3, DW4, DW5, DW6 and DW7, respectively.
151. It was the evidence of DW3 [Gordon Odeka Ochieng] that same is currently the Director of Land Administration in the Ministry of Lands, Public works and Urban Development. In any event, the witness averred that same has worked with the ministry for more than 34 years.
152. Other than the foregoing, the witness averred that same is conversant with and knowledgeable of the facts pertaining to the instant matter. Furthermore, the witness averred that same has since recorded a witness statement dated the 26<sup>th</sup> of October 2022; and which statement the witness sought to adopt and rely on as his Evidence in chief.
153. Pursuant to and at the request of the witness, the witness statement dated the 26<sup>th</sup> of October 2022; was thereafter adopted and constituted as the Evidence in chief of the witness.
154. On cross examination by Learned counsel for the Plaintiff, the witness averred that the suit property was first allocated to and in favor of the 2<sup>nd</sup> Defendant in the year 1994. However, the witness added that the Letter of allotment in favor of the 2<sup>nd</sup> Defendant contained various terms and conditions, which the 2<sup>nd</sup> Defendant was obligated to comply with and/or adhere to. In particular, the witness averred that the 2<sup>nd</sup> Defendant was called upon to pay the stand premium amounting to Kes. 692,000/= only, together with other statutory levies.
155. Whilst under further cross examination, the witness averred that the 2<sup>nd</sup> Defendant herein proceeded to and paid the sum of Kes. 50,000/= only, towards and on account of part payments of the stand premium.
156. Be that as it may, the witness averred that the payment of the sum of Kes. 50,000/= only, which was made by and on behalf of the 2<sup>nd</sup> Defendant herein was made long after the Letter of allotment had lapsed and/or extinguished.
157. Furthermore, the witness averred that upon the lapse of the Letter of allotment which was issued to and in favor of the 2<sup>nd</sup> Defendant, the suit property reverted to the Government and became available for allocation. In this regard, the witness added that the land in question was thereafter allocated to M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe, respectively.



158. Whilst under further cross examination, the witness averred that by the time the suit property was being allocated to and in favor of M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe, respectively, the property had long been surveyed and a Deed Plan had been prepared in respect of the suit property. Consequently, the witness averred that insofar as the property had long been surveyed, there would be no need to undertake a fresh/new survey at all.
159. Additionally, the witness averred that the Commissioner of Lands duly allocated to and in favor of M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe, the land in question. Further, the witness averred that upon allotment, the allottees proceeded to and paid the requisite statutory levies, which were duly acknowledged and receipted by the Commissioner of Lands on the 18<sup>th</sup> of December 2002.
160. Other than the foregoing, the witness averred that though the allottees [Karandi Farm Ltd, Peter Nduati and Pauline Muringe] paid the statutory levies outside the 30-day period, same however sought for and obtained the authority of the Commissioner of Lands to pay outside the statutory duration.
161. In any event, the witness averred that upon the payments and acknowledgement thereof by the Commissioner of Lands, the Commissioner of Lands proceeded to and processed the Lease, culminating into the issuance of a Grant in favor of the allottees.
162. Further and in addition, the witness testified that upon the issuance of the Grant in favor of Karandi Farm Ltd, Peter Nduati and Pauline Muringe respectively, same became the lawful owners of the suit property and thereafter same [the Leasees] transferred the suit property to and in favor of the Plaintiff.
163. Whilst under further cross examination the witness stated that the Title in favor of the 2<sup>nd</sup> Defendant in respect of the suit property, was issued on the face of an existing Certificate of Title in favor of the Plaintiff herein and thus same is irregular, illegal and unlawful.
164. On cross examination by Learned counsel for the Plaintiff, the witness herein repeated that same is the Director of Land Administration in the Ministry of Lands, Public works, Housing and Urban Development. Furthermore, the witness averred that by virtue of his office, same is in charge of records pertaining to and concerning allocation of land.
165. It was the further testimony of the witness that the process pertaining to allocation of land entails various steps and offices. In particular, the witness averred that the process of land allocation would involve the Directorate of Physical Planning, Directorate of Survey, Office of Commissioner of Lands [now defunct] and ultimately the Office of the Chief Land Registrar, who is chargeable of the issuance of Certificate of Title/Grant.
166. On further cross examination, the witness averred that in respect of the allocation of the suit property, there was a Part Development Plan [ PDP] which was prepared to and in favor of the 2<sup>nd</sup> Defendant. However, the witness has added that even though the Part Development Plan [PDP] was attached to the letter of allotment in favor of the 2<sup>nd</sup> Defendant, the letter of allotment in favor of the 2<sup>nd</sup> Defendant lapsed when the 2<sup>nd</sup> Defendant failed to meet and/or comply with the terms thereof.
167. On the other hand, the witness averred that upon the lapse of the Letter of allotment to and in favor of the 2<sup>nd</sup> Defendant, the land in question became available for allocation and indeed same was allocated to and in favor of Karandi Farm Ltd, Peter Nduati and Pauline Muringe, vide a Letter of allotment which was issued in the year 1999.
168. Whilst under further cross examination, the witness averred that even though the Part Development Plan [PDP] is not captured in the Letter of allotment in favor of Karandi Farm Ltd, Peter Nduati



- and Pauline Mulinge, the suit property had however been surveyed and thus there was no need for preparation of another Part Development Plan [PDP].
169. On further cross examination, the witness reiterated that the Letter of allotment to and in favor M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe was lawfully issued and acted upon by the allottees culminating into the preparation of the Grant in favor of the said allottees.
  170. Other than the foregoing, the witness also testified that same is aware that one Professor Gordon Wayumba wrote a letter to the Director of Survey seeking for the issuance of a certified copy of the Deed Plan. In this regard, the witness has highlighted the document at pages 95 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Bundle of documents.
  171. On the other hand, the witness averred that M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge were lawfully allocated and thereafter registered as the proprietors of the suit property.
  172. As concerns the Certificate of Title issued to and in favor of the 2<sup>nd</sup> Defendant, the witness herein has averred that same was issued on the face of an existing Certificate of Title in favor of the Plaintiff. Furthermore, the witness has averred that the said Certificate of Title was issued illegally and without compliance with the requisite procedures and hence same ought to be revoked.
  173. The second witness who testified on behalf of the 3<sup>rd</sup> Defendant is Wilfred Muchai Kabue. Same testified as DW4.
  174. It was the testimony of the said witness [DW4] that same is currently an Assistant Director of Survey in the Ministry of Lands, Public Works, Housing and Urban Development. Furthermore, the witness averred that same is also a licensed land surveyor duly registered by the Institution of Surveyors of Kenya.
  175. Further and in addition, the witness averred that his registration number is 733 of 2008.
  176. Other than the foregoing, the witness testified that same has worked with the Directorate of Survey for more than 29 years and same is conversant with the process pertaining to survey. In any event, the witness averred that same is privy to and knowledgeable of the facts pertaining to the subject matter.
  177. Additionally, the witness averred that same has since recorded a witness statement dated the 6<sup>th</sup> of October 2022; and which witness statement the witness sought to adopt and rely on as his Evidence in chief. Consequently and in this regard, the witness statement was thereafter adopted and constituted as the Evidence in chief of the witness.
  178. Other than the foregoing, the witness also adverted to the List and Bundle of documents dated the 6<sup>th</sup> of October 2022; and thereafter same sought to produce documents numbers 16 to 28 at the foot of the aid list of documents.
  179. Suffice it to point out that the documents in question were thereafter tendered and produced before the Honourable court as Exhibits by and on behalf of the 3<sup>rd</sup> Defendant. For coherence, the documents were admitted as Exhibits D16 to D28, respectively on behalf of the 3<sup>rd</sup> Defendant.
  180. On cross examination by Learned counsel for the Plaintiff, the witness confirmed that the survey over and in respect of the suit property was undertaken in the year 1994 ; and thereafter a survey plan was generated and produced.
  181. Besides, it was the testimony of the witness that once a survey has been undertaken over a designated plot or a parcel of land, then there would be no basis and/or requirement for undertaking a second or subsequent survey over and in respect of the same property.



182. On cross examination by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness [DW4] pointed out that a Deed Plan is indeed a necessary requirement prior to and before the registration and issuance of a Certificate of Title. For coherence, the witness added that a Deed plan is an essential document underpinning the issuance of a new Grant.
183. Whilst under further cross examination, the witness averred that a Deed plan would inter-alia, delimit the acreage of the plot in question. Besides, the witness also averred that the preparation of a Deed plan is well stipulated and provided for under the law and that once a Deed plan is duly prepared, approved and authenticated by the Director of Survey, same is thereafter released directly to the Commissioner of Lands [now defunct].
184. On further cross examination, the witness averred that same is aware of a request for the issuance of a certified copy of a Deed plan, which was made by and on behalf of Professor Gordon Okumu Wayumba. Nevertheless, the witness added that same has never come across a copy of the correspondence which released the Deed plan to M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge.
185. Whilst under further cross examination, the witness averred that the Directorate of Survey received a letter from the Directorate of Criminal Investigations and in respect of which the DCI sought information pertaining to the veracity of the Deed plan. In any event, the witness added that upon receipt of the Letter from the Directorate of Criminal Investigation, the Director of Survey responded to the letter and clarified the status pertaining to the impugned Deed plan.
186. On further cross examination, the witness herein testified that same is not aware of any letter by and/or from the Commissioner of Lands, [now defunct] which released the Deed plan to M/s Karandi Farm Ltd.
187. The next witness who testified on behalf of the 3<sup>rd</sup> Defendant was Nyandoro David Nyambaso. Same testified as DW5.
188. It was the evidence of the said witness that same is currently the Chief Land Registrar in the Ministry of Lands Public Works, Housing Urban Development. Furthermore, the witness stated that by virtue of being the Chief Land Registrar, same is charged and chargeable with various duties, inter-alia, registration of assorted legal instruments touching on and concerning interests in land, safe custody of documents as well as boundary determination pursuant to the provisions of the [Land Registration Act, 2012](#).
189. As pertains to the subject matter, the witness averred that same has since recorded a witness statement dated the 26<sup>th</sup> of October 2022; and which statement same [witness] sought to adopt and to rely on as his evidence in chief. For coherence, the witness statement dated the 26<sup>th</sup> of October 2022; was thereafter adopted and admitted as the evidence in chief of the witness.
190. Additionally, the witness herein also alluded to a List and Bundle of documents dated the 26<sup>th</sup> of October 2022; containing a total of 15 documents, which the witness sought to adopt and rely on.
191. In this regard and in the absence of any objection to the documents, same were duly admitted as Exhibit[s] D1 to D15 on behalf of the 3<sup>rd</sup> Defendant.
192. On cross examination by learned counsel for the Plaintiff, the witness averred that by virtue of being the Chief Land Registrar, same is conversant with the process attendant to and concerning the preparation and ultimate issuance of Certificate of Titles/Grants.



193. On the other hand, the witness also averred that as concerns the suit property, there are two [2] sets of Titles, one registered in the name of the Plaintiff whilst the other is registered in the name of the 2<sup>nd</sup> Defendant. Nevertheless, the witness averred that the Title in favor of the Plaintiff herein was the first one to be issued.
194. Whilst under further cross examination, the witness averred that the Plaintiff's Title is the only lawful and legitimate Title over and in respect of the suit property. To the contrary, the witness averred that the Certificate of Title in favor of the 2<sup>nd</sup> Defendant was irregularly and illegally issued.
195. On cross examination by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness averred that the Chief Land Registrar is tasked with several obligations and/or responsibilities, including custody and preservation of records concerning landed properties, as well as offering advises to the cabinet secretaries on issues pertaining to Land registration. In any event, the witness added that the duties of the Chief Land Registrar are also stipulated and enshrined under the [Land Registration Act, 2012](#).
196. On further cross examination, the witness averred that the Office of the Director of Land Administration is the one that deals with the preparation of leases before same are escalated to the office of the Chief Land Registrar for registration.
197. Furthermore, the witness averred that the Certificate of Title in the name of the Plaintiff herein was registered in the year 2002; whereas the Certificate of Title being held by the 2<sup>nd</sup> Defendant was issued in the year 2019.
198. Other than the foregoing, the witness averred that the issuance of a Grant/Certificate of Title is anchored and/or premised on the existence of a Letter of allotment and not otherwise. In any event, the witness added that the term of the Grant will be derivable from the Letter of allotment.
199. Besides, the witness herein also testified that same is also conversant with and knowledgeable of the process pertaining to the preparation of a Deed of indemnity. In any event, the witness averred that a Deed of indemnity is a document that is prepared by and on behalf of the registered owner/proprietor of a designated property and whose purpose is to facilitate the re-construction of the register of a particular title/land, whose title has been misplaced and/or otherwise lost.
200. Whilst under further cross examination, the witness averred that the Deed of indemnity is also instrumental and paramount because the registered owner of the land covenants to indemnify the Government in the event that the information contained therein turns out to be false.
201. Be that as it may, the witness herein averred that same has neither tendered nor produced before the Honourable court any Gazette Notice pertaining to the issuance of the Deed of indemnity.
202. Other than the foregoing, the witness averred that prior to and before undertaking the reconstruction of a register on the basis of the Deed of indemnity, the concerned Land Registrar undertakes due diligence with a view to ensuring the authenticity of the Certificate of Title which is the subject of reconstruction.
203. On the other hand, it was the testimony of the witness that the Plaintiff's Title emanated from the transfer executed by M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively, who were the immediate preceding owners of the suit property.
204. Whilst under further cross examination, the witness herein testified that same is privy to and/or aware of the Certificate of Title issued in favor of the 2<sup>nd</sup> Defendant. In any event, the witness has averred that the Title in favor of the 2<sup>nd</sup> Defendant was issued by a Land Registrar. However, the witness added that



- the issuance of the said Certificate of Title to and in favor of the 2<sup>nd</sup> Defendant was irregular, illegal and unlawful.
205. The 4<sup>th</sup> witness who testified on behalf of the 3<sup>rd</sup> Defendant was Chief Inspector Godfrey Mburungo. Same testified as DW6.
  206. It was the testimony of the witness that same is currently attached to the Directorate of Criminal Investigation, Land Fraud unit. In any event, the witness averred that by virtue of his attachment to the Land Fraud unit, same is therefore privy to and/or conversant with the facts of the instant matter.
  207. Further and in any event, the witness averred that same has recorded a witness statement pertaining to and concerning the subject matter. In this regard, the witness adverted to the witness statement dated the 3<sup>rd</sup> of March 2023, which same [witness] sought to adopt and rely on as his Evidence in chief.
  208. Pursuant to and at the request of the witness, the witness statement dated the 3<sup>rd</sup> of March 2023; was duly adopted and admitted as the Evidence in chief of the witness.
  209. Other than the foregoing, the witness also adverted to the Supplementary List of documents dated the 3<sup>rd</sup> of March 2023; filed by and on behalf of the 3<sup>rd</sup> Defendant. In this regard, the witness sought to tender and produce same as Exhibit[s] before the court.
  210. Be that as it may, an objection was taken by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to documents number 3 and 4, respectively, at the foot of the List and Bundle of document[s] dated the 3<sup>rd</sup> of March 2023.
  211. Arising from the objection which was taken to the named documents, the Honorable Court proceeded to and rendered an interim order whereby the two [2] documents that were objected to were held in abeyance awaiting the delivery of a substantive Ruling on admissibility or otherwise.
  212. On the other hand, the court proceeded to and decreed that the rest of the documents namely, documents numbers 1, 2, 5, 6, 7, 8 and 9, which were not the subject of the objection be admitted as Exhibits. Consequently and in this regard, the named documents were duly admitted as Exhibit[s] D29 to D35 respectively.
  213. It was the further testimony of the witness that the various documents which same had tendered and produced before the court were procured and obtained by himself [Witness], during the investigations which were undertaken by himself.
  214. Furthermore, the witness herein also adverted to a Further/Supplementary List of documents dated the 11<sup>th</sup> of May 2023; and sought to produce the documents at the foot thereof. For clarity, there being no objection to the production of the said list and bundle of documents, same were produced and admitted as Exhibits D36 to D51, respectively, on behalf of the 3<sup>rd</sup> Defendant.
  215. On cross examination by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness herein testified that same became seized of the instant matter with a view to investigating the criminal aspect pertaining to and concerning the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants procured and obtained the Certificate of Title.
  216. The witness averred that the investigations which were being carried out and undertaken, was informed by a Letter which was written to the office of Directorate of Criminal Investigation[s] [DCI] by the Honorable Attorney General. In any event, the witness averred that upon receipt of the letter from the Honorable Attorney General, the DCI undertook investigations over and in respect of the Certificate of Title in favor of the 2<sup>nd</sup> Defendant.



217. Notwithstanding the foregoing, the witness averred that during and in the course of investigations in question, the DCI received a protest letter from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated the 4<sup>th</sup> of July 2023; and wherein the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were complaining about what same [1<sup>st</sup> and 2<sup>nd</sup> Defendants] contended to as skewed investigations.
218. Furthermore, the witness herein testified that in the course of the investigations, same [witness] summoned the 1<sup>st</sup> Defendant to appear before himself with a view to shed light on the circumstances leading to the procurement of the Certificate of Title respecting the suit property.
219. At any rate, the witness averred that during and in the course of investigations, the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants appeared before him and also availed a memorandum pertaining to the concerns by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
220. Whilst under further cross examination, the witness averred that same has placed before the Honourable court all the documents that were gathered by himself [witness] and which are relative to the allocation of the suit property to M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge respectively.
221. It was the further evidence of the witness that same undertook the requisite investigations over and in respect of the subject property and thereafter same prepared a report which documents [ details] the outcome arising from the investigations.
222. On further cross examination, the witness averred that during the course of investigations, same also established that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had also been issued with a Letter of allotment over and in respect of the suit property. In any event, the witness averred that the Letter of allotment in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was not disputed.
223. On the other hand, the witness also testified that same also discovered that a Part Development Plan [PDP] had also been prepared by the Directorate of Physical Planning. At any rate, the witness added that the Part Development Plan [PDP] was also not in dispute.
224. The fifth witness who testified on behalf of the 3<sup>rd</sup> Defendant was Geoffrey Chania, a Commissioner of Police. For coherence, the witness averred that same is currently attached to Directorate of Criminal Investigation[s] [DCI], department of documents examination.
225. Other than the foregoing, the witness averred that same [witness] is currently the officer in charge of the documents examination section. Besides, the witness adverted to having been trained at various stations and/or fora, including at the CID laboratory, National Ribat University [Khatoum Sudan] as well as Gurat University, respectively.
226. Other than the foregoing, the witness averred that same undertakes assorted duties including document examinations and that in this respect, same was availed assorted documents for purposes of examination. Furthermore, the witness averred that upon examination of the various documents which were forwarded to him under a cover of Exhibit memo form, same [witness] proceeded to and prepared a document examination report which the witness sought to tender and produced before the court.
227. There being no objection to the production of the document examination report, which was document number 34 at the foot of the Further list and bundle of document dated the 11<sup>th</sup> of May 2023, same [document examination report] was duly tendered and admitted as an Exhibit.



228. On cross examination by Learned counsel for the Plaintiff, the witness pointed out that the scope of his work related to examining the designated documents which were forwarded under a cover of the Exhibit memo form. Furthermore, the witness averred that after the examination of the various documents, same [witness] proceeded to and prepared the report, which has since been tendered and produced before the court.
229. On cross examination by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness testified that same proceeded to and examined the various documents which were forwarded unto him. Nevertheless, the witness clarified that same did not examine the signatures of the 1<sup>st</sup> Defendant herein.
230. Whilst under further cross examination, the witness also averred that same was not called upon to examine the signature at the foot of the Part Development Plan [PDP]. In addition, the witness also clarified that same did not examine the Letter of allotment.
231. On further cross examination, the witness pointed out that the report which was prepared by himself, constitutes the opinion formed by himself and arising out of the analysis of the various documents, which analysis was undertaken by using assorted Equipments/gadgets meant for purposes of document examination.
232. With the foregoing testimony, the 3<sup>rd</sup> Defendant's case was duly closed.

### **Parties' Submissions:**

#### **a. Plaintiff's submissions:**

233. The Plaintiff herein filed written submissions dated the 30<sup>th</sup> of January 2024; and in respect of which same has highlighted and canvassed four [4] salient and pertinent issues for consideration and determination by the Honourable court.
234. Firstly, Learned counsel for the Plaintiff has submitted that the Certificate of Title/Grant issued to and in favor of the Plaintiff herein arose from the sale and transfer of the suit property to the Plaintiff by the persons who were previously the registered owners thereof.
235. Furthermore, Learned counsel for the Plaintiff has submitted that the plot [Property] in question was allocated to and in favor of M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge vide Letter of allotment dated the 30<sup>th</sup> of April 1999; and that upon being allocated the suit property, the allottee[s] proceeded to and complied with the terms of the Letter of allotment, inter-alia accepting the terms thereof and also paying the statutory levies alluded to on the face of the Letter of allotment.
236. Additionally, Learned counsel for the Plaintiff has submitted that upon the payments of the statutory levies highlighted and contained on the face of the Letter of allotment, the Commissioner of Lands [now defunct] proceeded to and generated the requisite documents culminating into the issuance of a Certificate of Title/Grant in favor of M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively.
237. Furthermore, it is the submissions of learned counsel for the Plaintiff that upon being issued with the Certificate of Title on the 31<sup>st</sup> of December 2002, M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively became the lawful and legitimate proprietors of the suit property and thus same were vested and/or bestowed with the lawful rights to own the property including the right to sell and dispose of same.
238. Other than the foregoing, Learned counsel for the Plaintiff has submitted that the said M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively thereafter sold and transferred the suit



- property to and in favor of the Plaintiff herein in the year 2012. For coherence, Learned counsel pointed out that the Plaintiff herein paid a consideration of Kes. 24,000,000/= only which payment was duly received and acknowledged by the vendors.
239. Arising from the foregoing, Learned counsel for the Plaintiff has thus contended that the Plaintiff herein was/is a bona fide purchaser for value of the suit property and thus the Plaintiff is entitled to the requisite protection by the Honorable Court.
240. Secondly, Learned counsel for the Plaintiff has submitted that the 2<sup>nd</sup> Defendant herein did not acquire and/or obtain a valid and lawful Title to and in respect of the suit property. To the contrary, Learned counsel has pointed out that the process attendant to and leading to the issuance of the Certificate of Title to and in favor of the 2<sup>nd</sup> Defendant was wrought and replete with fraud, irregularity and illegalities, which vitiate the propriety and validity of the 2<sup>nd</sup> Defendant's Title.
241. To start with, Learned counsel for the Plaintiff has submitted that even though the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were issued with a Letter of allotment over and in respect of an un-surveyed plot, which un-surveyed plot was assigned L.R No. 209/12077 (hereinafter referred to as the suit property), the 1<sup>st</sup> and 2<sup>nd</sup> Defendants neither paid the requisite stand premium in the manner prescribed by the letter of allotment or at all.
242. Thirdly, Learned counsel for the Plaintiff has submitted that even though the 2<sup>nd</sup> Defendant made some payment to and in respect of the letter of allotment, inter-alia payment of Kes. 50,000/= only, same was rendered and/or made long after the Letter of allotment had lapsed and therefore ceased to exist.
243. Fourthly, Learned counsel has submitted that the Certificate of Title/Grant which was subsequently processed and issued in favor of the 2<sup>nd</sup> Defendant in the year 2019; was issued irregularly, illegally and fraudulently, insofar as the suit property, for which the impugned Title was being issued had already been registered in the name of the Plaintiff herein in the year 2012.
244. Arising from the foregoing, Learned counsel for the Plaintiff has submitted that it was therefore not possible or legally tenable to process and issue a Certificate of Title/Grant in favor of the 2<sup>nd</sup> Defendant during the lifetime of the Certificate of Title/Grant in favor of the Plaintiff company.
245. The third issue that has been raised, canvassed and highlighted by Learned counsel for the Plaintiff touches on and concerns whether the Plaintiff herein is entitled to the reliefs sought and highlighted in the body thereof. In this respect, Learned counsel for the Plaintiff has submitted that the Plaintiff herein bought and acquired the suit property from the previous allottees thereof, namely, M/s Karandi Farm Ltd, Peter Nduati and Pauline Mulinge, respectively, who had hitherto complied with and adhered to the terms of the letter of allotment.
246. Further and in any event, Learned counsel for the Plaintiff has submitted that the Plaintiff herein is a bona fide purchaser for value, without notice of any defect or at all as pertains to the Title by and in favor of her predecessor.
247. To the extent that the Plaintiff herein was/is a Bona fide purchaser for value, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that same [Plaintiff] is therefore entitled to partake of and/or benefit from the suit property.
248. On the other hand, Learned counsel for the Applicant has also submitted that it was also not possible for the suit property to be transferred and registered in the name of the 2<sup>nd</sup> Defendant, albeit during the lifetime of the Certificate of Title in the name of the Plaintiff.



249. In a nutshell, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that the Plaintiff herein is the lawful and legitimate proprietor of the suit property and thus entitled to benefit from.
250. The fourth issue that was canvassed and highlighted by Learned counsel for the Plaintiff touches on and concerns whether the 2<sup>nd</sup> Defendant lawfully acquired title to and in respect of the suit property. In this regard, Learned counsel for the Plaintiff has submitted that even though the 2<sup>nd</sup> Defendant was duly lawfully allocated the suit plot, the 2<sup>nd</sup> Defendant did not comply with and/or adhere to the terms of the Letter of allotment and hence the Letter of allotment in question lapsed and ceased to exist.
251. In particular, Learned counsel for the Plaintiff has invited the court to find and hold that the letter of allotment had provided and stipulated that the 2<sup>nd</sup> Defendant herein was obliged, inter-alia, to generate and issue a Letter of acceptance and to make the requisite payments within 30 days and not otherwise.
252. Nevertheless, Learned counsel for the Plaintiff has submitted that despite the clear terms and stipulations contained in the Letter of allotment, the 2<sup>nd</sup> Defendant herein neither complied with nor adhered to the terms of the Letter of allotment. Firstly, Learned counsel for the Plaintiff has submitted that the 2<sup>nd</sup> Defendant neither generated nor issued the letter of acceptance; nor paid the statutory levies within the 30-day period.
253. For coherence, Learned counsel for the Plaintiff has submitted that the 2<sup>nd</sup> Defendant herein only paid the sum of Kes. 50,000/= only vide Bankers cheque dated the 7<sup>th</sup> of May 1996, which payments was made after two [2] years from the date of the letter of allotment.
254. Arising from the fact that the letter of acceptance and impugned payment were being made long after the expiry of the 30 days, learned counsel for the Plaintiff has submitted that the Letter of allotment lapsed and hence same could not be the subject of (sic) payments] being made, if at all, on the 7<sup>th</sup> of May 1996.
255. In this respect, Learned counsel for the Plaintiff has cited and invited the court to take cognizance of the decision in the case of Waterfront Holding Ltd vs Kandie & 2 Others [Civil Appeal No. 88 of 2019] [2023] KECA 1223 KLR, where the Court of Appeal underscored that a Letter of allotment which is not complied with within the set timelines lapses and hence becomes otiose.
256. Furthermore, Learned counsel for the Plaintiff has also submitted that by the time the 2<sup>nd</sup> Defendant purported to acquire a Certificate of Title over and in respect of the suit property, namely, in the year 2019, the suit property had long been registered in the name of the Plaintiff and thus same could not be lawfully registered in the name of the 2<sup>nd</sup> Defendant.
257. Further and in addition, Learned counsel for the Plaintiff has also submitted that it was illegal and fraudulent for a Certificate of Title to issue and be granted to the 2<sup>nd</sup> Defendant prior to and before the revocation or cancelation of the certificate of title in favor of the Plaintiff.
258. On the other hand, Learned counsel for the Plaintiff has also submitted that the certificate of title held by and on behalf of the 2<sup>nd</sup> Defendant was also found to be illegal and unlawful and was the subject of a determination by and on behalf of the National Land Commission in exercise of her constitutional powers by dint of Article 68 of *the Constitution* 2010.
259. Additionally, Learned counsel for the Plaintiff has also submitted that for as long as the decision by the National Land Commission remains in situ and has never been quashed, the 2<sup>nd</sup> Defendant herein cannot purport to be holding and legitimate title to the suit property.



260. Instructively, Learned counsel invited the attention of the court to the decision of the National Land Commission dated the 24<sup>th</sup> of March 2016; and which decision was ultimately gazetted vide Gazette Notice volume CXIX No. 97 of 17<sup>th</sup> July 2017.
261. Based on the foregoing, Learned counsel for the Plaintiff has thereafter implored the court to find and hold that the 2<sup>nd</sup> Defendant herein does not hold any lawful and legitimate title to and in respect of the suit property and hence the reliefs sought for by the 2<sup>nd</sup> Defendant as pertains to ownership of the suit property are misconceived and legally untenable.

**b. 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS' SUBMISSIONS:**

262. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein filed written submissions dated the 19<sup>th</sup> of February 2024; and in respect of which same have raised, highlighted and canvassed four [4] salient issues for consideration by the court.
263. First and foremost, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that what constitutes the suit property was lawfully and duly allocated to and in favor of the 2<sup>nd</sup> Defendant vide Letter of allotment dated the 3<sup>rd</sup> of February 1994; pursuant to and in accordance with the provisions of Section 3 of the Government Land Act, Chapter 280 Laws of Kenya, [now repealed].
264. Furthermore, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that upon the allocation of the suit plot to and in favor of the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant proceeded to and made payment vide two [2] tranches, which payments were duly acknowledged and received by the Commissioner of Lands.
265. In any event, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has also submitted that the 2<sup>nd</sup> Defendant also generated and issued a Letter of acceptance dated the 7<sup>th</sup> of May 1996, wherein same communicated her acceptance of the terms of the Letter of allotment.
266. Consequently and in view of the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that having duly generated the letter of acceptance and also paid the monies at the foot of the Letter of allotment, the 2<sup>nd</sup> Defendant herein met the terms of the letter of allotment and hence the land in question ceased to be available for re-allocation or otherwise.
267. Other than the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has also submitted that even though the letter of acceptance and the payments of the stand premium were made outside the prescribed timelines, the payments in question were duly received and acknowledged by the Commissioner of Lands [now defunct], and thus the acknowledgement thereof denotes acceptance on behalf of the Government.
268. Arising from the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has therefore invited the Honourable court to find and hold that the plot in question was lawfully allotted to and in favor of the 1<sup>st</sup> Defendant.
269. In support of the foregoing submissions, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, the case of Martha Wambui vs Joseph Kagongo & Another (2020)eKLR, Arnold Wabwile Litalala vs Peter Sane Lapatayi (2020)eKLR and Cabin Crew Investments Ltd vs Kenya Medical Training College & 4 Others (Civil Appeal No. 441 of 2019) [2021] KECA 49 [KLR] respectively.
270. Secondly, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that the transfer and registration of the suit property to and in favor of the Plaintiff herein was wrought and/or fraught



with inconsistencies and illegalities which are fatal to the certificate of title held by and on behalf of the Plaintiff.

271. To start with, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that what constitutes the suit plot [Property] had long been allocated to and in favor of the 2<sup>nd</sup> Defendant and hence same ceased to be available for allocation to and in favor of M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe, respectively.
272. In support of the foregoing submissions, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has cited and relied on the decisions of Benja Properties Ltd vs Syedna Mohamed Bhurhanudin Saheb & 4 Others (2015)eKLR and Philemon L Wambiya vs Gaitano Lusitsa Mukofu & 2 Others (2019)eKLR, where the Court of Appeal underscored the position that allotment of land is a transaction in rem and thus once a particular plot [Property] has been allocated and alienated, then same ceases to be available for a second allotment or at all.
273. Secondly, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have also submitted that there was no way that the suit property could have been allocated to M/s Karandi Farm Ltd, Peter Nduati and Pauline Muringe, respectively or at all without compliance with the provisions of Section 7, 12 and 13 of the Government Land Act, Chapter 280 Laws of Kenya.
274. Thirdly, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has also submitted that to the extent that suit property had been allocated to and in favor of the 2<sup>nd</sup> Defendant, who thereafter proceeded to and paid the statutory levies at the foot of the Letter of allotment, the Commissioner of Lands, [now defunct], was therefore divested of the authority and/or mandate to re-allocate the same plot.
275. Further and in any event, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has submitted that even though the payments to and on account of the stand premium were made outside the stipulated timeline, the fact that same were duly received and acknowledged by the Commissioner of Lands connotes that the Commissioner of Lands waived any objection pertaining to and concerning the lateness in payments.
276. In support of the foregoing submissions premised on waiver and/or acquiescence, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has cited and relied in the holding in the cases of Henry Methee Kathurima vs The Commissioner of Lands & Another (2015)eKLR, Cabin Crew Investments Ltd vs Kenya Medical Training College & 4 Others (Civil Appeal No. 441 of 2019) [2021] KECA 49 [KLR] and Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), respectively.
277. The third issue raised and canvassed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is to the effect that the 2<sup>nd</sup> Defendant is the lawful and legitimate proprietor of the suit property insofar as the 2<sup>nd</sup> Defendant was issued with a valid and lawful Letter of allotment dated the 3<sup>rd</sup> of February 1994.
278. Additionally, Learned counsel has submitted that upon the allotment of the suit property to and in favor of the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant engaged and/or instructed a licensed surveyor to undertake the necessary survey including the preparation of the survey plan, culminating into the issuance of a land reference number.
279. Other than the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has also submitted that after the preparation of the survey plan, same was submitted to the Directorate of Survey who thereafter generated the resultant Deed plan, and which Deed plan was ultimately relied upon for purposes of issuing the certificate of title to and in favor of the 2<sup>nd</sup> Defendant in the year 2019.
280. Be that as it may, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has also submitted that even though the original Deed plan which was issued as a result of the survey plan executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants'



- licensed surveyor was lost, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded to and obtained a certified copy of the Deed plan which facilitated the registration of the suit property in the name of the 2<sup>nd</sup> Defendant.
281. Thirdly, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that the Title to and in favor of the Plaintiff herein was generated by using the Deed plan which was prepared by and on behalf of the license surveyor instructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and hence the Certificate of Title in favor of the Plaintiff herein is vitiated by irregularity and illegality and hence same does not constitute a valid Certificate of Title.
282. Notwithstanding the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has also submitted that the validity and propriety of the Title does not depend on the issuance of the Title, which is contended to be the end product, but depends on the process culminating into the issuance of the Title.
283. Further and in any event, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has submitted that the Certificate of Title issued to and in favor of the Plaintiff did not follow the laid down procedure and process and thus same is neither justifiable nor legally tenable. To the contrary, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that the impugned Title is illegitimate.
284. To buttress the submissions that a Title which does not adhere to and comply with the lawful procedures is illegal and unlawful, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has cited and invited the court to adopt and apply inter-alia the cases of Nelson Kazugu Chai & 9 Others vs Pwani University College (2017)eKLR, Cabin Crew Investments Ltd vs Kenya Medical Training College & 4 Others (Civil Appeal No. 441 of 2019) [2021] KECA 49 [KLR] and Munyu Maina vs Hiram Gathiha Maina (2013)eKLR, respectively.
285. The fourth issue highlighted and canvassed by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants touches on and concerns the contention that the 2<sup>nd</sup> Defendant herein is entitle to the reliefs sought at the foot of the counterclaim. In particular, the Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has submitted that the 2<sup>nd</sup> Defendant has duly supplied to the court the requisite evidence to vindicate the process that was followed prior to and before the eventual issuance of the Certificate of Title to and in favor of the 2<sup>nd</sup> Defendant.
286. Simply put, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has contended that it is the 2<sup>nd</sup> Defendant who has justified the process culminating into the issuance of the Certificate of Title in her name and hence same is mandated to partake of and/or benefit from the ownership rights over and in respect of the suit property.
287. To this end and with a view to justify the propriety of the Certificate of Title in favor of the 2<sup>nd</sup> Defendant, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has cited and relied on, inter-alia, the cases of Charles Karathe Kiarie & 2 Others vs The Administrators of John Wallace Mathare (deceased) & 5 Others (2013)eKLR, Kiplagat vs Masit & 6 Others Environment and Land Court Case No. 930 of 2012, Kuria Greens Ltd vs Registrar of Titles (2011)eKLR, Sammy Mwangangi & 10 Others vs The Commissioner of Lands & 3 Others (2018)eKLR, Kenya Anti-Corruption Commission vs Online Eneterprises Ltd & 4 Others (2019)eKLR and Elijah Makeri Ny'anguara vs Stephen Mungai Njuguna & Another (2013)eKLR, respectively.
288. Premised on the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has invited the court to find and hold that between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Plaintiff herein, the 2<sup>nd</sup> Defendant holds a lawful and legitimate certificate of title to the suit property and thus same ought to be declared as the lawful owner.



289. In any event, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that even though the Plaintiff had hitherto contended that the 2<sup>nd</sup> Defendant's certificate of title was procured and obtained by fraud, the Plaintiff herein has neither demonstrated nor established any scintilla of evidence to warrant a finding of fraud either as alleged or at all.
290. In any event, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant has submitted that whoever seeks to procure a favorable order on the plea of fraud must tender and place before the court plausible and cogent evidence in the manner that was articulated vide the decision in the case of Ardhi Highway Developers Ltd vs Westend Butchery & 6 Others (2015)eKLR.
291. In a nutshell, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has therefore invited the Honourable Court to find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the reliefs sought for at the foot of the counterclaim dated the 10<sup>th</sup> of November 2022.

**c. 3<sup>rd</sup> Defendant's submissions:**

292. The 3<sup>rd</sup> Defendant filed elaborate/ comprehensive written submission dated the 9<sup>th</sup> of February 2024; and in which same has raised and canvassed three [3] salient issues for determination by the court.
293. Firstly, Learned counsel for the 3<sup>rd</sup> Defendant stated that even though the 1<sup>st</sup> and 2<sup>nd</sup> Defendant raised an issue that the directors of m/s Karandi Farm Ltd and the directors of the Plaintiff company are the same, it is important to recall that companies are juristic [legal] entities, which have a separate and distinct existence from their Directors, Subscribers, Shareholders and/or promoters.
294. Learned counsel for the 3<sup>rd</sup> Defendant has submitted that the suit property herein was hitherto registered in the name of M/s Karandi Farm Limited, Peter Nduati Mbugua and Pauline Muringe, respectively and same were the lawful owners thereof.
295. Subsequently, it has been contended that the suit property was sold and transferred in favor of the Plaintiff company and not to the Directors of the Plaintiff company. In this respect, Learned counsel for the 3<sup>rd</sup> Defendant has therefore submitted that the insinuation being raised and highlighted by Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as pertains to the similarities in directorship in M/s Karandi Farm Limited the Plaintiff company is a non-issue
296. Furthermore, Learned counsel for the 3<sup>rd</sup> Defendant has contended that the issue as to whether or not the Directors of M/s Karandi Farm Ltd are the same, was similarly not proved before the Honourable court.
297. Further and in any event, Learned counsel for the 3<sup>rd</sup> Defendant has also submitted that though there was an endeavor to tender and produce before the court the CR12 in respect of the two [2] companies, the endeavor to do so did not materialize because the CR12 in question were expunged from the record at the request and instance of Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
298. To the extent that the CR12 which the 1<sup>st</sup> and 2<sup>nd</sup> defendants intended to rely on were expunged from the record of the court, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cannot now be heard to say that because (sic) the directors of Karandi farm Ltd appear to be the same as the directors of the Plaintiff company [which fact was not proved], then there is some evidence of collusion.
299. Be that as it may, whilst highlighting the submissions that a company is separate and distinct from her directors, promoters, shareholders and/or subscribers, Learned counsel for the 3<sup>rd</sup> Defendant has cited and relied on inter-alia Salmon vs Salmon (1897) AC 22, Joel Ndemu Ong'au & Another vs Loice Mukunya (2015)eKLR; George W M Omondi & Another vs National Bank of Kenya Ltd & 2 Others



- (2001)eKLR and Ardhi Highway Developers Ltd vs Westend Butcheries Ltd & 6 Others (2015)eKLR, respectively to debunk the argument raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
300. Secondly, Learned counsel for the 3<sup>rd</sup> Defendant has submitted that the suit property, namely, L.R No. 209/12077 [I.R No. 90923] lawfully belongs to and is the property of the Plaintiff herein.
  301. To start with, Learned counsel for the 3<sup>rd</sup> Defendant has adopted and relied upon the evidence tendered by Gordon Odeka Ochieng [director land administration] and the evidence of Nyambaso David Nyandor [the chief land registrar], who both articulated the historical background pertaining to the initial allocation of the suit property to the 2<sup>nd</sup> Defendant vide letter of allotment dated the 3<sup>rd</sup> of February 1994 and the subsequent failure by the 2<sup>nd</sup> Defendant to comply with and/or adhere to the terms of the letter of allotment.
  302. Furthermore, learned counsel for the 3<sup>rd</sup> Defendant has submitted that arising from the failure and/or neglect of the 2<sup>nd</sup> Defendant to meet the terms specified, the letter of allotment in question lapsed and was rendered redundant for all intent and purposes.
  303. Additionally, Learned counsel for the 3<sup>rd</sup> Defendant has submitted that upon the lapse of the Letter of allotment dated the 3<sup>rd</sup> of February 1994; which had hitherto been issued in favor of the 2<sup>nd</sup> Defendant, the suit property reverted to the Government of Kenya and became an unalienated Government land, which was available for allocation by the commissioner of land; [now defunct].
  304. On the other hand, learned counsel for the 3<sup>rd</sup> Defendant has contended that the suit property was allocated to and in favor of M/s Karanda Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, respectively, vide Letter of allotment dated the 30<sup>th</sup> of April 1999.
  305. Other than the foregoing, it was pointed out that upon the allotment of the suit property to and in favor of M/s Karanda Farm Ltd, Peter Nduati Mbugua and Pauline Muringe; same [allottees] proceeded to and complied with the terms of the letter of allotment culminating into the eventual execution of the lease and ultimate registration of the suit property in their favor on the 31<sup>st</sup> of December 2002.
  306. It was the further submissions of the Learned counsel for the 3<sup>rd</sup> Defendant that upon the registration of the suit property in the names of M/s Karanda Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, same [registered owners] sold and transferred the suit property to and in favor of the Plaintiff company on the 18<sup>th</sup> of June 2012.
  307. For coherence, Learned counsel for the 3<sup>rd</sup> Defendant has pointed out that the Plaintiff company paid to and in favor of the vendors the agreed consideration/purchase price in the sum of Kes. 24,000,000/= only.
  308. Arising from the foregoing, learned counsel for the 3<sup>rd</sup> Defendant has therefore contended that the Plaintiff beforehand acquired a lawful and legitimate title to the suit property on account of being a bona fide purchaser for value and hence the rights of the Plaintiff ought to be vindicated by dint of the provisions of Section 24 and 25 of the [Land Registration Act, 2012](#).
  309. On the other hand, learned counsel for the 3<sup>rd</sup> Defendant has also submitted that the Title by and on behalf of the 2<sup>nd</sup> Defendant was issued in the year 2019, during the existence of the Title belonging to and registered in the name of the Plaintiff. Consequently and in this regard, learned counsel for the 3<sup>rd</sup> Defendant has submitted that the registration and ultimate issuance of the Title in favor of the 2<sup>nd</sup> Defendant was unprocedural, illegal and unlawful.



310. Finally, Learned counsel has also contended that by the time the Title in favor of the 2<sup>nd</sup> Defendant was being processed and issued in 2019, the letter of allotment which underpinned the said Certificate of Title stood extinguished and was thus incapable of giving birth to such a Certificate of Title/Grant.
311. In support of the submissions that the Plaintiff is lawful and legitimate owner of the suit property, Learned counsel for the 3<sup>rd</sup> Defendant has cited and relied on inter-alia Dr. Joseph N. K Arap Ngok vs Moiyo Ole Keiwa (1997)eKLR, Elizabeth Wabui Githinji & 29 Others vs Kenya urban Authorities & Others (2019)eKLR and Munyu Maina vs Hiram Gathiha Maina (2013)eKLR and Daudi Kiptugen vs The Commissioner of Lands & 4 Others (2015)eKLR, respectively.
312. The third issue that has been raised and canvassed by Learned counsel for the 3<sup>rd</sup> Defendant touches on and concerns whether the Plaintiff herein is entitled to the reliefs sought for at the foot of the Plaint.
313. In this regard, Learned counsel for the 3<sup>rd</sup> Defendant has answered the issue in the affirmative. First and foremost, learned counsel for the 3<sup>rd</sup> Defendant has submitted that the Plaintiff herein is a bona fide purchaser for value of the suit property from the initial allottees, namely, M/s Karanda Farm Ltd, Peter Nduati Mbugua and Pauline Muringe.
314. To the extent that the Plaintiff is a Bona fide purchaser for value, Learned counsel for the 3<sup>rd</sup> Defendant has therefore invited the Honourable court to find and hold that the Plaintiff's title to the suit property is legally insulated and thus indefeasible.
315. Secondly, Learned counsel for the 3<sup>rd</sup> Defendant has submitted that the Plaintiff herein acquired the title to the suit property long before any right accrued to or vested in the 2<sup>nd</sup> Defendant. For clarity, it was pointed out that rights to land only accrue and/or materialize upon the issuance of the letter of allotment, compliance with the terms of the letter of allotment and ultimate issuance of a Certificate of Title.
316. For good measure, Learned counsel for the 3<sup>rd</sup> Defendant has invited the Honourable court to take cognizance of the case of Dr. Joseph N. K Arap Ngok vs Moiyo Ole Keiwa (1997)eKLR where the Court of Appeal amplified the three [3] critical steps that precede the acquisition of title to property.
317. Thirdly, Learned counsel for the 3<sup>rd</sup> Defendant has also submitted that once the terms of the letter of allotment are not complied with and same lapses, any payments made ex-post-facto, whether received and acknowledged or otherwise; do not operate to resuscitate the dead letter of allotment.
318. In respect of the foregoing submissions, Learned counsel for the 3<sup>rd</sup> Defendant has cited and relied on inter-alia the holding in Joseph Kamau Muhor vs Attorney General & Another (2021)eKLR; Dr. Syedna Mohamed Bhurhanudin Saheb & 2 Others vs Benja Properties & 2 Others (2007)eKLR and Bubaki Investments Ltd vs National Land Commission (2016)eKLR, respectively where the court underscored that a dead letter of allotment is not re-birthed by subsequent payments thereto.
319. Finally, Learned counsel for the 3<sup>rd</sup> Defendant has also submitted that the certificate of title that was issued to and in favor of the 2<sup>nd</sup> Defendant was issued during the lifetime of the certificate of title in favor of the Plaintiff and hence it was not legally possible to do so without the Plaintiff's title being revoked beforehand.
320. In a nutshell, Learned counsel for the 3<sup>rd</sup> Defendant has submitted that the issuance of the certificate of title in favor of the 2<sup>nd</sup> Defendant on the face of and with the knowledge that the suit property was already registered in favor of the Plaintiff, constitutes an illegality which cannot be sanctioned and/or countenanced by a court of law.



321. Premised on the foregoing, Learned counsel for the 3<sup>rd</sup> Defendant has invited the court to uphold the evidence by Nyambaso David Nyandor [Chief land registrar] who pointed out that the impugned certificate of title in favor of the 2<sup>nd</sup> Defendant was illegal, unlawful and a nullity.

### **Issues for Determination:**

322. Having reviewed the pleading filed by the Parties, the evidence tendered [both oral and documentary] and having taken into account the written submissions filed on behalf of the Parties; the following issues crystalize [emerge] and are therefore worthy of determination:

- i. Whether the suit property was lawfully allocated to and in favor of the 2<sup>nd</sup> Defendant and if so, whether the 2<sup>nd</sup> Defendant complied with the terms of the Letter of allotment.
- ii. Whether the 2<sup>nd</sup> Defendant acquired any lawful rights and/or interests to and in respect of the suit property and whether the Certificate of Title issued to the 2<sup>nd</sup> Defendant was lawful.
- iii. Whether the Plaintiff herein acquired any lawful rights to and in respect of the suit property or otherwise.
- iv. What reliefs, if any; ought to be granted.

### **Analysis and Determination**

#### **Issue Number 1**

#### **Whether the suit property was lawfully allocated to and in favor of the 2<sup>nd</sup> Defendant and if so, whether the 2<sup>nd</sup> Defendant complied with the terms of the Letter of allotment.**

323. It was the evidence of DW1 [John Michael Ohas] that the suit property was allocated to and in favor of the 2<sup>nd</sup> Defendant vide letter of allotment dated the 3<sup>rd</sup> of February 1994.
324. Besides, the witness DW1 also pointed out that prior to and before the allocation of what now constitutes the suit property to and in favor of the 2<sup>nd</sup> Defendant, the Director of Physical Planning proceeded to and generated a PDP which was thereafter subjected to the requisite checking and ultimate approval by the commissioner of lands [now defunct].
325. Furthermore, the witness DW1 also averred that after the approval of the PDP, the Commissioner of Lands proceeded to and issued the letter of allotment which highlighted the Part Development Plan Number [PDP] number on the face thereof. Consequently and in this regard, the witness testified that the allocation of the suit property to the 2<sup>nd</sup> Defendant was lawful and legitimate.
326. Other than the foregoing, the witness [DW1] also testified that upon being issued with the Letter of allotment, the 1<sup>st</sup> Defendant herein proceeded to and generated a Letter of acceptance dated the 7<sup>th</sup> of May 1996, which letter also enclosed a bankers cheque in the sum of Kes. 50,000/= only payable to the Commissioner of Lands.
327. Further and in any event, the witness averred that the payment in question was on account of part payment of the statutory levies, including the stand premium, which had been highlighted in the body of the letter of allotment.
328. On the other hand, DW1 is also on record testifying that subsequently, same [DW1] wrote a letter to the Commissioner of Lands dated the 15<sup>th</sup> of May 2012 and in respect of which same intimated to the



Commissioner of Lands [now defunct] that same would be paying the outstanding monies due and on account of outstanding stand premium in bits and pieces.

329. For the avoidance of doubt, the evidence of DW1, which espouses the intimation to pay the outstanding bits of the stand premium by instalments is amplified in the answers of the witness whilst under cross examination by Learned counsel for the 3<sup>rd</sup> Defendant. The relevant excerpts of the evidence are reproduced as hereunder:

“Referred to page 30 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ bundle of documents, the witness states that the document in question is a letter dated the 15<sup>th</sup> May 2012. I have to make the payments in bits and pieces. By the time of 15<sup>th</sup> May 2012 I was still making payments on account of the stand premium. I repeat that by the 15<sup>th</sup> May 2012 I had not fully paid for the land.”

330. From the foregoing testimony, it is evident that by the 15<sup>th</sup> of May 2012, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein had neither concluded nor completed the payments of the statutory levies contained in the body of the letter of allotment.

331. Arising from the foregoing, the question that the court must grapple with are two [2] fold. Firstly, is whether the 2<sup>nd</sup> Defendant was lawfully allocated the suit property.

332. The second question relates to whether or not upon the allocation of the suit property, the 2<sup>nd</sup> Defendant timeously complied with and/or adhered to the terms of the Letter of allotment.

333. I propose to start with the first question and in this respect, my answer is that the 2<sup>nd</sup> Defendant was lawfully allocated and issued with the Letter of allotment by the Commissioner of Lands, [now defunct] in accordance of Section 3 of the Government [Land Act](#), Chapter 280 Laws of Kenya, now defunct.

334. In any event, the fact that the suit property was lawfully allocated to and in favor of the 2<sup>nd</sup> Defendant has been conceded to by DW3, namely, Gordon Odeka Ochieng [Director of Land Administration], who in his evidence in chief stated as hereunder:

“The records held in this office indicate that Kolumbus (2000) Ltd was allocated an un-surveyed industrial plot by the then commissioner of lands, vide letter referenced 88767/IV/142 dated the (sic) 2<sup>nd</sup> February 1994. The land which was allocated measured 2.0Ha and same was allocated for a term of 99 years with effect from the 1<sup>st</sup> February 1994. The allocation was based on a PDP number 42/14/93/14 prepared by the department of Physical Planning.”

335. Pertinently, the Director of Land Administration who testified as DW3, albeit on behalf of the 3<sup>rd</sup> Defendant, admits and concedes the allocation of the suit property to and in favor of the 2<sup>nd</sup> Defendant herein.

336. Consequently, and in the premises, there is no gainsaying that what constitutes the suit property was duly and lawfully allocated to and in favor of the 2<sup>nd</sup> Defendant, which allocation is underpinned by the Letter of allotment.

337. As pertains to the second question, I propose to interrogate whether the 2<sup>nd</sup> Defendant, who was duly issued with the letter of allotment, timeously complied with the terms and conditions thereof.



338. To start with, DW1 [John Michael Ohas] admitted and conceded that the Letter of allotment which was issued in favor of the 2<sup>nd</sup> Defendant contained various terms and conditions, inclusive of the special conditions thereunder which included inter-alia:

- i. Acceptance of the letter of offer within 30 days of the post mark.
- ii. Payments of the statutory levies, within 30 days from the date of post mark.

339. As pertains to this bit of evidence, it is appropriate to revert to the cross examination of DW1 by Learned counsel for the Plaintiff, where same stated as hereunder:

“I do confirm that the 2<sup>nd</sup> Defendant made payments at the foot of the letter of allotment. The letter of allotment says that the payments were to be made within 30 days. I do confirm that the payments were to be made within timelines. I do confirm that the special condition speaks to timelines for making the payments. I paid the sum of Kes. 50,000/= only after 2 years from the date of issuance from the date of allotment. I also wish to confirm that Kes.50, 000/- only was part payment of the dues. I also wish to state that I paid the balance after the lapse of 30 days.”

340. From the foregoing excerpts, it is crystal clear that DW1 duly understood and appreciated that the payments of the statutory levies were to be made within a prescribed timeline and not otherwise.

341. Furthermore, DW1 also appreciates and confirms that the special conditions, which were highlighted in the body of the letter of allotment clearly stipulated that in the event of default, the Letter of allotment would lapse.

342. Notwithstanding the foregoing, the witness [DW1] stated that same made payments outside the prescribed timelines. Quiet clearly, and there can not be debate at this point, the payments towards the letter of allotment were made and/or were being made outside the prescribed timelines.

343. Other than the foregoing, there is yet another sub- issue that merits mention and a short address. For good measure, the sub- issue herein relates to whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants paid any monies other than the sum of Kes. 50,000/= only, which was forwarded vide a letter dated the 7<sup>th</sup> of May 1996.

344. For coherence, there appears to be conflicting evidence by DW1 as to whether the balance of the statutory levies which amounted to more than Kes. 814,560/= only, was ever paid.

345. Firstly, whilst under cross examination by Learned counsel for the Plaintiff, DW1 stated as hereunder:

“I thereafter made further payments of Kes. 814,560/= only. I also wish to state that I paid the balance after the lapse of 30 days. I have not exhibited a copy of the cheque that was paid to the commissioner of land. The cheque was remitted to the commissioner of land. I don’t know how it was transmitted to the office of the commissioner of land.”

346. Whilst under further cross examination by learned counsel for the Plaintiff, DW1 ventured forward and stated as hereunder:

“I have produced a copy of the receipt at page 13 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’ bundle of document. I admit that the same [receipt] does not have a date on the face thereof. The receipt herein also doesn’t have a serial number. Now I say that there is a receipt number on the face of the receipt. However I don’t know whether the same relates to the year 2000 and thereafter.”



347. Fast forward, whilst under cross examination by Learned counsel for the 3<sup>rd</sup> Defendant, DW1 testified as hereunder:

“I also wish to state that before the process of the issuance of title could be completed I have to travel to the United Kingdom. I went to the United Kingdom in the year 2010. I was issued with a letter of allotment in the year 1994. I only made one payment upon letter of allotment.”

348. Taking into perspective the evidence tendered and which have been highlighted in the preceding paragraph[s], there exists a legitimate doubt as to whether the 2<sup>nd</sup> Defendant herein ever paid the balance of the statutory levies, other than Kes. 50,000/= only, which was forwarded under a cover of the Letter dated the 7<sup>th</sup> of May 1996.

349. Be that as it may, it is common ground that whereas the 2<sup>nd</sup> Defendant was lawfully issued with a Letter of allotment, same however failed to comply with and/or abide by the terms of the Letter of allotment.

350. Furthermore, I have highlighted the evidence by DW1 wherein same concedes that he [Witness] only made one payment on account of the letter of allotment and not the other. In this regard, the question that begs the answer is whether by the time the Certificate of Title was being processed and issued to the 2<sup>nd</sup> Defendant, the requisite fees had been duly and fully paid.

351. In a nutshell, my answer to the 2<sup>nd</sup> question which was highlighted elsewhere herein before is to the effect that the 2<sup>nd</sup> Defendant neither complied with nor adhered to the terms of the Letter of allotment either as required or at all.

## **Issue Number 2**

### **Whether the 2<sup>nd</sup> Defendant acquired any lawful rights and/or interests to and in respect of the suit property and whether the Certificate of Title issued to the 2<sup>nd</sup> Defendant was lawful.**

352. Whilst discussing issue number one [1] herein before, the court has found and held that the 2<sup>nd</sup> Defendant neither complied with nor adhered to the terms of the Letter of allotment which was issued on the 3<sup>rd</sup> of February 1994.

353. Having found and held that the 2<sup>nd</sup> Defendant did not comply and or adhere to the terms of the Letter of allotment, the question that now merits determination and answer is what is the implication of a failure/neglect to comply with the terms of the Letter of allotment.

354. According to learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, it has been contended that even though the letter of acceptance and the payment[s] of the stand premium were never made and/or rendered within the prescribed timelines, same were however paid and thereafter acknowledged by the Commissioner of Lands.

355. To the extent that the payments were (sic) made and thereafter acknowledged by the Commissioner of Lands, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has contended that the acceptance of the payments in question operates as a waiver and/or acquiescence, so much so that neither the Commissioner of Lands, [now defunct] nor the Government of the Republic of Kenya can be heard to deny the existence of a lawful contract.

356. Further and in any event, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has invited the court to take cognizance of the decision of the Court of Appeal in the case of Cabin Crew Investments Limited v



Kenya Medical Training College & 4 others (Civil Appeal 441 of 2019) [2021] KECA 49 (KLR) (23 September 2021) (Judgment), where the court held as hereunder:

35. On the second issue, the elephant in the room is whether the suit property was available for alienation when the same was allocated to the appellant. As stated earlier, it is common ground that the 1st respondent was allocated the suit property and was supposed to comply with the terms stipulated in the letter of offer. The 1st respondent accepted the offer and paid the required monies albeit outside the thirty days stipulated in the letter of offer. Having done so, responsibility to process and issue the title documents rested with the 3rd respondent. Although the acceptance and payment of the premium was done outside the stipulated time, the 3rd respondent accepted the money and issued a receipt for the same and never informed the 1st respondent that the offer had been withdrawn or had lapsed. In the circumstances, the Commissioner of Lands could not purport to deem the suit property as unalienated and purport to allocate the same to another party.
357. Arising from the foregoing decision, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has sought to persuade this court that the acceptance of the payments which were made outside the stipulated 30-day period effectively operates to resuscitate and/or revive the letter of allotment.
358. However, I beg to point out that I have hitherto held the humble albeit firm position that where the terms of a Letter of allotment are neither adhered to nor complied with timeously, the impugned Letter of allotment is rendered redundant and becomes otiose.
359. In this regard, I have held the view that such a Letter of allotment lapses and becomes extinct. For good measure, my humble position has been reflected at the foot of the decision in the case of Joseph Kamau Muhoro versus The Attorney General & Another (2021)eKLR; where I held and stated thus:
34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.
35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR;
- “ In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive.”
360. Other than the foregoing position which I have held dear to my heart, I am aware of the latest [current] position taken by a different bench of the Court of Appeal in the case of Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), where the court stated and held as hereunder:
52. Just as in the previous case, the issue as to whether the stand premium for the first allotment was paid or not was not an issue. However, this Court in Swaleh Mohamed Waziri & 3 Others v Houd Mohmoud Athman & Another [2020] eKLR held that:–“...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.”



53. There is therefore no difficulty in situations where an allottee has duly paid the stand premiums and related charges and the title documents issued. In those circumstances, the allottee, now the registered proprietor, acquires all the rights to that land hence removing the land from the ambit of further allotment. That position is reflected in this Court’s decision in *Dr. Joseph N K Arap N’gok v Justice Moiyo Ole Keiwua & Others* Civil Application No. Nai. 60 of 1997 where this Court held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.
54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court’s decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters. “It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”
361. Most recently, the debate pertaining to whether or not a letter of allotment whose terms have not been complied with and/or adhered to, survives the expiry of the stipulated timelines was addressed, highlighted and elaborated upon by the Supreme Court of Kenya [ the Apex Court], in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment).
362. For coherence the court stated and held thus:
- “ [58] So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...”
363. By dint of the provisions of Article 163(7) of *the Constitution* 2010, [ which provisions underscores the Doctrine of stare decisis] the decisions of the Supreme Court of Kenya [the apex court] are binding on all the other courts save for the Supreme Court itself.
364. Arising from the provisions of Article 163(7) (supra), I do not have to undertake a calibration between the two-conflicting decisions the Court of Appeal in the case of *Cabin Crew Investments Limited v Kenya Medical Training College & 4 others* (Civil Appeal 441 of 2019) [2021] KECA 49 (KLR) (23 September 2021) (Judgment) and *Waterfront Holdings Limited v Kandie & 2 others* (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment, respectively).
365. Pertinently, the obtaining the position as pertains to the fate of a Letter of allotment whose terms have not ben complied with is now settled. Instructively, such Letter of allotment is rendered otiose.
366. Notably, once the terms of a letter of allotment are not complied with, [like in the instant case], same lapses and becomes extinct. Subsequently, the allottee cannot purport to act on the basis of a dead letter of allotment.
367. To my mind, the letter of allotment which was issued to and in favor of the 2<sup>nd</sup> Defendant herein lapsed and thus became extinct and hence same could not underpin/ anchor the purported Certificate of Title/Grant that was issued in the year 2019.



368. On the other hand, it is also not lost on this court that where a Certificate of Title is issued albeit without the requisite documentation and/or foundation, then the resultant Certificate of Title is a nullity and cannot anchor the claim of any lawful rights whatsoever.
369. In my humble albeit considered view, the Certificate of Title/Grant which the 2<sup>nd</sup> Defendant alludes to and espouses to evince her entitlement to and in respect of the suit property was issued in vacuum.
370. For good measure, it appropriate to cite and adopt the doctrine of Ex-Nihilo-Nihil-Fit [out of nothing comes nothing].
371. Before departing from the issue herein, it is also appropriate to recall and remind ourselves of the trite and hackneyed dictum in the case of *Macfoy vs United Africa Limited* (1961) 3 All F.R. 1169; where Lord Denning said at p. 1172:

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up 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.”

372. Finally on this aspect, it is also not lost on this court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein lodged and/or mounted a complaint with the National Land Commission and in respect of which, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the Plaintiff's Title to and in respect to the suit property was illegal, unlawful and thus a nullity.
373. Besides, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also complained that the transfer and registration of the suit property in favor of the Plaintiff also constitutes historical injustice. Consequently and in this regard, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought to impugn and/or impeach the Title belonging to and registered in the name of the Plaintiff.
374. Instructively, upon receipt of the complaint by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, National Land Commission undertook due investigations with a view to interrogating and authenticating the veracity of the complaints that had been mounted by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant[s] respectively.
375. To be able to understand the aspect that a complaint was mounted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the National Land Commission as pertains the propriety, validity and legality of the Certificate of Title in favor of the Plaintiff, it is appropriate to take cognizance of the evidence tendered by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through DW1 [John Michael Ohas].
376. For coherence, whilst under cross examination by learned counsel for the Plaintiff, DW1 stated as hereunder:

“There is a dispute over the title of the suit property. I made a complaint to National Land Commission. Before the National Land Commission I was not represented by an advocate. I repeat that I was not represented by an advocate. The meeting before the National Land Commission was a general meeting. I did not have any advocate before the National Land Commission”.



377. Furthermore, whilst still under cross examination by learned counsel for the Plaintiff DW1 proceeded to and stated as hereunder:

“I made a complaint to National Land Commission. I am not aware of the decision of National Land commission. I am not aware of the decision of National Land Commission. I never followed up the dispute before National Land Commission.”

378. On the other hand, whilst being cross examined by learned counsel for the 3<sup>rd</sup> Defendant, DW1 stated as hereunder:

“I have seen a copy of the gazette notice. However, I am not aware of any revocation of the 2<sup>nd</sup> Defendant’s title by the National Land Commission. Referred to the bundle of documents dated the 4<sup>th</sup> July 2023 by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness avers that same is familiar with the documents. Further the witness identifies the document as a gazette notice.”

379. Whilst still under cross examination by learned counsel for the 3<sup>rd</sup> Defendant, the witness proceeded to and stated that:

“I am not aware of the gazette notice that was published by National Land Commission.”

380. Other than the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant[s] also confirmed that indeed a Complaint was made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the National Land Commission. For clarity, the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants mounted a complaint with the National Land Commission is acknowledged and re-affirmed at the foot of paragraph 16 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s written submissions.

381. Moreover, the issue pertaining to the complaint that was mounted before the National Land Commission and the resultant outcome of the investigation that was taken by National Land Commission has also been adverted to and highlighted by Learned counsel for the Plaintiff.

382. For coherence, Learned counsel for the Plaintiff has discussed the recommendation[s] by the National Land Commission and the resultant gazettement thereof at the foot of paragraph 36, 37, 38 and 39 of the written submissions dated the 30<sup>th</sup> January 2024.

383. Notably, the complaint which was mounted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the National land Commission was duly investigated by the commission in exercise of her [commissions] powers espoused vide Article 68 of *the constitution* 2010 as read together with Section 14 of the *National Land Commission Act*, 2012 and thereafter the commission rendered a determination.

384. Suffice it to point out that the determination by and on behalf of the National Land Commission was made on the 24<sup>th</sup> of March 2016 and thereafter communicated to both the Plaintiff and the 2<sup>nd</sup> Defendant on the 6<sup>th</sup> of April 2016. Furthermore, it is worthy to recall that the commission thereafter proceeded to and published gazette notice number CX1X No. 97 dated the 27<sup>th</sup> of July 2017; wherein the commission revoked the Certificate of Title in favor of the 2<sup>nd</sup> Defendant.

385. Remarkably, the copy of the gazette notice which was issued and published by the National Land Commission and which spoke to the revocation of the 2<sup>nd</sup> Defendant’s title to the suit property, was indeed tendered and produced as evidence before the court by DW1 [John Michael Ohas].



386. Be that as it may, it is not lost on this court that the same witness [DW1], who tendered and produced the said gazette notice is the same one who whilst under cross examination feigned ignorance about the outcome of the Complaint that same [DW1] had mounted before the commission.
387. Notwithstanding the feigned ignorance exhibited and displayed by DW1 [John Michael Ohas], there is no gainsaying that National Land Commission rendered a determination which was thereafter gazetted in the usual manner. In this regard, whether or not one is aware of and/or privy to the terms of the gazette notice, it is common knowledge that the contents of the gazette notice are deemed to be known to all Kenyans irrespective of age and/or status.
388. However, in respect of this matter, evidence abound that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were duly informed and thus appraised of the outcome [determination] of the investigations by National Land Commission. Consequently, the pretense that was exhibited by DW1, has no place in law.
389. Be that as it may, the critical issue which merits espousal and amplification is to the effect that the Certificate of Title, which the 2<sup>nd</sup> Defendant herein anchors her claim to and in respect of the suit property, was indeed revoked and, the gazette notice revoking same, has never been challenged, impugned and/or impeached.
390. To my mind, the National Land Commission is a constitutional Commission established vide the provisions of Article 67 of *the Constitution* and was conferred with a constitutional mandate to interrogate and address certain grievances pertaining to the manner in which Public land was alienated and/or allocated. Consequently, whenever the commission renders a determination [like in the instance case] then such a determination cannot be wished away.
391. Instructively, whoever is aggrieved by the decision, recommendation and/or determination by the commission, in exercise of her constitutional mandate, [the 1<sup>st</sup> and 2<sup>nd</sup> Defendants not excepted] would be expected to challenge such a decision before a court of law and not otherwise.
392. Simply put, the decisions, recommendations and determination by the National Land Commission, like the one beforehand, has the force of law. Further and in any event, it cannot be said that the people of the Republic of Kenya fought for the establishment of the constitutional commission, only for their determination, recommendations and/or decisions to be ignored and or disregarded.
393. Put differently, it is my holding that the decisions of National Land Commission were not intended to serve aesthetic or cosmetic purposes. To the contrary, such decisions have legal and constitutional implications and unless same are quashed and/or set aside by a court of law, same [decisions] must be respected, adhered to and/or complied with.
394. At any rate, I beg to point out and highlight that the status and legal import of the decisions, determinations and/or recommendations by the constitutional commissions, National Land Commission not excepted, have hitherto been elaborated by the Supreme Court of Kenya [the apex court] in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (Petition 42 of 2019) [2021] KESC 35 (KLR) (24 March 2021) (Judgment), where the court held thus:
39. From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in *the Constitution* or in law. Neither *the Constitution* nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the



manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to inter alia: pay the 3rd respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him, were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

395. Furthermore, the court proceeded and stated as hereunder:

42. We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this court and other superior courts. As such we are of the opinion that the following guiding principles ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

Guiding Principles on the recommendations from Commission to public bodies:

- a. Any power to make a recommendation ought to be specifically provided for in *the Constitution* or in law; [Emphasis supplied].
- b. Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;
- c. A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in *the Constitution* or in law;
- d. The manner in which a recommendation is to be implemented by a Public entity is discretionary;
- e. Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority.
- f. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;

396. Arising from the foregoing analysis, my answer to issue number two [2] is fourfold. Firstly, the letter of allotment issued on the 3<sup>rd</sup> of February 1994 in favor of the 2<sup>nd</sup> Defendant herein lapsed and became extinct by operation of the law. In this regard, the said letter of allotment became redundant and otiose.

397. Secondly, that once the letter of allotment lapses for want of compliance and/or adherence to the terms and conditions thereunder, any payments and/or actions made ex-post facto do not rebirth or resuscitate the dead letter of allotment.

398. Thirdly, the Certificate of Title/Grant which was issued to and in favor of the 2<sup>nd</sup> Defendant on or about the year 2019 [albeit during the existence of the certificate of title in favor of the Plaintiff], was issued in vacuum and was thus a nullity ab initio.

399. Fourthly, the Certificate of Title upon which the 2<sup>nd</sup> Defendant herein anchors her claim to the suit property was duly and lawfully revoked by the National Land Commission vide Gazette Notice No. Volume CX1X No. 97 dated the 17<sup>th</sup> of July 2017. Consequently, the impugned Certificate of Title



is non-existent and thus cannot be the basis of a claim of any legal rights to and/or in respect of the suit property.

### **Issue Number 3**

#### **Whether the Plaintiff herein acquired any lawful rights to and in respect of the suit property or otherwise.**

400. It was the evidence of DW3, namely, Gordon Odeka Ochieng [Director Land Administration] that the letter of allotment which was issued to and in favor of the 2<sup>nd</sup> Defendant was neither complied with nor acted upon within the set timeline.
401. Consequently, DW3 proceeded to and averred that upon the lapse of the letter of allotment in favor of the 2<sup>nd</sup> Defendant, the plot in question [now the suit property] reverted to the Government and became unalienated Government land.
402. Additionally, DW3 testified that thereafter, the Commissioner of Lands proceeded to and issued a letter of allotment reference number 88767/IV dated the 30<sup>th</sup> of April 1999, whereupon L.R No. 209/12077 [suit property] was allocated to and in favor of M./s Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe.
403. Furthermore, the witness ventured forward and testified that upon the issuance of the letter of allotment, [details in terms of the preceding paragraphs], the allottees proceeded to and complied with the terms of the letter of allotment, inter-alia, payments of the requisite stand premiums culminating into the execution of a lease instrument which gave rise to the grant registered on the 31<sup>st</sup> of December 2002.
404. Effectively, the witness confirmed that the suit property was thereafter registered in favor of M./s Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe.
405. On the other hand, the same witness [DW3] testified that long after the suit property had been registered in the name of M./s Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe, same was sold to and in favor of the Plaintiff herein culminating into the transfer and registration of the suit property in favor of the Plaintiff company on the 18<sup>th</sup> of June 2012.
406. At any rate, PW1 [Sammy Silas Komen Mwaita], testified and averred that the Plaintiff company bought and/or purchased the suit property from M./s Karandi Farm Ltd, Peter Nduati Mbugua and Pauline Muringe at a consideration of Kes. 24,000,000/= which money was duly paid to and acknowledged by the vendor.
407. Furthermore, PW1 averred that upon the payment of the purchase price, the vendors transferred the suit property to and in favor of the Plaintiff company who thereafter became the lawful and legitimate proprietor thereof.
408. From the foregoing testimony, what becomes crystal clear is that the Plaintiff company is a bona fide purchaser for value of the suit property from the previous allottee [vendors], who held not only an apparent valid Title; but a valid title, whose roots are traceable to the letter of allotment issued on the 30<sup>th</sup> of April 1999.
409. To my mind, the Plaintiff herein lawfully acquired rights to and in respect of the suit property premised and predicated on a lawful transfer instrument dated and registered on the 18<sup>th</sup> of June 2012.



410. Ostensibly, the Plaintiff herein satisfies and meets the requisite parameters that define a bona fide purchaser for value, as elaborated upon in the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014, where the Honourable Court stated and held as hereunder:

This Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

411. More recently, the parameters that underpin a claim for bona fide purchaser for value were revisited, highlighted and amplified by the Supreme Court of Kenya [the apex court] in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court held thus:

(90) The Black’s Law Dictionary 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

(91) The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 E A 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:



- (1) he holds a certificate of title;
- (2) he purchased the property in good faith;
- (3) he had no knowledge of the fraud;
- (4) he purchased for valuable consideration;
- (5) the vendors had apparent valid title;
- (6) he purchased without notice of any fraud; and
- (7) he was not party to the fraud.”

(92) On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005* [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

412. Having considered the import, tenure and scope of the concept of bona fide purchaser for value and having taken cognizance of the circumstances preceding the acquisition, transfer and ultimate registration of the suit property in favor of the Plaintiff company, there is no gainsaying that the Plaintiff herein is truly a bona fide purchaser for value of the suit property and hence deserving of the requisite protection of the court, in accordance with the provisions of Section 24 and 25 of the [Land Registration Act](#) [2012].
413. Before departing from this issue, it is also important to point out that other than the proclamation that the Plaintiff company is a bona fide purchaser for value of the suit property, I would still have made a finding in favor of the Plaintiff based on the principle of priority in the registration.
414. To this end, it is worthy to recall that the Certificate of Title which was subsequently sold to and transferred in favor of the Plaintiff was first registered in the names of the vendors on the 31<sup>st</sup> of December 2002, before same was transferred to and registered in the name of the Plaintiff on the 18<sup>th</sup> of June 2012.
415. On the other hand, it is not lost on this court that the Certificate of Title/Grant which the 2<sup>nd</sup> Defendant was relying upon to lay a claim to the suit property was procured and issued in the year 2019. Consequently, even on the basis of priority of registration, the Certificate of Title in favor of the Plaintiff would take precedence.
416. In this respect, it is imperative to adopt and reiterate the holding of the Court of Appeal in the case[s] of *Elizabeth Wambui Kiragu v Ndirangu Macharia* [2018] eKLR and *Kamau James Njendu v Serah Wanjiru & Another* [2018] eKLR where the court stated and held thus:

Further, there are two competing titles herein over Ruiru Kiu Block 2/2820, which parcel of land lie on Index Map Sheet No.4. The Plaintiff obtained her title deed over Sheet No,4 on 7<sup>th</sup> September 2010, and the Defendant obtained his in the year 2011. Therefore, this Court finds that the Plaintiff's title is the first in time and should therefore prevail. The Court will rely on the maxim of Equity which states; "when two equities are equal, the first



in time prevails". See the case of *Gitwany Investment Ltd & 3 Others... Vs... Commissioner of Lands*, HCCC No. 1114 of 2002, where the Court held that:-

"The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail...Having found that the Plaintiff's title deed is the first in time and that it should prevail, then the Court further finds as a holder of Certificate of registration, she's deemed to be the absolute and indefeasible owner. "

417. In a nutshell, my answer to issue number three [3] is twofold. Firstly, the Plaintiff company herein fits within the prescription and parameters of a bona fide purchaser for value without notice of any defect in the Title of her predecessor.
418. Secondly, even if the determination was to be made on the basis of priority in terms of registration, [ first in time in accordance with the Doctrine of Equity], the Plaintiff's Title to and in respect of the suit property, which clearly preceded the one in favor of the 2<sup>nd</sup> Defendant, would take priority and prominence, in the eyes of the law.

#### **ISSUE NUMBER 4**

##### **What reliefs, if any, ought to be granted.**

419. It is imperative to note and recall that both the Plaintiff and the 2<sup>nd</sup> Defendant herein have sought for reliefs touching on and concerning ownership of the suit property. For good measure, both the Plaintiff and the 2<sup>nd</sup> Defendant have parallel and rivaling Certificates of Title to the suit property.
420. Nevertheless, whilst discussing issue number two [2] herein before, this court highlighted the perspective[s] that the Certificate of Title to and in favor of the 2<sup>nd</sup> Defendant was actually issued in vacuum and thus same was devoid of any legal anchorage.
421. Further and in any event, the court thereafter proceeded and held that the Doctrine of Ex-nihilo-nihil-fit [out of nothing comes nothing] was relevant and applicable to the Title espoused by the 2<sup>nd</sup> Defendant.
422. Arising from the foregoing, there is no gainsaying that the 2<sup>nd</sup> Defendant herein whose claim to the suit property was underpinned on the void Certificate of Title; has neither established nor demonstrated any lawful interests to the suit property.
423. To the contrary, the Plaintiff herein has laid and placed before the court credible, plausible and cogent evidence that documents the manner in which same bought, purchased and acquired the suit property from the vendors, who were the initial allottees thereof.
424. Additionally, the court found and held that the Plaintiff company fits within the legal prescription of a bona fide purchaser for value as defined as elaborated upon in a legion of case law. [see *Ardhi Highway Developers Ltd vs Westend Butcheries Ltd & 6 Others* (2015)eKLR; *Mwangi James Njehia vs Janita Wanjiru James & Another* (2021)eKLR and *Dina Management Ltd vs The County Government of Mombasa & 6 Others* (supra)].
425. To the extent that the Plaintiff has established and proved her case as pertains to ownership of the suit property, there is no gainsaying that the Plaintiff is entitled to assorted reliefs sought for and enumerated at the foot of the Plaint beforehand.



426. Nevertheless, it is worth pointing out that at the foot of the Plaint beforehand, the Plaintiff has sought for, inter-alia, General damages for trespass and punitive damages as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Consequently, it behooves this court to interrogate and discern whether the Plaintiff has established a basis to warrant the grant of such [sic] damages.
427. To start with, it is common ground that it is the Plaintiff herein who has been in occupation and possession of the suit property. Indeed, the fact that the Plaintiff is the one in possession and occupation of the suit property was conceded and acknowledged by PW1.
428. Furthermore, DW1 [John Michael Ohas] is on record as stating that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have never been in possession of the suit property even after same acquired the impugned Certificate of Title in the year 2019.
429. Arising from the foregoing, the question that begs the answer is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed onto the suit property to warrant the application of the provisions of Section 3(3) of the Trespass Act, Chapter 294 Laws of Kenya.
430. In my humble view, the Plaintiff herein has neither placed nor tendered before the court any evidence to buttress the claim for payment of general damages for trespass [See Winfield & Jolowicz on Tort, Sweet & Maxwell, 19<sup>th</sup> Edition at page 428, which states as follows:
- “Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].
431. Other than the foregoing, evidence abound that upon the transfer and registration of the suit property in favor of the Plaintiff, the Plaintiff utilized the title of the suit property to procure and obtain a banking facility in the sum of Kes. 200,000,000/= only. Furthermore, the Certificate of Title in respect of the suit property is admittedly charged to and in favor of M/s Equity Bank Ltd.
432. Pertinently, there is no gainsaying that it is the Plaintiff who has been in possession of the suit property, including using the Certificate of Title thereto to secure a banking facility, which benefits the Plaintiff.
433. Simply put, this court is not persuaded that the Plaintiff herein who is in occupation and possession of the suit property is entitled to recompense on account of general damages. [See the dictum in Kenya Power & Lighting Company Ltd v Eunice Nkirote Ringera [2020] eKLR] and Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR].
434. On the other hand, the Plaintiff has also laid a claim on account of Punitive damages. However, despite laying a claim for payment of punitive damages, it is worth stating that even learned counsel for the Plaintiff did not deem it appropriate to pursue the claim for punitive damages. For good measure, not even a sentence has been alluded to in the submissions by learned counsel for the Plaintiff to that effect.
435. Ostensibly, it is apparent that even learned counsel for the Plaintiff came to a subtle and/or tacit conclusion that no punitive damages were neither claimable nor payable in respect of the instant matter.



436. Notwithstanding the foregoing, it is imperative to state and underscore that a claim for punitive damages can only arise and be decreed in circumscribed circumstances, which must be clearly pleaded and thereafter proved vide credible evidence.
437. Instructively, the circumstances under which punitive and/or aggravated damages may issue and/or become payable were enunciated, highlighted and elaborated upon by the Court of Appeal in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, where the court stated and held thus:
25. The respondent prayed for exemplary damages. As stated by this Court in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:
- “Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:
- i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.
438. Consequently, and in view of the foregoing, I come to the conclusion that even though the Plaintiff herein has duly proved and established her claim to and in respect of the suit property and is thus entitled to the requisite protection of the law in the manner highlighted vide the decision in the case of *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] eKLR; same is however, not entitled to an award of General and punitive damages.

#### **FINAL DISPOSITION:**

439. Having reviewed the thematic issues which were enumerated [highlighted] in the body of the Judgment herein, it is now appropriate to bring the Judgment to a close by making and/or proclaiming the final orders.
440. Nevertheless, it is worthy to underscore that whilst discussing the various issues highlighted elsewhere herein before, the court has made various findings and conclusions. For coherence, the court has found that the Plaintiff herein has duly proved her case to the requisite standard.
441. Conversely, the court has also found and come to the conclusion that the 2<sup>nd</sup> Defendant herein has neither demonstrated nor proved her claim to and in respect of the suit property. Simply put, the 2<sup>nd</sup> Defendant’s Counterclaim is not proved.
442. Consequently and in the premises, the court proceeds to enter Judgment in the following terms:
- i. A declaration be and is hereby issued that the Plaintiff is the lawful registered and absolute owner of all that parcel of land known as L.R No. 209/12077 [I.R. No. 90923].
  - ii. A declaration be as is hereby issued that the Defendants’ activities and actions on the official documents and records at the Lands Registry on the Plaintiff’s parcel of land known as LR. No. 209/12077 [I.R No. 90923], were irregular, fraudulent and therefore illegal and that the same be and are hereby nullified and cancelled accordingly.



- iii. A declaration be and is hereby issued that the 2<sup>nd</sup> Defendant's Title known as LR. No. 209/12077 [I.R. No. 90923] was obtained fraudulently, irregularly and illegally and that the same is therefore invalid, null and void.
- iv. The 3<sup>rd</sup> Defendant be and is hereby ordered to rectify the register in the Land's office to cancel all unlawful entries on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and indicate the Plaintiff as the lawful and registered proprietor of all that parcel of land known as LR. No. 209/12077 [I.R. No. 90923].
- v. The 3<sup>rd</sup> Defendant be and is hereby ordered to cancel, revoke and nullify the Title known as LR. No. 209/12077 [I.R. No. 213651] in the name of the 2<sup>nd</sup> Defendant.
- vi. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their employees, servants, agents or any other person(s) whatsoever and however acting in connection with and/or under their instructions from excavating, carrying out any construction works, building any structures, carrying out any subdivisions, transferring, trespassing, encroaching, alienating, interfering with and or dealing in any manner whatsoever and howsoever with the Plaintiff's parcel of land known as L.R. No. 209/12077 [I.R. No. 90923].
- vii. The 2<sup>nd</sup> Defendant's Counterclaim dated the 10<sup>th</sup> of November 2022 be and is hereby dismissed with costs to the Plaintiff only.
- viii. The Plaintiff be and is hereby awarded costs of the suit [Plaint] as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only.
- ix. Any other relief not expressly granted is hereby declined.

443. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the presence of:**

Benson – Court Assistant.

Mr. George Wandati for the Plaintiff.

Mr. Moses Owuor; Mr. C M Ongoto and Ms. Rebecca Mogire for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Allan Kamau [Principal Litigation Counsel] for the 3<sup>rd</sup> Defendant

