



Kenya Anti-Corruption Commission v Willesden Investments Limited & 6 others; City Council of Nairobi (Interested Party) (Environment and Land Case Civil Suit 35 of 2010 & Environment & Land Petition 28 of 2020 (Consolidated)) [2025] KEELC 279 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 35 OF 2010 &
ENVIRONMENT & LAND PETITION 28 OF 2020 (CONSOLIDATED)**

OA ANGOTE, J

JANUARY 30, 2025

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WILLEDEN INVESTMENTS LIMITED 1ST DEFENDANT

BEN MULI 2ND DEFENDANT

JATIN PATEL 3RD DEFENDANT

HITESH RATHOOD 4TH DEFENDANT

MARTHA KIMWELE 5TH DEFENDANT

KENYA HOTEL PROPERTIES LIMITED 6TH DEFENDANT

WILSON GACHANJA 7TH DEFENDANT

AND

CITY COUNCIL OF NAIROBI INTERESTED PARTY

JUDGMENT

Introduction

1. There are maps that guide us, and then there are maps that lead us into a legal labyrinth.
2. In this case, a survey map did not just show the road – it decided, rather boldly, that the road, which had been used since independence by members of the public, and the occasionally lost tourists, simply did not exist.



3. The court was left to figure out whether the road had been lost to history, or if it was simply the victim of a cartographic error big enough to re-route an entire community's daily commute. The complexity of the matter made the court to briefly consider if it should pursue a degree in geodetic engineering just to follow.

ELC No. 35 of 2010

4. Through a Further Amended Plaintiff dated 23rd November 2021, the Plaintiff's claim is that at all material times, the parcel of land referred to as LR. 209/12748, I.R. 66986 in Nairobi was previously a section of Kaunda Street and a public road running between Nyayo House and the Hotel Intercontinental, linking Uhuru Highway to the Central Business District, and that as early as February 1967, the width of this public road was mapped out at 80 feet or approx. 24.4 meters.
5. The Plaintiff averred in the Plaintiff that in 1995, a survey was illegally undertaken on this section of the public road, and the original dimensions were altered and reduced to 37.76 feet or approx. 11.51 meters and that this, they contend, was to create the suit property, which was later registered as LR No. 209/12748 I.R. 66986 measuring 0.100 hectares.
6. According to the Plaintiff, on 13th January 1994, the 7th Defendant fraudulently allocated the suit property as an un surveyed commercial plot to a company called Center Park Limited and that their investigations revealed that this company does not exist at the Registrar of Companies.
7. It was averred by the Plaintiff that the grant was later issued to the 1st Defendant, M/S Willesden Investments Limited. They urge that although the suit property was purportedly issued for development of a multi-storey car park, no development plan for such car park was ever approved by the Director of Physical Planning or the Commissioner of Lands.
8. The Plaintiff iterated the particulars of the Defendants' fraud and illegalities as alienating a public road which they knew or ought to have known was not available for alienation; altering or diverting a public road within a local authority without regard and in breach of the Local Government Act and encroaching on a public property in breach of the Physical Planning Act.
9. The Plaintiff claims that despite the said illegalities, the 1st Defendant instituted High Court Civil Case No. 367 of 2000 for damages for trespass against the 6th Defendant, which had apparently been in exclusive possession of the suit property between 1994 and February 1998, and that in its decision, the High Court upheld the 1st Defendant's suit and awarded the 1st Defendant a sum of Kshs. 80,902,400 as general damages, mesne profits and damages for loss of business opportunity.
10. It was the Plaintiff's further averment that the 6th Defendant appealed this decision to the Court of Appeal through Civil Appeal No. 149 of 2007, but only succeeded in scaling the High Court's award downwards and restricting it to mesne profits only. The Plaintiff argues that had the courts been aware that the action for trespass was based on a property which was on a public road, the award for trespass would not have been made in the 1st Defendant's favour.
11. The Plaintiff asserts that the 1st Defendant's actions have visited loss and damage upon the public, which will continue to suffer unless the letter of allotment and grant issued to the 1st Defendant are cancelled.
12. On this basis, the Plaintiff prays for judgment against the Defendants jointly and severally for:
 - a. A declaration that the letter of allotment dated 13th January 1994 addressed to Center Park Limited is null and void;



- b. A declaration that Grant No. I.R. 66986 of 15th September 1995 in respect of L.R. No. 209/12748 is null and void.
- c. Cancellation and/or revocation of the letter of allotment dated 13th January 1994 addressed to Center Park Limited.
- d. Cancellation of the Grant No. I.R. 66986 of 15th September 1995 in respect of L.R. No. 209/12748;
- e. A permanent injunction restraining the Defendants, their servants, agents or any other person from wasting, damaging, alienating or in any other way interfering with the property referred to as L.R. No. 12748, I.R. No. 66986 and or any section of Kaunda Street.
- f. The sum of Kshs. 22,729,800/- awarded to the 1st Defendant in Appeal Case No. 149 of 2007 as mesne profits.
- g. Costs of this suit and interest thereof.

The 1st- 5th Defendants' Amended Defence

- 13. In a joint Statement of Defence, the 1st to 5th Defendants opposed the Plaintiff's suit. It is the Defendants' case that the original width of the road in the survey completed on 3rd February 1967, registered as Folio Number 110 in Register No. 15, being 80 feet wide, has not been tampered with.
- 14. They contend that the portion of which the present title stands is from the bigger portion of Nyayo House and that before Willesden took possession of the suit property in 1998 from the 6th Defendant, Willesden used, operated and maintained the property as a car park in full glare of the Nairobi City Council.
- 15. It is their assertion that between 2004 and 2012, the City Council of Nairobi had possession of the suit property and the City Council used, operated and maintained the property as a car park, and that between 2018 and sometime in 2020, the suit property was jointly operated between the 1st Defendant and the County Government of Nairobi, until the latter ceased interfering with the suit property.
- 16. The 1st – 5th Defendants averred that the Nairobi County Government has never attempted to revert the property to the purported road reserve and has never demonstrated any case where a road reserve has been used as a parking lot. They argue that accordingly, the suit property has never been a road reserve and the Plaintiff must show how the same is a road reserve.
- 17. It is the 1st – 5th Defendants' case that a letter of allotment dated 13th July 1994 with respect to the suit property was issued to Center Park Limited at a stand premium of Kshs. 3.2 million and annual rent of Kshs. 640,000 and that in 1995, after the 1st Defendant showed interest in purchasing the suit property, the allottee, Center Park Limited, wrote a letter dated 7th August 1995 to the Commissioner of Land requesting for the title to be issued in the 1st Defendant's name.
- 18. This request, it was averred, was approved and the 1st Defendant made the payment of Kshs. 4,047,690/- to the Commissioner of Lands, which was the requisite stand premium, annual rent and other costs towards processing title in the 1st Defendant's favour.
- 19. According to the 1st – 5th Defendants, the Plaintiff has not shown the illegality or the provision of law that has been contravened, as the allotment letter describes the property as an un surveyed commercial plot and not as a road reserve.



The 7th Defendant's Defence

20. The 7th Defendant denied that there was an illegal survey in 1995, and averred that it was not within the province of the office of the Commissioner of Lands to conduct surveys. He stated that alienation and allotment of land is as a result of several stages and processes undertaken, processed, vetted and approved by different cadres of officers within the Ministry of Lands.
21. He denied the allegations that the grant was issued and registered in the name of a company that was not allocated the land and that as a Commissioner of Lands, he was not vested with the duty of issuing letters of allotment or ascertaining registration of companies and therefore, he did not author the letter of allotment dated 13th January 1994.
22. The 7th Defendant reiterated that the issuance of the grant to the 1st Defendant was legal, regular and lawful. He argued that these proceedings, which have been instituted against him in his personal capacity, ten years after he ceased to hold office, are discriminative, misconceived, scandalous and vexatious, and amounts to an abuse of the judicial process.

ELC Petition 28 of 2020

23. The second suit, ELC Petition No. 28 of 2020, was instituted by Kenya Hotels Properties Limited, the 6th Defendant/Petitioner, through an Amended Petition dated 16th February 2022. The 6th Defendant/Petitioner has sought judgement as follows:
 - a. A declaration that Grant No. I.R. No. 66986 in respect of land known as L.R. No. 209/12748 issued by the 5th Respondent to the 2nd Respondent was unlawful and illegal for being in contravention of the Government Lands Act (repealed), Local Government Act (repealed) and the Physical Planning Act for lack of lawful conversion of a public road to private use.
 - b. A declaration that the Letter of Allotment Ref. No. NTP 9/1/XII/31 dated 13th January 1994 to Center Park Limited in respect of the unsurveyed commercial plot was null and void ab initio as the company was non-existent.
 - c. A declaration that Grant No. I.R. No. 66986 in respect of the parcel of land known as L.R. No. 209/12748 issued to the 2nd Respondent was null and void ab initio as there was no transfer of the lease from Center Park Limited to the 2nd Respondent.
 - d. An order of mandamus be issued compelling the 1st, 5th and 6th Respondent to cancel the allocation of all that parcel of land known as L.R. No. 209/14159 issued to the non-existent entity known as Center Park Limited vide the Letter of Allotment dated 13th January 1994 and cancellation and revocation of Grant No. I.R. No. 66986 in respect of the parcel of land known as L.R. No. 209/12748 in the name of the 2nd Respondent.
 - e. An order of certiorari be issued to remove and bring into the High Court to quash:
 - i. The Letter of Allotment Ref. No. NTP 9/1/XII/31 dated 13th January 1994 to Center Park Limited.
 - ii. Grant No. I.R. No. 66986 in respect of the parcel of land known as L.R. No. 209/12748 to the 2nd Respondent.
 - f. A declaration that it would be against public policy and Article 40(6) of *the Constitution* for the 2nd Respondent to derive any benefit from the decree in *Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited* as the revocation of Grant



No. I.R. No. 66986 in respect of the parcel of land known as L.R. No. 209 /12748 would apply retrospectively to 15th September 1995 invalidate all subsequent proceedings, orders and judgements.

- g. A permanent injunction be issued preventing the 2nd Respondent, its servants or agents or any other Respondent from executing the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited in any manner whatsoever or by enforcing the bank guarantee held by the 2nd Interested Party.
 - h. An order directing the 3rd to 6th Respondents to investigate what taxes and land rents have not been paid by the 2nd Respondent to the government regarding L.R. No. 209/12748 I.R. No. 66986.
 - i. Or such other orders as this Honourable Court shall deem just, inclusive of costs of the Petition to be paid by the 2nd Respondent
24. The Petitioner's case is that the suit property was unlawfully acquired by Willesden (the 1st Defendant) from a non-existent entity known as Center Park Limited. They also assert that the property was at all material times a public road held in trust for the public and was not available for alienation.
25. The Petitioner deponed that Willesden was registered as proprietor of the suit property on 15th September 1995, and that Willesden filed a suit against the Petitioner in Milimani HCCC No. 367 of 2000 Willesden Investments Ltd v Kenya Hotel Properties Limited seeking damages for trespass to land and mesne profits.
26. According to the Petitioner, the land had at all times been leased by Intercontinental Corporation Hotels from the City Council of Nairobi (the 1st Interested Party) and the hotel continued to pay rent to the 1st Interested Party even after a title was purportedly issued to Willesden.
27. The Petitioner averred that judgment was entered against it in Milimani HCCC No. 367 of 2000 on 14th December 2006 for Kshs. 54,902,400/- for mesne profits, Kshs. 10 million general damages for trespass, Kshs. 6 million for loss of business opportunity, interest and costs.
28. According to the Petitioner, it thereafter lodged an appeal against the said judgment and partially succeeded in reducing the same and that, however, none of the judgments of the superior courts considered or determined whether the suit land was public property that was illegally acquired.
29. The Petitioner asserts that the Kenya Anti-Corruption Commission (KACC) conducted investigations and established that the allotment of the suit property and issuance of title to Willesden was irregular, illegal and fraudulent and that the suit land is located on a public road.
30. The Petitioner asserts that KRA has confirmed that Willesden was neither tax compliant nor registered as a taxpayer and appropriate measures should be taken to trace and recover all taxes due.
31. It was deponed that the Nairobi City County confirmed that Willesden cannot pay rates because the suit land is not ratable on account of it being public property and that the County has been in possession of the suit land since September 2004 to the date of filing the Petition.

The 2nd Respondent's Answer to Petition

32. Willesden Investments Limited, the 1st Defendant/2nd Respondent, through its Reply to Petition dated 15th March 2022, has sought for dismissal of the Petition. The Petitioner contends that prior to the



institution of Milimani HCCC no. 367 of 2000, the 2nd Respondent had instituted HCCC No. 84 of 1997, which was withdrawn.

33. The 2nd Respondent (Willesden Investment Limited) averred that prior to the takeover of the suit property by the 2nd Respondent, the said property had been used by the 1st Interested Party and the Petitioner as a car park and that despite Justice Mbogoli Msagha's order of stay on 18th February 2010 in Milimani HCCC No. 24 of 2008, the matter came up before Odunga J on 14th February 2012 where the parties recorded a final consent order confirming that Willesden is the registered owner of the suit property, and that Judgment was entered against the Nairobi City Council in favour of Willesden for the sum of Kshs. 85 million, payable within 60 days.
34. It was deponed that the parties have never honored the said court order ever since, and when the 1st Interested Party attempted to interfere with the 2nd Respondent's quiet possession in 2020, the parties recorded a subsequent consent before Justice Nzioka.
35. The 2nd Respondent, in response to the assertions that it is not tax compliant, averred that the Court of Appeal, in Civil Appeal No. 184 of 2013, set aside the order directing that an amount of Kshs. 37,567,717 be paid to KRA from the decretal sum in HCCC 367 of 2000, and that accordingly, the Petitioner cannot purport to be the agent of KRA in collection of outstanding tax payments from the 2nd Respondent.
36. According to the 2nd Respondent, the Petitioner has deliberately failed to join Center Park Limited in any suit, to erase its existence; that the allotment letter described the property as an un surveyed commercial plot and not a road reserve as alleged; that the road between Inter-Continental Hotel and Nyayo House has never been Kaunda Street as alleged, but was Posta Road, and that the suit property could not have been hived from Kaunda road.
37. The Plaintiff averred that it is not illegal to issue a grant of title to a company other than the original allottee who issued instructions to the Commissioner of Lands to issue the grant to a different entity and that none of the agents or directors of the 2nd Respondent have ever been questioned or arraigned in court for the alleged unlawful acquisition of title and it is a mockery for the Petitioner to file this suit.

Hearing and Evidence

38. The Plaintiff's witness, (PW1), relied on his statement dated 2nd March, 2022 as his evidence in chief. He produced in evidence a bundle of documents dated 23rd November, 2021 as PEXB1.
39. It was his evidence that he was part of the team that investigated the allocation, survey and issue of grant in respect of LR 209/12748 I.R. 66986 and that this was after the City Council of Nairobi made a report on the illegal allocation of the suit property to the Plaintiff through a letter dated 5th January 2007.
40. PW1 testified that investigations established that the suit property was illegally hived from Kaunda Street and that the original width of the section of the road was 80 feet, as per the survey dated 3rd February 1967, registered as Folio No. 110 in Register No. 15. He asserted that in 1995, a private surveyor purportedly surveyed the road and hived off a portion of it to create the suit property, measuring 0.1000 hectares, which survey is registered in Folio No. 284 and Register No. 126. According to PW1, the road section in issue was then reduced from 80 feet (approx. 24.4 metres) to 37.76 feet (approximately 11.51 meters).
41. It was averred by PW1 that on 13th January 1994, the Commissioner of Lands, Mr. Wilson Gacanja, purported to allocate the property to a private company called Center Park Limited; that the company



- does not appear in the database of records of registered companies or business names, and that although the allotment letter is addressed to Center Park Limited, the new grant was issued in the name of M/ S Willesden Investments Limited.
42. PW1 stated that in 1997, the 1st Defendant instituted High Court Civil Suit No. 84 of 1997 for damages for trespass against the 6th Defendant; that a similar suit, High Court Civil Suit No. 367 of 2000, was later instituted and judgment entered in favour of the 1st Defendant and that the sum awarded in this case was however reviewed downwards by the Court of Appeal in Civil Appeal No. 149 of 2007 to Kshs. 22,729,800 with interest from January 1994.
 43. It was contended by PW1 that the 1st Defendant similarly instituted High Court Civil Case No. 24 of 2008 in which it sought damages for trespass; that the Interested Party has purported to legitimize the 1st Defendant's title after it entered into a consent in Civil Case No. 24 of 2008, where the 1st Defendant and the Interested Party were the only parties and that the Interested Party later purported to disown the consent.
 44. In cross-examination, PW1 emphasized that Center Park Limited does not appear in the records of the Registrar of Companies or Business names; that they also did not come across any document to show that Centre Park transferred the land to Willesden and that there was no part development plan or any document to show the change of user from a road to any land that could be allocated and that there was no re-gazettement of the road before the curving off the land.
 45. PW1 stated that there is a road on the suit property, which has a private parking on the side; that the plot is adjacent to Nyayo House and the General Post Office and that the 80 feet includes the private parking area which is LR No. 209/12748.
 46. Lastly, PW1 stated that the consent orders had not been set aside as at 2021. He denied that the land was in public use as had been claimed by the NMS following a site visit by surveyor Mbithi.
 47. The Plaintiff's second witness (PW2), was a licensed private surveyor. She relied on her statement dated 6th October 2021, in which she averred that in September 1995, one Mr. Kirui, whom she knew, and who was then working with the Ministry of Works as a surveyor, gave her an allotment letter dated 13th January 1994 addressed to Center Park Limited.
 48. It was her evidence that while a sketch map was attached to the letter of allotment, the Part Development Plan (PDP) was not availed to her; that Mr. Kirui instructed her to undertake a survey on the basis of the sketch attached to the letter of allotment; that she did not confirm the width of the existing road before she surveyed the land and that she later discovered that the plot she surveyed actually formed part of the road.
 49. PW2 stated that had she known that the sketch plan fell on a public road, she would not have surveyed the plot and that the survey was subsequently authenticated by the Director of Surveys and the Deed Plan was later released.
 50. In cross-examination, PW2 stated that she bought the previous plans; that when she did the survey, she did not have survey plan number 110/15 of 1967 and that when she conducted the survey in 1995, the road was 11.5 metres, or 37 feet and that the remainder of the road was the suit property.
 51. The Plaintiff's third witness, PW3 was an employee at Business Registration Service (formerly the Registrar of Companies) since 2008. He relied on his statement of 11th December 2021, in which he stated that their office received a letter referenced KACC/LEG8/16/82 dated 18th January 2020 requesting for information in respect of Centre Park Limited.



52. It was the evidence of PW3 that he was assigned the task of searching and developing a report on the same by Doris Githua; that he conducted a search regarding the business entities and prepared a report dated 25th January 2010 referenced CR13 General, which report was signed by Doris Githua and that the report indicated that Center Park Limited does not appear in their database of registered businesses/companies.
53. In cross-examination, he emphasized that the search he conducted was comprehensive. He testified that the Registrar of Companies has had three systems; that the first was a manual system which was active from the colonial period until 2009 and that the indexing register was later integrated, and fully automated in 2017. PW3 stated that he conducted a search using information stored in the e-portal.
54. The Plaintiff's last witness (PW4) was the Principal Physical Planner in the Ministry of Lands and Physical Planning. He relied on his statement dated 3rd March 2022 and also referred to the Part Development Plan attached at page 42 of the Plaintiff's bundle.
55. He testified that his office received a request for information from the Kenya Anti-Corruption Commission in respect of Part Development Plan Ref No. 42/10/93/1 for the proposed site for a multi-story car park. He averred that the said Plan, although submitted, was not approved.
56. PW4 referred to the register kept by the Department of Physical Planning for all the approved PDPs, attached at Page 55 of the Plaintiff's Bundle. According to PW4, the PDP was never approved. In cross-examination, he stated that the letter of allotment is only issued once the PDP is approved. He stated that PDPs must be approved to facilitate alienation of land.
57. The Defendants' first witness (DW1) was Ian Abwao Erick Odhiambo, the Acting County Solicitor for the Interested Party, Nairobi City County. He relied on his statement dated 7th November 2022, in which he testified that he received instructions from the then Director Legal Affairs to represent the County in Civil Suit No. 24 of 2008, Willesden Investments Limited v the City Council of Nairobi concerning the suit property.
58. It was the evidence of the Acting County Solicitor for the Interested Party, Nairobi City County that he was informed that the County had already taken possession of the property, evicted the employees of Willesden Investment Ltd, taken full possession and was collecting parking fees on behalf of the Council.
59. The Acting County Solicitor for the Interested Party, Nairobi City County informed the court that the Town Clerk wrote to the Commissioner of Lands on 1st October 2004 requesting to have the said title to Willesden revoked or cancelled for trespassing on the road reserve and illegally collecting parking fees on county property.
60. It was the evidence of DW1 that he was later informed that the ownership of the suit property had already been decided in High Court Case No. 367 of 2000 and judgement entered in favor of Willesden Investment Limited, the 1st Defendant.
61. DW1 asserted that the Council thereafter did its due diligence and found that Willesden Investment Ltd had not encroached on the road reserve and the suit property had never belonged to the City Council of Nairobi since it had been allocated to Willesden to put up a multi-story car park.
62. It was the evidence of DW1 that the Deputy Director Legal wrote to the Town Clerk proposing that the County withdraw from the case, and hand over possession and the money collected during the period that the council was in possession of the property; that a consent agreement was then executed on 26th January 2012, in which the parties agreed to Kshs. 85 million as sufficient compensation and



- that the court on 6th February 2012 ordered by consent that Willesden is the registered proprietor of the suit property and judgement was entered in the Plaintiff's favor in the sum of Kshs. 85 million.
63. It was the testimony of Acting County Solicitor for the Interested Party, Nairobi City County that the property was handed over to Willesden, which was acknowledged through a letter dated 13th September 2012.
 64. DW1 further testified that a subsequent consent was recorded on 9th November 2015 with regards to payment due to Willesden following Judicial Review Application JR MISC APP No. 164 of 2015 for contempt of court for non-payment of the decretal sum and that in December 2018, Willesden Investment filed Civil Suit No. 24 of 2008 against the county alleging that it had interfered with their quiet possession by invading the suit property, clamping private vehicles and collecting parking fees.
 65. According to DW1, a further consent was entered into between the County and Willesden and the court adopted the consent letter dated 28th February 2020 that the orders of 19th December 2018 be vacated, and that pursuant to the orders of 6th February 2012, the Council was not to interfere with the exclusive, peaceful and quiet possession of the suit premises.
 66. DW1 asserted that the County's position is that Willesden is the registered proprietor of the suit property and that the judgment for Kshs. 85 million was entered in its favor.
 67. In cross examination, DW1 stated that in the Defence dated 10th March 2008 and filed in High Court Case No. 24 of 2008, he had indicated that the allocation of the land to Willesden was illegal because the excision of the road reserve had not been gazetted and that he did not have any evidence to support how the consent to pay Willesden was arrived at.
 68. DW2, a land surveyor employed by the City Council of Nairobi, asserted that the road reserve is 80 feet and is available and is not part of the land being used by Willesden as a carpark; that from the map of 12th January 1967, the link road for Uhuru Highway is 80 feet; that the survey plan F/R 284/126 does not represent the actual spatial arrangement, including LR 209/12748, and that the survey plan is not drawn in accordance with the PDP.
 69. DW2 averred that when he received information to conduct a survey, he looked for the PDP, as a survey can only be done where there is a PDP. DW2 submitted a report dated 20th December 2022. He testified that the oldest survey is for 1967; that Intercontinental Hotel occupies L.R 209/6805; that 'Nyayo House' existed as two plots- LR 209/6833 and 209/6834, and that there was a 4-meter road between the two plots of Nyayo House.
 70. DW2 informed the court that the Survey Plan of 1967 was updated in 1986 by way of survey plan which shows Nyayo House occupying a portion of Parcel No. 209/10467 and that the plan retained the 80-foot-wide road.
 71. It was the evidence of DW2 that upon inspecting the PDP in respect of the land that Willesden is claiming and the 1995 survey plan that gave rise to the title to the suit property, he noted that there was a disparity and that the 1995 survey was wrong because it shows that Willesden plot eats into the 80 feet road, which is a public land. DW1 generated a drawing to show the disparity of the 1995 survey plan.
 72. DW2 asserted that the suit property has a car park managed by the county, a pedestrian walkway and 4.5 metres which Willesden is using as a car park. He averred that the creation of LR No. 209/12748 was a mistake and does not reflect the scenario on the ground. According to PW2, the land that Willesden is now using is inside the cadastral plan of 'Nyayo House' up to the fence by 10.5m to 11m.



73. It was the evidence of DW2 that the boundary wall of Nyayo House does not follow the cadastral plan of L. R. No. 209/10467, and that while there is encroachment on the road on paper, as portrayed in the Deed Plan of LR No. 209/12748, on the ground, the 80 feet road remains intact.
74. DW2 stated that the width between P8 and T2 is 12.8 metres; that G2 and G3 are the beacons for Intercontinental Hotel facing Posta Road; that between T1 and G2 the distance is 11.49 metres which is being used as a road and that the distance between G2 and P1 is 24.37 metres which is the 80 feet road.
75. DW2 stated that they have a PDP for Willesden showing their parcel is part of 'Nyayo House' Land; that if the PDP is genuine, then a title for that land would be valid and the contested parking on the ground encroaches on the road reserve by only 5 meters.
76. DW3, a surveyor, asserted that his diagram shows LR No. 209/12748, the suit property, is inside a road reserve; that between LR No.209/12748 and the perimeter wall of Nyayo House, there is a parking, and that there is another area inside LR No. 209/12748, that is also being used as a parking.
77. He asserted that the 1986 plan shows that the Nyayo House land was amalgamated in 1986; that LR No. 209/12748 is within the 80 feet as beacon P1 and P8 of "Nyayo House" Cadastral Plan remains the same. Further, it was the evidence of DW3 that the road exists on the ground and that LR No. 209/12748 encroaches on the said road.
78. The Defendants' fourth witness, DW4, Teddy Mulwa, is a surveyor in the Ministry of Lands, Survey Department. It was his evidence that he prepared the report dated 20th January 2023 which was signed by Mr. Wilfred Muchae, who is his supervisor. He produced the report as DEXB4.
79. In cross-examination, he testified that before the 1995 survey, there existed two plots, one for 'Intercontinental Hotel' and the other one for 'Nyayo House,' and between them was an 80 feet road. He asserted that the beacons of 'Nyayo House' plan have never changed, and that a truncation was introduced on the side of the Nyayo House. He averred that LR No. 12748 was curved out of the 80 feet road.
80. According to the report of Wilfred Muchae, the records of the Survey of Kenya indicate that the Survey Plan for LR no. 12748 was approved. He stated that the Director of Surveys usually receives an approved PDP and a letter of allotment, and that all the documents submitted to the Director of Surveys were in order.
81. The Defendants' fifth witness, Dw5 was Patrick Opiyo Odero, a licensed land surveyor. He submitted his report dated 31st January 2023 as 1DEXB1. It was his evidence that he obtained the survey plans from the Director of Surveys, including a certified PDP.
82. DW5 stated that according to the PDP, the property that the 1st Defendant is claiming is outside the road reserve, and is outside the 80 feet wide road. He stated that he had read the reports of the three surveyors and the difference between his report and that of Mbithi is one metre.
83. He asserted that the boundary between Intercontinental Hotel and the Road is a wall; that while Mbithi's report indicates that the said boundary is a flower bed which is one metre from the wall, his measurements start from the wall.
84. DW5 stated that when someone is building the wall, the same is done along the beacon line; that the wall should represent the beacon; that between the two walls of Intercontinental Hotel and Nyayo house, there is a distance of 37 metres, out of which 24 meters represent the 80 feet road; that the road reserve is 24 meters leaving 13 metres, which was planned by the Director of Physical Planning and allocated, and is being used for parking.



85. DW5 asserted that the surveyor who surveyed the land that gave rise to the suit property did not follow the PDP, and as a result, his surveyed encroached on the 80 feet road. He asserted that the strip of land of 13 meters is what ought to have been surveyed and not what was actually surveyed, and that the 13 meters, which is the portion used for parking, and allocated to the 1st Defendant, is not an encroachment on the road reserve.
86. DW5 produced in evidence a certified copy of the PDP register, which shows 11 entries. DW5 further asserted that the wall of Nyayo House was within government land and that Nyayo House did not have a boundary, as it is within a bigger government land. When referred to Songole's report, he asserted that Nyayo house was on a portion of L.R. No. 2019/10467 and it has its own wall, where its land reaches. He agreed that Intercontinental House is on 209/6835, which has a wall too.
87. According to DW5, LR No. 12748 was wrongly surveyed as it did not follow the PDP. On the plan, the plot is on a road reserve but on the ground, the suit property is at its rightful place He recommended that there is need to resurvey and position LR No. 12748 where it is supposed to be, and that a new land reference number (L.R No.) is not required.
88. DW5 asserted that the anomaly in Survey Plan F/R 284/126 has been corrected and he has submitted it for checking and approval. He asserted that the land in the PDP is 0.1 Ha (quarter acre) which is the same measurement in the deed plan that gave rise to LR No. 209/12748, that is 0.1 Ha.
89. He argued that even after shifting the survey to the correct position, the acreage remains the same, and will not affect the Nyayo House boundary Wall. He also stated that the PDP was inside the survey plan for LR No. 209/10467, which was procedurally issued, as the same was still unalienated government land.
90. DW5 informed the court that government land can be surveyed and still remain unalienated government land; that in his report, he had given five (5) examples where PDPs had been issued over government land that had already been surveyed, including PDP number N9/94/34 for Kisumu Block 12/35 where the PDP was issued for the land while the whole of parcel number 35 was government land. It was his evidence that an excision of a portion of the said land was made and given title number Kisumu Block 12/317.
91. In this case, it was the evidence of DW5, while the portion where the PDP was prepared was government land, a different portion was surveyed. He proposed that a re-survey be conducted based on the PDP and urged that it is possible to retain the LR number after the re-survey. According to the witness, the position of the plot in question will change both on the survey plan and the deed plan, but the LR Number will be retained, including the size of the land.
92. On this proposition, DW5 gave the example of LR. No. 20295 and LR 18998-Kisumu. It was his evidence that LR No. 20295 is on FR 254/60 and was surveyed in 1993. In 2000, the Director of Survey discovered that they were erroneous entries in the survey.
93. On 20th June 2000, the Director of Surveys did a letter to the surveyor, and indicated that the parcels will retain the same registered land numbers after re-survey. DW5 presented a diagram showing the initial survey of the suit property (in red) and the re-survey (in blue). It was his evidence that allocated land should retain the same number although the position on the ground changes.
94. The 6th witness, DW6, was the operation's manager of the 1st Defendant. He relied on his statement dated 21st March 2022, and produced a bundle of documents as 1DEXB3 and a further bundle as 1DEXB4.



95. He stated that the 1st Defendant has at all material times been the registered proprietor of the suit property, which lease was issued to it by the Commissioner of Lands, on 1st September 1995, vide an allotment letter dated 7th August 1995 in favor of Centre Park Limited.
96. It was the evidence of DW6 that the suit property is situate between Hotel Intercontinental and Nyayo House, along Posta Road off Uhuru Highway Nairobi; that the 6th Defendant is the registered owner of the property to the west of the suit property, known as LR 209/6835 where Inter-Continental Hotel stands and that the two properties are separated by Posta Road.
97. He asserted that between January 1994 and February 1998, the 6th Defendant, without the 1st Defendant's consent and with the consent of the then City Council of Nairobi, entered upon its land, took possession of the same and used it as a car park, and even made improvements to the property for the said use.
98. According to DW6, the 1st Defendant filed Civil Suit No. 84 of 1997 against the 6th Defendant, which in its Defence claimed that it had taken possession of and fenced the suit premises prior to 1994, even before the creation of the Plaintiff's alleged interest in the suit property, and that the said suit was discontinued on the understanding that the 6th Defendant would vacate the land and not interfere with the 1st Defendant's quiet possession.
99. According to DW6, when the 6th Defendant failed to desist from the trespass and continued occupying the suit land, the 1st Defendant filed Milimani HCCC No. 367 of 2000, and judgment was entered on 14th December 2006 in the 1st Defendant's favor and that the subsequent Civil Appeal No. 149 of 2007 was concluded and judgment entered against the 6th Defendant on 2nd April 2009.
100. DW6 asserted that there is non-disclosure of material facts by the 6th Defendant; that the 6th Defendant has failed to disclose to this court that it used the suit property as a parking lot and not a road reserve; that the property was initially allotted to Centre Park Limited and not the 1st Defendant and that neither the Interested Party, the Nairobi Metropolitan Services or any roads authority has ever laid claim to the said road reserve.
101. In cross-examination, DW6 asserted that there is a title document as well as an allotment letter; that the amount of Kshs. 4,047,600 was paid on 6th September 1995 vide a cheque, a year after issuance of the letter of allotment and that Willesden was not to pay any stamp duty after paying the stand premium of Kshs. 4 million. Further, he stated that a title could not have been issued if there was a delay, and accordingly, Willesden cannot be faulted.
102. DW7 was a director of the 6th Defendant/Petitioner. He produced a bundle of documents as DEXB6 and relied on his statement in which he averred that the 1st Defendant filed suit against the Petitioner in Milimani HCCC No. 367 of 2000 and judgment was entered in its favor; that the court ruled that the issue of ownership was not before the court and revocation of the title could only be done in other proceedings, and that the Petitioner lodged an appeal in Nairobi Civil Appeal No. 149 of 2007 where it partially succeeded to reduce the award to Kshs. 22,729,800/- with interest at court rates from January 1994.
103. In both suits, it was stated by DW7, the courts never considered if the land was public property that was illegally acquired.
104. DW7 supported the case filed by the Plaintiff, as its investigations found that the allotment of the suit land and issuance of a title to Willesden was irregular, illegal and fraudulent, and that the suit land is a public road allocated to the 1st Defendant illegally.



105. In cross-examination, DW7 stated that the award of Kshs. 22 million has never been paid and that the main issue in that suit was trespass. He asserted that if the title is nullified, they are not supposed to pay the amount and that there is no evidence to show that Willesden has paid taxes.

Site visit by the court

106. A site visit was conducted by the court on 3rd July 2023 in which Mr. Wambugu was present for the Plaintiff; Mr. Allen Gichuki and Mr. Oyatta for the 1st-6th Defendants; Mr. Ndichu for the Nairobi County Government, Mrs. Ngure for the 7th Defendant, Dr. Ominde for the 2nd Interested Party and Mr. Mwamburi for the Attorney General. The Surveyors present were Mr. Patrick Opiyo and Mr. Steve Kobado for Willesden, and Mr. Rodger Gachewa, for Director of Surveys.
107. The court, with the help of the parties and the surveyors took measurements on the ground and confirmed that the property that was being used for parking, which is represented by the PDP, and which the 1st Defendant claims to be the land that Center Park Limited was allocated was outside the 80 feet road. The court further confirmed that the said 80 feet was in use as a road.

Submissions

108. Counsel for the Plaintiff submitted that pursuant to the existing temporary injunction in this suit through the ruling of 11th February 2021, restraining the Defendants from further alienating or interfering with the suit property pending hearing of this suit, Willesden's action to purportedly re-survey the land and submit to the Director of Surveys a corrected survey, while this suit is pending is an illegality. They urged that the proposal by DW5 Patrick Opiyo through the letter dated 31st January 2023 be ignored.
109. Counsel relied on the paper title 'The Kenyan Cadastre and Modern land Administration' by D. Siribba, G. Gulaku and W. Vocc, in which they discuss the nature of survey, deed plans and the concept of fixed boundaries. They also relied on the case of Abdalla Mohamed Salim & Another vs Omar Mahmud Shallo & Another [2014] eKLR where the court recognized a survey as having fixed boundaries and having an accurate linear and angular measurements to aid the registration of a title of a parcel.
110. Counsel urged that fixed boundaries are mathematically and accurately surveyed and the corner points marked with survey beacons, and that the beacon points of the suit property are identifiable in F/R 284/16 of 1995 and are marked as P1, P8, T1 and T8. Counsel submitted that the oral testimonies and reports of all surveyors were unanimous that F/R 284/16 of 1995 depicts the suit property to be on the 80 feet road. They urged this court to find that the suit property encroaches a public road as per the cadastral maps.
111. It was Counsel's submission that the evidence led by PW1 and PW3 that Center Park Limited was a non-existent company was uncontroverted by Willesden. They relied on the Court of Appeal case of Charles Karaithe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others [2013] eKLR where it held that a non-existent company could not hold title.
112. Counsel further submitted that it is indisputable that Center Park Limited, which was allocated the suit property, did not effect registration of the suit property and yet supposedly sold and passed its interest to Willesden through a letter dated 7th August 1995 to the Commissioner of Lands.
113. It was submitted that Center Park Limited had no proprietary interest that it could sell or transfer to the 1st Defendant. They relied on the Supreme Court case of Torino Enterprises Limited vs Attorney



- General [2023] KESC 79 (KLR), where the court held that an allottee cannot pass a valid title through mere possession of an allotment letter.
114. As to whether the 7th Defendant had authority to alienate Government land, Counsel submitted that the 7th Defendant acted outside his authority in the purported alienation to the 1st Defendant, assuming the property was unalienated Government Land.
 115. Counsel for the 6th Defendant/Petitioner submitted that Center Park Limited was non-existent and Willesden failed to rebut how it acquired the land. Counsel submitted that the burden of proof was on Willesden to produce the sale agreement, evidence of payment for valuable consideration, company resolutions or exchange of correspondence between the two companies and their respective advocates. Counsel relied on the Court of Appeal case of Munyu Maina vs Hiram Gathiha Maina [2013] eKLR.
 116. Counsel submitted that a letter of allotment does not confer a transferable title on the allottee. It was his assertion that the grant issued to Willesden was accordingly null and void. Counsel relied on the Supreme Court case of Torino Enterprises Limited vs Attorney General [2023] KESC 79 (KLR).
 117. Counsel's further submitted is that at all material times the suit property was a public road held in trust for the public and not available for alienation. According to Counsel, the evidence adduced by the County's witnesses or Willesden's surveyor is baseless as they seek to sanitize Willesden's title, while offering no answer as to how the root was derived.
 118. Counsel relied on the Supreme Court case in Dina Management Limited vs County Government of Mombasa & 5 Others [2023] KESC 30 (KLR) where it held that ownership of land whose title was not acquired regularly is not protected under Article 40 of *the Constitution*. Counsel also relied on the case of Mangrove Investments Limited vs Attorney General & another [2020] eKLR.
 119. Counsel for the 1st to 5th Defendants submitted that the undisputed facts are that Willesden is the sole registered proprietor of the suit property; that no party has claimed or is claiming ownership to the suit property and that Willesden is in possession of the suit property and the same is being used as a public car park.
 120. It was submitted that the City Council admitted to trespassing on the suit property and recognized Willesden to be the proper owner of the suit property; that the Petitioner was found to have trespassed onto the suit property in High Court Civil Suit No. 367 of 2000 and condemned to pay damages, which have been affirmed by the Supreme Court and that the Petitioner has evaded settling the decretal sum in Civil Case no. 367 of 2000 by filing numerous applications and suits.
 121. As to the location of the suit property, Counsel submitted that the suit property was found to border Posta Road and did not touch Kaunda Street, as had been claimed by the Plaintiff.
 122. The 1st – 5th Defendants' counsel submitted that the internal memo by Philip Mbithi Kiswii dated 10th September 2021 and produced before this court clearly stated that the road reserve of 80 feet was still available on the ground and had never been encroached by anyone. It was submitted that this was supported by the testimony of Mr. Opiyo in court, and during the site visit, where it was proved that the suit property did not fall within the road reserve, but was excised from the vacant government land which was available for allotment.
 123. On the issue of allotment of land to a non-existent entity, the 1st Defendant's counsel submitted that the testimony by PW3, Josias Mwangi, was that Center Park Limited does not appear on the digital database of the registered companies; that he testified that before the integration of the system in 2009, the records were kept in a manual register and that it would have been prudent that the manual register be produced before the court as an exhibit to discount the existence of Center Park Limited.



124. Counsel submitted that the witness did not list any other measures undertaken to confirm the existence or otherwise of the company, save for searching the online companies register database and that sometimes company files go missing in the companies Registry, as stated in the case of *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR. He argued that the fact that the search into Center Park limited did not bear fruit does not mean the company does not exist.
125. Counsel asserted that as no allegations were made connecting Center Park to Willesden Investments Limited or its directors, the burden remained on the Plaintiff to enjoin Center Park Limited as a party to the suit to explain its existence and registration.
126. Counsel submitted that it was the duty of the Plaintiff to rebut the existing presumption of regularity as pointed out in the case of *Mwinyi Hamisi vs Attorney General Civil Appeal No. 125 of 1997* cited with approval in *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others* [2018] eKLR.
127. Counsel additionally submitted that Center Park Limited did not transfer or sell title to the suit property. Instead, it was submitted, after perfecting the letter of allotment, as evidenced by the letter of 7th August 1995, Center Park Limited sought to transfer the allotment letter and/or the title to be issued in the name of Willesden Investments Limited, and that the Commissioner of Lands proceeded to internally approve the said request and the said grant was issued in Willesden's name.
128. Counsel submitted that the principles in the Torino case do not apply as no sale was conducted and that the title could only be unlawful on grounds of fraud committed by Willesden or if the same was acquired vide misrepresentation to which Willesden was a party to.
129. Counsel sought to rely on the following cases which set out the procedural requirements in allocating unalienated government land: *Nelson Kazungu Chai & 9 Others vs Pwani University* [2014] eKLR and *African Line Transport Co. Ltd vs the Hon. AG Mombasa HCCC No. 276 of 2013*.
130. Counsel asserted that the Part Development Plan was prepared on 20th August 1993 and approved on 23rd August 1993 and that the allotment letter was then issued on 13th January 1994 and the survey was approved by the Director of Surveys on 15th September 1995.
131. Counsel contends that the Plaintiff's prayer that the award of the decretal sum of Kshs. 22,729,800/-, owed by the Petitioner to the 1st Defendant in Civil Suit 367 of 2000, be transferred to the Plaintiff, is unlawful and would set a dangerous precedent and that the award was issued to Willesden as the owner of the suit property to compensate for the trespass committed by the Petitioner.
132. On the merits of the Petition, Counsel submitted that the Petitioner was not filed for the benefit of the public interest, as the Petitioner has through this suit, sought to deny the 2nd Respondent the fruits of the judgment delivered in Civil Suit 367 of 2000. Counsel relied on the definition of public interest set out in *Kenya Anti-Corruption Commission vs Deepak Chamanlal Kamni and 4 Others* [2014] eKLR.
133. Counsel also submitted that the Petitioners contention that the 2nd Respondent does not pay taxes or annual rent as the land could not be valued as it was government land, is not true, as the title document issued to Willesden states that the land rent payable for the suit property is Kshs. 640,000.
134. Furthermore, Counsel maintained that the consent between Willesden and the 1st Interested Party in Civil Case No. 24 of 2008 has not been set aside.
135. Counsel for the 7th Defendant submitted that the Plaintiff did not substantiate the particulars of fraud and illegalities against the 7th Defendant. Counsel submitted that the letter of allotment Ref. No. NTP9/1/X11/31 issued in respect of the suit property was not signed by the 7th Defendant, and that



the 7th Defendant issued the grant once it was confirmed by all the requisite officers on the ground that the land was available for alienation.

136. Counsel for the 2nd Interested Party submitted that following the judgment in HCCC No. 367 of 2000, the Petitioner appealed against the judgment and sought a stay of execution vide Civil Application No. 322 of 2006. In this suit, it was submitted, a stay of execution was granted on condition that the Petitioner provide a Bank guarantee for the decretal sum of Kshs. 70,902,400.
137. It was submitted that at the request of the Petitioner, the 2nd Interested Party gave a Bank Guarantee to the limit of Kshs. 70,903,400 pending hearing and final determination of the appeal; that the appeal was heard and determined on 2.4.2009 where the court set aside the award of Kshs. 70,902,400 thereby discharging the Bank from the said guarantee and that the court granted the reduced figure of Kshs. 22,729,800.
138. It was submitted that the 2nd Respondent, however, refused to recognize the outcome of the appeal and demanded payment of Kshs. 70,902,400; that the 2nd Respondent has sought this money based on its title to the suit property, which is questionable and that the 2nd Respondent cannot therefore call up a Guarantee that is premised on an impugned title.

Analysis and Determination

139. The Plaintiff in ELC No. 35 of 2010, the Kenya Anti-Corruption Commission (now EACC), averred that it received a request from the then City Council of Nairobi, through a letter dated 5th January 2007, to assist the Council in causing the title of the suit property to be revoked. It thereafter undertook investigations culminating in the filing of ELCC 35 of 2010.
140. According to the Plaintiff, on 13th January 1994, the 7th Defendant fraudulently allocated the suit property as an un surveyed commercial plot to a company called Center Park Limited and that their investigations revealed that this company does not exist at the Registrar of Companies. It was averred by the Plaintiff that the grant was later issued to the 1st Defendant, M/S Willesden Investments Limited.
141. It is the Plaintiff's case that its investigations revealed that in 1995, a survey was illegally undertaken on a section of a public road, and the original dimensions of the road measuring 80 feet were altered and reduced to 37.76 feet or approximately 11.51 meters and that this, they contend, was to create the suit property, which was later registered as LR No. 209/12748 I.R. 66986 measuring 0.100 hectares.
142. They urge that although the suit property was purportedly issued for development of a multi-storey car park, no development plan was ever approved by the Director of Physical Planning or the Commissioner of Lands.
143. The Plaintiff has challenged the legality of the title of the suit property on the grounds that the suit property was illegally surveyed on a public road, which runs from Uhuru Highway and is between Nyayo House and the Hotel Intercontinental and that the part development plan was never approved.
144. The 1st-5th Defendants contend that the suit property was carved out of the "Nyayo House Land" but was erroneously surveyed on a public road in 1995. They argue that on the ground, the 80-foot-wide road is intact, and that the 1st Defendant's property borders Nyayo House and the road, and that the 1st Defendant lawfully obtained title to the suit property, as a bona fide purchaser from Center Park Limited.
145. With respect to the Petition, the Petitioner/6th Defendant supports the case by the Plaintiff that the 1st Defendant's title to the suit property is illegal, null and void ab initio for the reasons stated above. The said Petitioner was found culpable of trespass against the 1st Defendant's title to the suit property



in Civil Suit No. 367 of 2000. In the said decision, the High Court upheld the 1st Defendant's suit and awarded it a sum of Kshs. 80,902,400 as general damages, mesne profits and damages for loss of business opportunity.

146. The 6th Defendant thereafter appealed this decision to the Court of Appeal through Civil Appeal No. 149 of 2007, but only succeeded in scaling the High Court's award downwards restricting it to mesne profits of Kshs. 22,729,800. The Petitioner contends that this award ought not to be paid to the 1st Defendant because the claim was based on the 1st Defendant's title to the suit property, which they assert is a nullity.
147. The 7th Defendant contends that the issuance of the grant to the 1st Defendant was legal, regular and lawful. He denied the allegations that the grant was issued and registered in the name of a company that was never the allottee and affirmed that as a Commissioner of Lands, he was not vested with the duty of issuing letters of allotment or ascertaining registration of companies and therefore, he did not author the letter of allotment dated 13th January 1994.
148. While the predecessor of the 1st Interested Party, Nairobi City County Government, is the entity that filed a complaint with the Kenya Anti-Corruption Commission in 2007 on the purported illegality of the suit property, in this matter, the County Government of Nairobi has taken the position that the title was lawfully issued to the 1st Defendant.
149. This, they assert, is in accordance with a consent entered into between Willesden Investments and the City Council of Nairobi in Milimani Civil Case No. 24 of 2008 on 6th February 2012. The terms of the consent included, inter alia, that the City Council pays mesne profits in the sum of Kshs. 85 million to Willesden Investments within 60 days for trespass on the suit property. This consent has never been set aside.
150. It is the 2nd Interested Party's position that upon the decision of the Court of Appeal setting aside the award of Kshs. 70,902,400, and reducing the figure to Kshs. 22,729,800, the Bank was discharged from the said guarantee.
151. Upon consideration of the pleadings, evidence and submissions filed in this consolidated matter, the following issues arise for this court's determination:
 - a. Whether the suit property, LR No. 209/12748, encroaches on a public road.
 - b. Whether the letter of allotment dated 13th January, 1994 is null and void.
 - c. Whether the allottee lawfully passed title to the 1st Defendant.
 - d. Whether the suit is merited.
 - e. Whether the Petition is merited.
 - f. The orders which this court should issue.

Whether the suit property, LR No. 209/12748, encroaches on a public road.

152. The Plaintiff and Petitioner assert that the suit property, LR No. 209/12748, I.R. 66986 was unlawfully surveyed, and curved out of a section of Kaunda Street, and is therefore located on a road reserve.
153. The 1st-5th Defendants however assert that the suit property on the ground has not encroached on the road reserve and that the survey registered in Folio No. 284 Register No. 126, with respect to the



suit property, was not prepared in accordance with the PDP and was therefore not an accurate spatial representation.

154. The parties have robustly presented evidence on the issue of the location of the suit property. The court heard the testimony of five surveyors who each presented their professional opinions on the position of the suit property. To ascertain the position of LR No. 209/12748 and the actual position of the land that was allocated to the 1st Defendant's predecessor in title, the court visited the locus quo and took actual measurements of the road, and the land abutting the boundary wall of Nyayo House, which the 1st Defendant claimed was the land they are laying claim to.
155. In the four survey reports presented before this court, it was undisputed that the earliest survey of the subject area was that of 3rd February 1967, which is a road between Nyayo House and the Hotel Intercontinental, joining Uhuru Highway to the Central Business District is 80 feet wide.
156. Under the 1967 survey plan, Nyayo House was situated on two plots, LR Nos 209/6833 and 209/6834. These two plots were later amalgamated in 1986 into LR No. 209/10467 by way of a survey plan registered as Folio No. 176 Register 56. The 80-foot-wide (24.38 meters) road between the amalgamated plot, that is LR No. 209/10467, on which portion Nyayo House stands and LR No. 209/6835 (Intercontinental Hotel) was maintained in the 1986 map.
157. It is not disputed that a Part Development Plan (PDP) Ref No. 42/10/93/1 for the proposed site for a multi-story car park was drawn and prepared on 20th August 1993. This is the PDP that was used to issue a letter of allotment to Center Park Limited, which informally transferred the land to the 1st Defendant. The Commissioner of Lands subsequently issued a grant to the 1st Defendant.
158. The said 1993 PDP was drawn on a portion of the land (LR No. 209/10467) where Nyayo house is situated, but outside the perimeter wall of Nyayo house. The land indicated in the 1993 PDP borders the boundary wall of Nyayo House and the 80 feet public road, also known as Posta Road.
159. The evidence before me shows that in September 1995, when Ms. Bibiana Rabuku (PW2) surveyed the suit property, to create LR No. 209/12748, she did not follow the dimensions of the PDP, a position that she admitted. According to the licensed surveyors who testified, the survey plan that gave rise to LR No. 209/12748 (the suit property) encroached on the link road, reducing the said road from 80 feet wide (24.34 metres) to 37.76 feet wide (11.51 metres), which is almost half the road.
160. PW2 testified that in September 1995, a fellow surveyor, Mr. Kirui, who was then working with the Ministry of Works as a surveyor, gave her an allotment letter dated 13th January 1994 addressed to Center Park Limited.
161. It was her evidence that while a sketch map was attached to the letter of allotment, an approved Part Development Plan (PDP) was not availed to her and that she undertook the survey which created the suit property on the basis of a sketch attached to the letter of allotment.
162. PW2 stated that although she went with Mr. Kirui to the site using a sketch plan, they did not confirm the width of the existing road; that she later discovered, after submitting her survey work which created LR No. 209/12748, that the plot she had surveyed actually formed part of the 80 feet road, and that had she known that the sketch plan she had fell on a public road, she would not have surveyed the land.
163. It was her evidence that the erroneous survey plan that gave rise to LR No. 209/12748 (the suit land) was subsequently authenticated by the Director of Surveys and the Deed Plan was later released.
164. The evidence of PW2, in which she admits that the survey plan registered as FR No. 284/126 which gave rise to the suit property, LR No. 209/12748, was not drawn as per the PDP, was neither challenged



- nor impeached. In fact, most of the surveyors who testified were unanimous that the survey plan as drawn and registered in 1995 had encroached on the 80-foot-wide road by 37 feet.
165. Indeed, DW2, a land surveyor employed by the County Government of Nairobi, asserted that the road reserve in question is 80 feet and is available on the ground. It was his evidence that the said road is being used by the public. According to DW2, the land which was erroneously surveyed as LR No. 209/12748 encroaches on the road but is not the same land that is being used by Willesden, the 1st Defendant, as a carpark.
 166. It was the evidence of DW2 that from the map of 12th January 1967, the link road from Uhuru Highway is 80 feet, and remains so on the ground; that the survey plan F/R 284/126 which created the suit property does not represent the actual spatial arrangement, and that the survey plan is not drawn in accordance with the PDP.
 167. DW2 averred that when he received information to conduct a survey, he looked for the PDP, as a survey can only be done where there is a PDP.
 168. It was the evidence of DW2 that upon inspecting the PDP in respect of the land that Willesden is claiming and the 1995 survey plan that gave rise to the title to the suit property, he noted that there was a disparity and that the 1995 survey was wrong because it shows that Willesden plot eats into the 80 feet road, which is public land.
 169. DW2 generated a drawing to show the disparity of the 1995 survey plan. He averred that the creation of LR No. 209/12748 was a mistake and does not reflect the scenario on the ground.
 170. It was the evidence of DW2 that the boundary wall of Nyayo House does not follow the beacons of the cadastral plan, and that while there is encroachment on the road on paper, as portrayed in the Deed Plan of LR No. 209/12748, on the ground, the 80 feet road remains intact.
 171. The evidence of the County's surveyor was collaborated by the County Attorney, PW4, who stated that the County did its due diligence and found that Willesden Investment Limited had not encroached on the road reserve, and the land in issue never belonged to the County.
 172. It was his evidence that after establishing that the land that was being used as a car park belonged to Willesden, the County recorded a consent in HCCC No. 24 of 2008 to pay Willesden Kshs. 85 Million as compensation for having used the land for parking.
 173. DW5, a licensed surveyor stated that according to the PDP and the letter of allotment that was issued to Center Park Limited in 1993, the property that the 1st Defendant is claiming is outside the 80 feet wide road. According to the witness, the PDP that was issued to Center Park Limited, and which is the land that the 1st Defendant had paid for, was drawn to scale, and that the said land measures 0.1 Ha.
 174. It was his evidence that when the measurements on the 1993 PDP are superimposed on the datum survey plan number 110/85 and 176/56, the parcel of land allocated is in its clear position on the ground, and it's the land that is being used for parking.
 175. DW2, just like DW5, stated that from the existing data and in comparison to the actual positions, the survey plan number 284/126 that gave rise to the suit property was not properly plotted and indicates a wrong position on the survey plan in comparison to the allocation documents.
 176. Upon considering the PDP, the survey plan FR 284/126 and visiting the locus, DW5 concluded that the surveyor did not follow the PDP, and as a result, encroached on the 80-foot-wide road reducing it to 37.76 feet. He stated that between the wall of Intercontinental Hotel and Nyayo House, as indicated



in Mr. Songole's report, there is a distance of 37 metres, of which 24 meters is the 80 feet road reserve, leaving 13 metres.

177. DW5 asserted that the strip of land measuring 13 meters is what ought to have been surveyed and not what was actually surveyed. This is the same conclusion that DW2 arrived at when he stated that had the suit property been surveyed according to the PDP, there would have been no encroachment on the 80 feet road.
178. This position of the 'misplaced' survey was captured in the letter by the Director of Surveys dated 23rd April, 2021 in which he stated as follows:

“Records held in this office indicate that the parcel of land was allocated to Center Park Ltd vide letter of allotment Ref. No. NTP.9/1/XII/31 dated 13th January 1994 for multi-story car park purposes. The parcel was surveyed and approved as LR No. 209/12748 on 15th September, 1995 and thereafter a deed plan No. 198489 was issued on 9th October, 1995.”
179. DW5, informed the court the land represented in the PDP ought to be re-surveyed and retain the same LR number considering that the acreage of the land will not change. According to the witness, the new survey plan and the Deed Plan will just be 'flipped' on the side of Nyayo House. DW5 gave several examples where the Director of Surveys had approved such re-surveys, and issued new titles while retaining the old LR numbers.
180. The court conducted a site visit in the presence of a team of surveyors and the parties. During the site visit, it was evident that the 80-foot wide road was still available on the ground, and the land that was allocated to Center Park Limited was in fact in situ, and was being used as a parking. The court did take the measurements of the road, and observed that the entire road was intact.
181. Taking into consideration the evidence on record, and the site visit, the court finds that while there is encroachment on the road reserve vide Survey Plan F/R 284/126, Deed Plan number 198489, there is no such encroachment by the land represented in the 1993 Part Development Plan. Indeed, the measurement of the 'land' represented in the erroneous survey plan, being 0.1Ha is the same measurement represented in the PDP.
182. This shows that the mistake by the surveyor (PW2) who surveyed the road, instead of the land abutting the wall of Nyayo House, and represented in the 1993 PDP made a genuine mistake, which was neither intentional nor meant to curve out a public road.
183. Having analysed the testimonies of the witnesses and the documents produced in this matter, and having visited the locus quo and taken measurements of the impugned road, I agree with the evidence of PW2, DW2 and DW5 as to the location of the suit property, that is LR 209/12748, and the land represented in the 1993 PDP issued to Center Park Limited. The two are two different parcels of land.
184. Indeed, an approved Part Development Plan (PDP) is an integral component of land use planning, as allocation and survey of land cannot commence without an approved Part Development Plan. An approved Part Development Plan (PDP) is what guides surveyors when surveying land
185. It is essential that a survey plan corresponds with its respective Part Development Plan, a requirement that PW2, a surveyor, with failed to comply when she conducted her survey in 1995 which gave rise to the impugned LR No. 209/12748 and the Deed Plan which encroaches on the 80 feet public road by 37 feet.
186. Consequently, this court finds that on the ground, the boundaries of Nyayo House and Intercontinental Hotel are intact and represented by concrete walls. It is the finding of this court



that the land which was allocated to Center Park Limited vide the Part Development Plan of 1993, is between the boundary wall of Nyayo House and the 80 feet road, measuring 0.1Ha and does not encroach on the 80 feet road.

187. Further, this court finds that the land that the 1st Defendant, the Petitioner and the Nairobi City County Government have used interchangeably as a parking is the one represented in the 1993 Part Development plan measuring approximately 0.1 Ha, and not the land represented in LR No. 209/12748 measuring 0.1Ha and which encroaches on the 80 feet public road, as captured in the google maps and the drawings of DW5. Although the two parcels of land have the same measurements (0.1Ha), they are distinct on the ground.
188. As this court held in *Kenya Armed Forces Old Comrades Association Registered Trustees vs City Council of Nairobi & 7 others* [2022] KEELC 3857 (KLR), a survey plan that is drawn without according with the dimensions and features of an approved Part Development Plan is subject to cancellation by the Director of Surveys, and a resurvey be conducted. In the said case, this court held as follows:
- “ 61. That being the case, it follows that in as far as the initial survey of the Plaintiff’s property was done without placing reliance on the part development plan of 1977, which appears to have been the position as evinced from the various correspondence between the Commissioner of Lands, the Director of Surveys, the Plaintiff and the 2nd Defendant, and the testimony of the witnesses, it is the finding of the court that the Director of Surveys lawfully cancelled the Plaintiff’s initial survey plan and directed for the said land to be re-surveyed.”
189. Therefore, this court is in agreement with the evidence of DW5 that if the land represented in the 1993 PDP was procedurally allocated to Center Park Limited, the said land should be re-surveyed, and be issued with the same Land Reference number and a Deed Plan.
190. However, this can only happen upon the cancellation of the impugned survey plan number 284/126 and Deed Plan number 198489 which gave rise to the title that was issued to the 1st Defendant which encroaches on the 80 feet public road.

Whether the letter of allotment dated 13th January, 1994 is null and void

191. Having found a discrepancy between the survey which mapped the suit property and the actual situation on the ground, the next issue for determination is the validity of the Part Development Plan and the legality of the allocation of the land represented in the letter of allotment dated 13th January, 1994.
192. The Plaintiff and the Petitioner submitted that Center Park Limited, which was allocated the suit property, did not effect registration of the suit property and yet supposedly sold and passed its interest to Willesden through a letter dated 7th August 1995 to the Commissioner of Lands.
193. It was submitted that Center Park Limited had no proprietary interest in the land that it could sell or transfer to the 1st Defendant. Reliance was placed on the Supreme Court case of *Torino Enterprises Limited vs Attorney General* [2023] KESC 79 (KLR), where the court held that an allottee cannot pass a valid title through mere possession of an allotment letter.
194. The Plaintiff and the Petitioner further averred that Center Park Limited was non-existent and Willesden failed to rebut how it acquired the land, and that in any event, the PDP that was issued to Center Park Limited and which the 1st Defendant is relying on was not approved.



195. The evidence by the Principal Physical Planner, PW4, was that the impugned PDP reference number 42/10/93/1 was prepared by his department for a proposed site for multi-storey car park. PW4 produced in evidence a copy of the said PDP together with the register
196. It was his evidence that although the said PDP was signed by the then Director of Physical Planning and the Commissioner of Lands on 20th August, 1993 and 23rd August, 1993, the register does not indicate that the same was approved. It was the evidence of PW4 that the said PDP was the basis upon which the Commissioner of Land issued to Center Park Limited the letter of allotment dated 13th January Center Park Limited.
197. According to PW4, the issue of updating the register in respect of PDPs is a continuous exercise; that the copy of the register that he had was certified on 1st February, 2010 and that indeed, a letter of allotment was issued based on the PDP.
198. The evidence of PW4 was collaborated by the evidence of DW5, a licensed surveyor who produced a certified copy of the PDP dated 20th August, 1993 and “approved” by the Director of Physical Planning and Commissioner of Lands. The said PDP was certified by the Director of Physical Planning to be a true copy of the original on 6th April, 2023.
199. The process of alienation of public land was set out by this court in the case of Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR as follows:
- “It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottee. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease.”
200. Accordingly, the process of alienation of public land must be initiated by a Part Development Plan (PDP), which must be approved by the Commissioner of Lands or the Minister for Lands. A letter of allotment is then issued and a survey thereafter conducted. Upon approval of the said survey by the Director of Surveys, a land reference number is then allocated and a title is processed and registered by the Chief Land Registrar (the Commissioner of Lands).
201. In this case, it is not disputed that a Part Development Plan (PDP) Ref No. 42/10/93/1 for the proposed site for a multi-story car park was drawn and prepared on 20th August 1993. The said PDP was duly approved by the Director of Physical Planning and Commissioner of Lands.
202. To the extend that the 1st Defendant and PW4 produced a PDP which on the face of it was approved, the issue of the register having not been up dated to indicate that the PDP had been approved, cannot invalidate it.
203. To the extend that the PDP was signed by the Director of Surveys and the Commissioner of Lands on 20th August, 1993 and 20th August, 1993 respectively, and exists in their official records, it is the finding of this court that the said PDP was lawfully issued alongside the letter of allotment to Center Park Limited, notwithstanding the fact that the register held by the Director of Physical Planning was not up dated to reflect the approval of the PDP.
204. Having found that PDP RefNo. 42/10/93/1 was approved and lawfully issued, this court will consider the propriety of the letter of allotment which was issued to Center Park Limited on 13th January, 1994.



205. The Plaintiff asserts that there are no records of the existence of Center Park Limited. PW3, who works at the Business Registration Service (formerly the Registrar of Companies), stated that he conducted a search regarding the business entities and prepared a report dated 25th January 2010, which indicated that Center Park Limited does not appear in their database of registered businesses/companies.
206. It was his evidence that documents pertaining to registration of companies have been scanned; that they are no longer using the manual index to search for the names of companies; that they use an electronic data base to do searches; that the impugned company, Center Park Limited, fall under letter 'C' and that a computer print out would show all the companies falling under letter 'C.' According to the witness, when he searched for Center Park Limited, he did not find a company with such a name in the portal.
207. The 1st-5th Defendants' Counsel submitted that the witness ought to have produced an extract of the register before this court to prove his claim that the said company does not appear in the register. It was argued that by the witness's own admission that the Registry of Companies was operated manually until 2009, he should have produced the manual registry.
208. The Defendants have relied on the case of Universal Hardware Limited vs African Safari Club Limited [2013] eKLR, where the court acknowledged that sometimes company files go missing in the companies Registry.
209. Looking at the evidence of PW3, I am of the view that he should have done better than just stating that the company known as Center Park Limited which was allotted the suit property in 1994, almost 31 years ago, was not in their data base. This court would have been convinced that indeed the company was not in existence in 1994 if the witness had produced a computer print-out of the companies whose names start with letter "C."
210. I say this because this court is not sure if all the manual documents pertaining to the registration of companies since 1962, when the repealed *Companies Act* came into operation, have been scanned and uploaded on the e-citizen portal. This information would have become clearer if a computer print-out of the companies whose names start with letter 'C' had been placed before this court.
211. Although the existence of Centre Park Limited was pivotal to the 1st-5th Defendant's cause, the court takes judicial notice of the fact that Center Park Limited is not a party to this suit, and the long period that has lapsed between 1994 and when this suit was filed.
212. That being so, the witness should have produced an extract from the data base as alluded to above to enable the court make a definitive finding on the existence or non-existence of the Company. Instead, the witness, without producing even a single document, expects the court to take what he says as the gospel truth.
213. Having alleged that Centre Park Limited did not exist in 1994 or at all, it was upon the Plaintiff and the Petitioner to prove that allegation. It is the finding of the court that the Plaintiff and the Petitioner did not discharge that burden to the required standards.

Whether the allottee lawfully passed title to the 1st Defendant

214. The Plaintiff and the Petitioner asserted that a letter of allotment does not confer a transferable title on the allottee. It was their assertion that the grant issued to Willesden Investment Limited, the 1st Defendant, was accordingly null and void. Counsel relied on the Supreme Court case of Torino Enterprises Limited vs Attorney General [2023] KESC 79 (KLR).



215. Some of the key issues that were before the Supreme Court for consideration in *Torino Enterprises Limited vs Attorney General* [2023] KESC 79 (KLR) were whether a letter of allotment that had not been perfected could confer property rights; whether a letter of allotment, in and by itself, conferred a transferable title on the allottee and whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party.

216. As to whether an allotment letter can pass a good title, the Supreme Court held that:

“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...Suffice it to say that an allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein.

These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law.

It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

“[15] In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences” [Emphasis added].

While we agree with the general tenor of the learned Judge’s foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.”

217. The history of informal transfer of letters of allotment was discussed at length in the Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land (The Ndung’u Land Report). The report noted that:

“Until June 2003, notwithstanding the absolute prohibition of sales of undeveloped land, there was a vibrant land market in such lands. The selling and buying of undeveloped leaseholds took place pursuant to consents illegally given by the Commissioner of Lands. The sales were often actualized through the informal transfers of Letters of Allotment. (This practice could be in fact criminal).”

218. In the letter of allotment issued to Center Park Limited, the stated conditions were that the allottee was to issue a banker’s cheque of Kshs. 4, 047, 690 to the Commissioner of Lands within 30 days of 13th January 1994.



219. The 1st Defendant produced in evidence a letter dated 7th August, 1995 authored by Center Park Limited, the allottee, addressed to the Commissioner of Lands. In the letter, Center Park Limited requested the Commissioner of Lands to transfer the allotment and/or issue the title in the name of Willesden Investments Limited.
220. The 1st Defendant's Operations Manager (DW6) asserted that the amount of Kshs. 4,047,600 stipulated in the letter of allotment was paid on 6th September 1995 to the Commissioner of Lands by the 1st Defendant vide a cheque. DW 6 produced in evidence a copy of the bankers cheque for the said amount addressed to the Commissioner of Lands.
221. The circumstances in the Torino Enterprises case, and the narration in the Ndung'u Commission are distinguishable from this case. In the Torino case, the Supreme Court was emphatic that a holder of a letter of allotment cannot not sell land allocated to him, unless and until he processes a title. This is because until he obtains a title, he has no registrable interest in the land to sale.
222. There is no evidence in this case to show that the allottee sold the land that it had been allocated. Indeed, the 1st Defendant has not claimed that it bought the land from the allottee. According to the letter dated 7th August, 1995, the allottee requested the Commissioner of Lands to transfer the allotment to the 1st Defendant, and issue it with a title.
223. In my view, on the basis of that request, and the letter of allotment having been perfected by the payment of Kshs. 4, 047,690, to the Commissioner of Lands, the Commissioner of Lands had the option of declining to accede to the request, whereby the land would be available for allocation to someone else, or acceding to it by accepting the payments and issuing a title as requested by the allottee.
224. The Commissioner of Lands having acceded to the request by the allottee, I do not find any illegality on the part of the Commissioner of Lands in the processing of the title in the name of the 1st Defendant, save for the fact that the title was erroneously issued in respect of a road, and not the land that was actually allocated to the initial allottee, Center Park Limited.

Whether the decretal sum in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited is payable.

225. The Plaintiff and the Petitioner sought that this court find that it would be against public policy and Article 40(6) of *the Constitution* for the 1st Defendant to derive any benefit from the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited because the revocation of Grant No. I.R. No. 66986 in respect of the parcel of land known as L.R. No. 209/12748 would apply retrospectively to 15th September 1995 and would invalidate all subsequent proceedings, orders and judgements.
226. They further seek for a permanent injunction to prevent the 1st Defendant and its servants or agents from executing the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited in any manner whatsoever or by enforcing the bank guarantee held by the 2nd Interested Party, as well as an order directing the 3rd to 6th Respondents (in the Petition) to investigate what taxes and land rents have not been paid by the 2nd Respondent to the government regarding L.R. No. 209/12748 I.R. No. 66986.
227. The 1st Defendant herein sued the Petitioner (the 6th Defendant) in High Court Civil Case No. 367 of 2000 for damages for trespass, which had apparently been in exclusive possession of the suit property between 1994 and February 1998. The High Court upheld the 1st Defendant's suit and awarded the 1st Defendant a sum of Kshs. 80,902,400/- as general damages for trespass, mesne profits and damages



- for loss of business opportunity, which sum is to be paid by the 6th Defendant, Kenya Hotel Properties Limited.
228. The 6th Defendant appealed against the decree to the Court of Appeal in Civil Appeal No. 149 of 2007. The Court of Appeal upheld the High Court's finding, but reviewed the award downwards to Kshs. 22,729,800/- with interest from January 1994.
229. This court has already found that the land that the Petitioner/6th Defendant used for parking, and which was the basis of the suit in the High Court, was not the land represented in L.R. No. 209/12748, I.R. No. 66986. Rather, the actual land on the ground that was occupied by the Petitioner/6th Respondent and used for parking was the one represented in the PDP of 1993.
230. This court has also found that the land in the 1993 PDP is the land that should have been surveyed, and not L.R. No. 209/12748 represented in survey plan number 284/126. The court has further found that the land on which the Petitioner/6th Defendant used for parking, and which led to the filing of the suit in the High Court belonged to the 1st Defendant, and not the public road captured in L.R. No. 209/12748.
231. Consequently, the issue of not paying the decretal amount in High Court Civil Case No. 367 of 2000 on the basis that the land was public land does not arise.
232. But even if this court was to find that the land on which the 1st Defendant's claim was based on in the former suit was public land, can this court set aside or vary the Judgment on the ground that the Judgment is against public policy, or that the decretal amount is payable to the EACC (the Plaintiff)?
233. Section 34(1) of the *Civil Procedure Act* prescribes as follows:
- “ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
234. Section 34(1) of the *Civil Procedure Act* bars this court from issuing any orders with respect to the execution and satisfaction of the decree in HCCC No. 367 of 2000, as between the Petitioner and the 2nd Respondent.
235. Further, the decree in High Court Civil Case No. 367 of 2000 having been issued by a court of concurrent jurisdiction, the issues raised by the Plaintiff and the Petitioner, in so far as the decree of the court is concerned can only be raised in that suit, and not by way of separate suits, as has happened herein.
236. Moreover, in an earlier ruling delivered in this matter on 30th November 2021, this court held that this court cannot issue any orders with respect to the matter of enforcement of the bank guarantee, as the same was pending before the Court of Appeal. In the said Ruling, this court held as follows:
- “ Whether the 2nd Respondent can call up the bank guarantee issued by Development Bank of Kenya Limited is not only pending before the Court of Appeal, but cannot also be raised in the current Petition. That issue can only be raised in HCCC number 367 of 2000. To that extent, this court cannot grant an order staying the calling up of the said bank guarantee.”
237. Accordingly, having held that the land in question was not public land, and for lack of jurisdiction, this court cannot issue any order to prevent the execution of the decree in HCCC no. 367 of 2000, neither can it prevent the call-up of the bank guarantee. The prayers sought by the Plaintiff and the Petitioner in that regard must therefore fail.



238. The Petitioner sought for an order compelling the 1st Defendant to pay taxes in respect of the suit property. In my view, that issue falls outside the jurisdiction of this court. This court's mandate is limited to disputes relating to the environment and the use and occupation of, and title to, land (see Article 162 (2) (b) of *the Constitution*). The court will therefore not address that issue.

Appropriate reliefs

239. In view of the issues that arose during trial, which this court has addressed comprehensively, the court proceeds to make the following orders:

- a. A declaration be and is hereby issued that the letter of allotment dated 13th January 1994 addressed to Center Park Limited and Part Development Plan reference number 42/10/93/1 dated 20th August, 1993 were lawfully issued.
- b. A declaration be and is hereby issued that Grant No. I.R. 66986 of 15th September 1995 in respect of L.R. No. 209/12748 is null and void, the same having been created on a public road.
- c. An order of cancellation of the Grant No. I.R. 66986 of 15th September 1995 in respect of L.R. No. 209/12748 is hereby granted.
- d. A declaration be and is hereby issued that Grant No. I.R. 66986 of 15th September 1995 in respect of L.R. No. 209/12748 be replaced by a fresh survey plan and Deed Plan in the name of the 1st Defendant in respect of the land represented in the Part Development Plan reference number 42/10/93/1 dated 20th August, 1993.
- e. The sum of Kshs. 22,729,800 together with interest awarded to the 1st Defendant in Appeal Case No. 149 of 2007 as mesne profits is payable, unless the Court of Appeal orders otherwise.
- f. Each party shall bear his/its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30TH DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Oyatta for 1st – 5th Defendants

Ms Muturi for 7th Defendant

Dr. Omondi for 2nd Interested Party

Mr. Otieno for Gichuhi (S.C.) FOR Petitioners.

Court Assistant - Tracy

