Intex Construction Limited & 2 others v Suppliers & Services Limited & 6 others (Environment & Land Case 1085 & 598 of 2013 & 691 of 2012 (Consolidated)) [2025] KEELC 674 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 674 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1085 & 598 OF 2013 & 691 OF 2012 (CONSOLIDATED)

OA ANGOTE, J

FEBRUARY 20, 2025

BETWEEN

INTEX CONSTRUCTION LIMITED ..... PLAINTIFF

AND

SUPPLIERS & SERVICES LIMITED ..... 1ST DEFENDANT

CHARLES WAMBUGU GITONGA ..... 2ND DEFENDANT

COMMISSIONER OF LANDS ..... 3RD DEFENDANT

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 598 OF 2013

BETWEEN

CHARLES WAMBUGU GITONGA ..... PLAINTIFF

AND

SUPPLIES AND SERVICES LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 691 OF 2012

BETWEEN

SUPPLIES AND SERVICES LIMITED ..... PLAINTIFF

AND

STEPHEN KAMAU KAHORA ..... 1ST DEFENDANT

CHARLES WAMBUGU GITONGA ..... 2ND DEFENDANT

NEWTON OMONDI ..... 3RD DEFENDANT

JUDGMENT

Background

1. This judgment is with respect to three consolidated suits being ELC 1085 of 2013, 598 of 2013 and 691 of 2012.

LC 1085 OF 2013

2. Vide the Plaint dated 10th September, 2013, the Plaintiff seeks as against the Defendants the following reliefs:

    i. A declaration that the Plaintiff is the duly registered proprietor of all that piece of land situate in the City of Nairobi known as L.R No 15207, Nairobi and registered under the provisions of the Registration of Titles Act, (Cap 281 of the Laws of Kenya) (now repealed)) vide Grant No I.R 53129 issued on 15th July, 1991 for a term of 99 years from 1st March, 1990, and whose dimensions are delineated in the Deed Plan No 156279 annexed to the Grant.

    ii. A permanent injunction barring the 1st and 2nd Defendants whether by themselves, their servants, employees or agents from further occupying, constructing, modifying, transferring or claiming ownership or in any other way dealing with or interfering with the Plaintiff's ownership of all that piece of land situate in the City of Nairobi area known as L.R No 15207, Nairobi and registered under the provisions of the Registration of Titles Act(Cap 281 of the Laws of Kenya)(now repealed))vide Grant No I.R 53129 issued on 15th July, 1991 for a term of 99 years from 1st March, 1990, and whose dimensions are delineated in the Deed Plan No 156279 annexed to the Grant.

    iii. Vacant possession of all that piece of land situate in the City of Nairobi area known as L.R No 15207, Nairobi and registered under the provisions of the Registration of Titles Act (Cap 281, Laws of Kenya) (now repealed))vide Grant No I.R 53129 issued on 15th July, 1991 for a term of 99 years from 1st March, 1990, and whose dimensions are delineated in the Deed Plan No 156279 annexed to the Grant.

    iv. An order directing the 3rd and/or 4th Defendant to cancel and revoke any purported title documents issued to the 1st and 2nd Defendants and to nullify any such transfers of all that piece of land situate in the City of Nairobi area known as L.R No 15207 Nairobi and registered under the provisions of the Registration of Titles Act, Cap 281 of the Laws of Kenya(now repealed)vide Grant Number I.R 53129 to the 1st and 2nd Defendants.

    v. Costs of this suit.

    vi. Any other reliefs this Honourable Court may deem fit and just to grant.

3. It is the Plaintiff's case that it is the registered proprietor of all that parcel of land situate in the City of Nairobi area containing by measurement Two (2) Hectares or thereabouts, known as L.R No 15207 and registered under the provisions of the repealed Registration of Titles Act vide Grant No I.R 53129

issued on the 15th July, 1991 for a term of 99 years from 1st March, 1990, and whose dimensions are delineated in the Deed Plan No 156279 annexed to the Grant(hereinafter the suit property).

4. The Plaintiff averred in the Plaint that it purchased the suit property from Lesmat Limited on or about 16th July, 1997 and fully paid for the same; that it is up to date with all the land rent, rates and other fees due on the land and that vide a charge dated 2nd March, 2006, it charged the property to Giro Commercial Bank for the sum of Kshs 10,000,000.

5. It was averred by the Plaintiff that it took out a further charge dated the 28th May, 2007 for the sum of Kshs 20,000,000/= and a second further charge dated 2nd February, 2011 in which it was advanced Ksh 60,000,000/= all by the same bank.

6. Sometime in May, 2013, the Plaintiff contends, it realized that unauthorized construction was being undertaken on the suit property and person's unknown to them were in the process of constructing a concrete fence and other developments; that they reported the matter to the CID Embakasi who visited the suit property with their representatives and that they found a sign post that had been erected on the suit property which indicated that the 1st Defendant was the owner and developer thereof.

7. It is the Plaintiff's case that it later transpired that there existed a suit between the 1st and 2nd Defendants' over the suit property-Nairobi ELC 598 of 2013 wherein the 2nd Defendant obtained injunctive orders against the 1st Defendant, purporting to be the registered owner of the suit property.

8. The Plaintiff urges that whereas it is the only genuine and duly registered proprietor of the suit property, the 1st and 2nd Defendants have colluded with officials at the Lands Department to have fake titles issued in their names with a view to depriving it of its property by circumventing the due process of the law.

9. In view of the foregoing, the Plaintiff avers, any other titles to the 1st and 2nd Defendants are defective, invalid and/or void ab initio having been issued fraudulently by the 3rd Defendant and/or its servants and employees and that the foregoing led to it issuing a Caveat Emptor warning members of the public that it is the duly registered proprietor of the suit property.

10. The 1st Defendant filed a Defence and Counterclaim on 30th October, 2013. Vide the Defence, it denied the assertions as set out in the Plaint stating that if indeed the Plaintiff purchased the suit property from Lesmat as alleged, then Lesmat did not have any land to sell as the land was at the material time legally allocated to the 1st Defendant and that consequently, the alleged purchase was null and void.

11. The 1st Defendant maintains that it is the duly registered proprietor of the parcel of land-L.R 15207 (suit property) having been duly allotted the same by the Commissioner of Lands on the 22nd March, 1991 pursuant to conditions which it duly complied with; that at the time of the allotment of the property to it, the same had neither been allotted to anyone else nor was it registered in any other person's name and that the land was vacant when it took over the same and no one trespassed thereon until sometime in 2012 when the 2nd Defendant started laying claim to it.

12. According to the 1st Defendant, after the 2nd Defendant and other persons attempts to trespass, it instituted ELC 691 of 2012 against them and was granted injunctive orders; that the 2nd Defendant and others had temporarily taken possession of part of the suit property and were evicted pursuant to enforcement orders issued in HC Misc App 495 of 2013 and that the 2nd Defendant filed ELC 598 of 2013 in a bid to circumvent the orders issued in ELC 691 of 2013.

13. The 1st Defendant averred that the purported registration of the suit property in the names of the Plaintiff and the 2nd Defendant was actuated by fraud, the particulars of which include, the Plaintiff and

the 2nd Defendant registering the suit property in their names when the same was reserved, registered and in possession of the 1st Defendant and purporting to charge the property when the same was not in the chargor's name and ownership.

14. The 1st Defendant has sought in the Counterclaim for the following reliefs:

    i. A declaration that the 1st Defendant (Plaintiff as per the Counterclaim) is the legally registered proprietor of all that parcel of land known as L.R 15207.

    ii. An order cancelling the registration of the Plaintiff (1st Defendant as per the Counterclaim) and the 2nd Defendant as proprietor of L.R No 15207.

    iii. An injunction to restrain the Plaintiff (1st Defendant as per the Counterclaim) and the 2nd Defendant by themselves, or through any of their agents or servants from trespassing onto, disposing of, selling, charging or further charging, or in any manner dealing with land parcel L.R No 15207 pending the hearing and determination of this suit.

    iv. Costs of this suit.

    v. Such other or further relief this court may in its discretion deem just and reasonable to grant.

15. None of the other Defendants filed Defences in this suit.

ELC 598 of 2013

16. The Plaintiff herein (2nd Defendant in ELC 1085) instituted a suit on the 22nd May, 2013 seeking the following reliefs:

    i. An order of mandatory injunction directed to the Defendants by herself, agent and/or servants to remove all equipment and machinery from the Plaintiff's property better known as L.R No 15207(Mombasa-Road Nairobi).

    ii. An order of injunction directed to the Defendant by herself, agents, and/or servants from interfering with the Plaintiff's peaceful possession, occupation and enjoyment of all that parcel of land better known as L.R No 15207, Mombasa Road, Nairobi.

    iii. Damages for trespass.

    iv. Costs of the suit.

17. It is his case that at all material times relevant, he is and has been the registered owner of all that parcel of land known as L.R 15207-Mombasa Road (hereinafter the suit property) and has been in possession and quiet enjoyment thereof and that pursuant to his possession, he erected a perimeter wall on the suit property.

18. According to the Plaintiff, on 19th May, 2013, the Defendant through her agents and/or servants invaded and trespassed onto the suit property in readiness to excavate the subject property; that he has not transferred his proprietary rights to any person and the Defendant's actions are unlawful, illegal and aimed at taking over his property and that despite demands, the Defendant has failed to cease its actions.

19. In response, the Defendant (1st Defendant in 1085) filed a Defence on the 9th December, 2013 in which it denied the assertions as set out in the Plaint contending that the suit was in any event defective on account of ELC 691 of 2012 over the same subject matter.

ELC 691 OF 2012

20. The Plaintiff herein (1st Defendant in ELC 1085) instituted this suit on the 8th October, 2012 seeking the following reliefs:

    i. An injunction to restrain the 1st, 2nd and 3rd Defendants, either by themselves or through any of their agents and/or servants or howsoever from trespassing onto, taking possession of, or interfering with operations on the Plaintiff's land parcel no L.R No 15207, Nairobi pending the hearing and determination of this suit.

    ii. General damages for trespass.

    iii. Costs of the suit.

    iv. Such other or further relief this Honourable Court may in the interest of justice be deem fit to grant.

21. The Plaintiff's case as per the Plaint was that it is and was at all material times the registered proprietor of all that parcel of land known as L.R No 15207, Grant No I.R 83012, Nairobi having been so registered on 18th December, 1998 and that the Defendants have unlawfully been claiming to be the owners of the suit property.

22. According to the Plaintiff (1st Defendant), it is in the process of fencing off the suit property by erecting a stone perimeter wall around the same and that the Defendants and their agents and/or servants have severally trespassed onto the suit property and attempts to have them cease has had no results.

23. The 2nd Defendant (both herein and in ELC 1085) filed a Defence on the 1st December, 2014. Vide the Defence, he denied the assertions as set out in the Plaint stating that he is the lawful proprietor of the suit property and has been in possession thereof and that whereas he instituted ELC 598 of 2013 against the Plaintiff, he was at the time unaware of this matter. The other Defendants did not respond to this suit.

Hearing and Evidence

24. The matter proceeded for hearing on the 6th February, 2024. PW1 was Samit Gehlot, the Plaintiff's Managing Director. He adopted his witness statement dated 22nd March, 2022 as his evidence in chief and produced the bundle of documents dated 10th September, 2013 as PEXHB1 and the supplementary bundle dated the 24th March, 2022 as PEXHB2.

25. It was his evidence that the Plaintiff acquired the land from Lesmat Limited vide a transfer dated 16th July, 1997 as evinced by Entry No 4 in the title; that after purchasing the land, they fenced it and have severally charged it to Bank of Kenindia and Giro Bank and that sometime in May, 2013, they discovered that a person unknown to them had trespassed onto their land, destroyed their fence and taken possession.

26. In cross-examination, he stated that he was not involved in the acquisition of the property which was undertaken by his predecessors; that he cannot tell how the Plaintiff came to know about the availability of the suit property and that he is unaware of the process leading up to the allotment of the land by the government to Lesmat Limited and has no records predating the transfer of the property from Lesmat to themselves.

27. PW1 testified that he has no records of the initial survey as that they only relied on the Title Deed; that he is unsure whether they involved the surveyor to identify the land and that he does not remember the person who showed them the beacons and that they do not have the beacon certificate.

28. It was his further evidence on cross-examination that the sale agreement does not have a date on the first page; that they paid Kshs 1million at the time of signing the agreement and Kshs 5 million before completion of the agreement but he does not have evidence of the same; that the names of the people who signed the agreement is not indicated and that the document does not have a seal and that the agreement was not witnessed.

29. PW1 conceded to not having seen the transfer document noting that as per the agreement, they purchased L. R 156279; that they must have paid stamp duty; that they do not have a record of the fence as it was taken down and that they have been unable to pay rates since 2016 and that he doesn't have a record of the rent payments.

30. According to PW1, the company does not have a resolution to acquire the property; that the Director of Lesmat declined to appear in court and testify; that he is not aware that the sale agreement captured the wrong title number and that when they went to pay rates, they discovered someone else was paying the same.

31. PW1 stated that there is no dispute as to the directorship of the Plaintiff; and that when the file went missing, they filed a Deed of Indemnity and the file was reconstructed.

32. DW1 was Lawi Kigen Kiplagat. He adopted his witness statement dated the 4th August, 2022 as his evidence in chief and adduced the bundle of documents dated the 3rd August, 2022 as 1DEXHB1, the supplementary bundle dated the 3rd November, 2022 as 1DEXB2 and the 1st Defendant's resolution dated 19th September, 2022 as 1DEXHB3.

33. DW1 informed the court that he is the general manager of the 1st Defendant which is the lawful and registered owner of the suit property having been alloted the same by the Government of Kenya in March, 1991 as evinced by a letter of allotment dated the 22nd March, 1991 and the payment receipt dated 10th June, 1992 and that at the time of allocation of the suit property, the same was vacant and therefore available for allocation.

34. Upon payment of the requisite fees, it was stated, the suit property was surveyed by the Government, a Deed Plan and a grant issued in favour of the 1st Defendant and that the 1st Defendant thereafter took possession of the property, which possession it remains with, while discharging its obligations by settling rates and land rents.

35. It was his further testimony that the Defendants in ELC 691 of 2012 trespassed onto the suit property leading them to institute the aforesaid suit; that the aforesaid Defendants thereafter rushed to Court and obtained injunctive orders on the basis of false information which orders were later discharged and that the Defendants destroyed their wall and other properties valued at over Kshs 18 million for which it is entitled to compensation.

36. It was his evidence on cross-examination that he is a General Manager but not a Director of the 1st Defendant; that when the 1st Defendant acquired the land, he was not with the company; that they acquired the property through allotment which indicates Plot E, but the plan is not indicated; that the survey must have been done after paying for the land; that the Grant and the Deed Plan are dated the 5th July, 1991 before the payment was done in 1992 and that their Grant number is different from the Plaintiff's and the date of the Deed Plan is 4th July, 1991.

37. He further stated on cross that their title does not show the name of the Commissioner of Lands; that there is no evidence of payment of rates between 1998-2012; that they have developed the land but don't have approvals thereof; that they only carried out excavations and the perimeter wall and that as per the letter of allotment dated 22nd March, 1991, they were to make payments within 30 days but they accepted the offer later on the 10th June, 1992.

38. DW1 testified that he never came across a PDP for the plot; that they were supposed to pay by cheque the stamp duty but paid he by cash; that he doesn't know who carried out the survey; that they paid for unsurveyed land; that while it is a new grant, the Deed Plan does not indicate the same and that the name of the licensed surveyor who prepared it is not indicated.

39. DW2 was Charles Gitonga, a businessman. He adopted his witness statement in ELC 598 of 2013 and produced the documents in the bundle dated 10th October, 2013 as 2DEXHB1 and the letters dated 23rd July, 2013 s 2DEXHB2 (a) and (b).

40. It was his evidence that the land was allotted to him through an allotment in 1989 dated the 9th May, 1991; that he paid the stamp duty of Kshs 400,000, rent and conveyancing fees; that he got possession of the land and processed the title which he was issued for a term of 99 years from the 1st March, 1990 and that he took possession of the land and developed the structures thereon for his workers.

41. During cross-examination, he stated that he was 18 years old when he was allotted the land; that at the time the land was allotted to him it was not surveyed; that the allotment was made on behalf of a County Council whose name is not indicated and that it also indicates that there is a plan number 156279 which is however not attached.

42. It was his further evidence on cross-examination that he paid survey fees; that there was already a Deed Plan Number 156279; that he was not in control of the issue of payment which was done by his workers. It was his evidence that he paid rates although some of the receipts got lost and that he could not remember if he paid land rent.

43. DW3 was Wilfred Muchai, an Assistant Director of Surveys at the Ministry of Lands, Public Works and Housing attached to the office of the Director of Surveys.

44. DW3 adopted his statement dated 2nd May, 2023 as his evidence in chief and the bundle of documents of an even date as 3DEXHB1. Briefly, it was his evidence that the records held at the survey records in respect of parcel L.R No. 15207 indicates that the suit land, located in Embakasi, is a resultant new grant surveyed out of parcel L.R 15124.

45. According to DW3, L.R Nos 15207, 15208 and 15209 as surveyed by Government Surveyor Charles M Lwanga are contained in Cadastral Plan Number F/R No 212/53, survey computations 25899, which records were approved and authenticated by the Director of Surveys on 25th June, 1991.

46. He stated that the approval and authentication of the new Grants aforesaid were recorded and filed with the Director of Surveys vide letter reference No L.R 34/Vol.30/3896 dated 25th June, 1991 and that following the approval and authentication of the survey plans, Deed Plans in respect of L.R No 15207, 15208 and 15209 were issued in support of the registration of title to these properties.

47. According to DW3, guided by the *Survey Act*, and Regulation 108 of the Survey Regulations, 1994, it is only Deed Plan number 156279 dated 4th July, 1991 that was issued by the Director of Surveys, and that the Deed Plan number 156279 dated 4th July, 1991 annexed to Grant No I.R No 53129 registered on the 16th July, 1991 in favour of Lesmat Limited is authentic, being a replica of the official office copy of the Deed Plan record held by the Director of Surveys.

48. It was his evidence that Deed Plan 156279 dated 5th July, 1991 annexed to Grant No I.R 53129 allegedly registered on 16th July, 1991 in favour of Charles Gitonga does not match the records held by the Director of Surveys; that the Deed Plan equally does not contain the header note on the right hand corner indicating "New Grant" and that the signature of M/S D.R Gitau on the Deed Plan is a forgery.

49. As regards Deed Plan No 156279 dated the 5th July, 1991 annexed to Grant No I.R 83012 allegedly registered on the 18th December, 1998 in favour of Supplies and Services Limited, it was his evidence that the same is not authentic because the date of the Deed Plan does not match the records held by the Director of Surveys and the same does not have the Header note on the right hand corner indicating "New Grant", and that further, the signature of M/S D.R Gitauon the Deed Plan is a forgery.

50. In cross-examination, he stated that the Deed Plan number for all the three titles is 156279; that the one on I.R 83012 is different from the one held at survey; that the Deed Plan number 83012 also indicates that the survey was done by a private surveyor whereas the present one was done by a government surveyor, C. M. Lwanga, as evinced by survey plan number F/R No 212/50; that all Deed Plans emanating from licensed surveyors must indicate the name thereof and that the anomaly in the Deed Plan by the 1st Defendant is that it lacks the name of the surveyor.

51. In re-examination, it was his evidence that he knows Mr. Gitau because he was his colleague thus his observation that Mr. Gitau's signature on the Deed Plan is a forgery.

52. According to DW3, the Plaintiff's title has a date and the error therein is in terms of the month-June instead of July; that the office copy shows the date of 4th July, 1991 as the date of the Deed Plan; that they have a authentic slip note of approval dated 25th June, 1991 and that at this time, the Director of Surveys was communicating to the Commissioner of Lands indicating that the survey records had been approved.

53. It was his evidence that the survey for the suit property was undertaken by a government surveyor and this is why the Director of Surveys informed the Commissioner of Lands of the completeness; that after this, the Commissioner of Lands prepared an indent in respect of the survey for the Director to prepare a Deed Plan.

Submissions

54. The Plaintiff's counsel filed submissions on the 26th September, 2024. Counsel submitted that the Plaintiff has through his evidence established that it is the legitimate proprietor of the suit property having acquired the same through a purchase from Lesmat Limited and that the parcel of land was Grant Number L.R 53129 for a term of 99 years from the 1st March, 1990 and Deed Plan Number 156279 dated the 4th July, 1991.

55. It was submitted that conversely, the 1st Defendant alleges to have acquired the property through allotment dated the 22nd March, 1991 for a term of 99 years from 1st April, 1991 and its Deed Plan Number 156279 dated the 5th July, 1991 and that it is apparent that as between the two, the Plaintiff' s title was first in time and cannot be overridden by the 1st Defendant's title and that similarly, the 1st Defendant's title does not have the name of the Commissioner of Lands who purportedly signed it.

56. As regards the 2nd Defendant, it was urged that whereas his Certificate of Title contains the same contents as the Plaintiff's Certificate of Title, Deed Plan number 156279 relied on by the 2nd Defendant is dated 5th July, 1991 whereas the one availed by the Plaintiff is dated 4th July, 1991 and that the Plaintiff's title was further authenticated by the 3rd and 4th Defendants who are mandated to keep and

uphold the sanctity of records at the Lands office as stated in Philemon L Wambia vs Gaitano Lusitsa Mukofu & 2 Others[2019]eKLR.

57. It was submitted that as expressed in Kamau James Njendu vs Serah Wanjiku & Anor[2018]eKLR, the same land cannot have more than one title and where such a scenario exists, one is genuine while the other was issued either unlawfully or through a mistake and thus constitutes double allocation and that from the evidence, it is clear that at the time of the purported allotment to the 1st Defendant, the property was already surveyed and registered in the names of Lesmat Limited from whom the Plaintiff purchased the same.

58. It was submitted that there has in any event been no evidence of payment for the allotment and neither the 1st nor 2nd Defendants adduced a Part Development Plan, a necessity where land has been allotted as expressed in Nelson Kazungu Chai & 9 Others vs Pwani University College [2014]eKLR and Kiplagat vs Masit & 6 Others[2022]KEELC 2596(KLR).

59. It was submitted that the 2nd Defendant's letter of allotment states that it is for industrial plot L.R 15207 Nairobi meaning that the land was already surveyed. This, according to counsel, lends credence to the fact that at the time of the purported allotment, the land was surveyed and registered in the name of Lesmat Limited. Further, it was submitted, the plan referenced in the 2nd Defendant's allotment letter is not attached.

60. Counsel submitted that in view of the discrepancies noted regarding the 1st and 2nd Defendant's titles and the documents relied on, in terms of Section 26(1)(a) and (b) of the *Land Registration Act*, the Plaintiff has proved that their titles were acquired either fraudulently and/or irregularly or un procedurally and are liable to be cancelled.

61. The 1st Defendant filed submissions on the 18th November, 2024. Counsel submitted that in Munyu Maina vs Hiram Gathicha Maina[2013]eKLR, the court was categorical that where there are rival claims of ownership over property, parties are obligated to establish their claims and that when a registered proprietor's root of title is under challenge, he must go beyond the instrument and prove the legality of how he acquired the title.

62. It was urged that the 1st Defendant's allotment of the suit property was uncontroverted and that whereas there was a delay in making the payment as set out in the allotment letter, the same did not have the effect of reversing the allotment as the payment was accepted by the Government and a receipt issued implying a waiver of the condition requiring payment within 30 days. Reliance in this respect was placed on the case of Cabin Crew Investments Limited vs Kenya Medical Training College & 4 Others[2021]KECA 49(KLR).

63. It was submitted that beyond the title, it was the testimony by the 1st Defendant that it has been in physical possession of the suit property from the date of allocation and continues to be in such possession; that possession is prima facie an indicator of ownership and that the 1st Defendant has continued to remit rents and rates to the Government which have always been accepted and receipts issued.

64. According to Counsel, whereas the Plaintiff claims to have purchased the suit property from Lesmat Limited, no evidence has been adduced as regards the propriety of the title held by Lesmat Limited and the 3rd and 4th Defendants evidence is not sufficient in this respect and that a Deed Plan is not the beginning and end of title to land.

65. It was urged that further still, the sale agreement relied on by the Plaintiff is fatally defective being undated, unsigned and unsealed by the purchaser, unsealed by the vendor, unwitnessed by an Advocate

and the names of the Directors of the two companies who signed are not captured in the jurat; that the Plaintiff further failed to provide evidence of payment for the suit property to Lesmat Limited and that it was revealed during the Plaintiff's testimony that the Directors of Lesmat Limited declined to testify on their behalf leading credence to the assertion that the Plaintiff's title is fraudulent.

66. It was submitted that the 2nd Defendant similarly did not prove lawful and valid acquisition of the suit property; that apart from the letter of allotment, he did not show the conditions that formed part of the letter of allotment and whether he met them nor evince payment of the requisite sums.

67. It was submitted that while the 2nd Defendant claimed he was allotted the land that had an L.R Number, on the face of it, the letter of allotment indicated that the land was subject to a survey and that while the allotment letter purports to be on behalf of a County Council, the aforesaid Council is not named.

68. Finally, it was submitted, the 2nd Defendant is not and has never been in possession of the suit property and did not prove the root of its title and that as was held in Miroro vs Nyarumu & 5 Others[2023]KEELC 21533(KLR), the court will have to weigh the evidence and find in favour of one of the three protagonists, in this instance, the 1st Defendant.

69. None of the other parties filed submissions.

Analysis and Determination

70. Having duly considered the pleadings, testimonies and the rival submission including all the authorities cited therein, the following arise as the issues for determination;

    i. Who is the bona fide owner of the suit property?

    ii. What are the appropriate reliefs?

71. The parties herein will be referred to as per ELC 1085 of 2013, that is the Plaintiff, the 1st 2nd 3rd, and 4th Defendants. The present dispute revolves around the ownership of L.R No 15207, which the Plaintiff and the 1st and 2nd Defendants each lay claim to.

72. It is the Plaintiff's case in this respect that it is the legitimate proprietor of the suit property having purchased it from one Lesmat Limited on 16th July, 1997; that sometime in 2013, it discovered that construction was ongoing on the suit property without its knowledge and/or authority and that investigations revealed that the 1st and 2nd Defendants hold forged titles to the suit property.

73. The Plaintiff adduced into evidence Grant I.R 53129 over L.R No. 15207 issued on the 15th July, 1991 to Lesmat Limited; the sale agreement between Lesmat Limited and itself in respect of Grant I.R 53129 over L.R 15207; Certificate of Registrations in respect of the first Legal Charge dated 8th November, 2006, second legal charge dated 25th June, 2007 and the second further legal charge dated 8th August, 2011 together with the letter from Giro Commercial Bank dated 13th June, 2013.

74. The Plaintiff further adduced Grant No I.R 53129 over L.R 15207 issued on the 15th July, 1991 to Charles Wambugu Gitonga; Grant No I.R 83012 over L.R 15207 issued on the 27th November, 1998 to Supplies and Services Limited; Caveat Emptor issued by the Plaintiff in respect to L.R No 15207; Deed of Indemnity; Certificate of official search dated the 9th December, 2020 and a copy of a letter dated the 17th June, 2013; certificate of Official Search dated the 9th December, 2020.

75. The 1st Defendant equally lays claim to the suit property. It asserts that it acquired the same vide an allotment by the Government of Kenya through an allotment letter dated 22nd March, 1991 and that after allotment, it paid the requisite sums and thereafter took possession.

76. It is the 1st Defendant's position that at the time of allocation of the suit property, the same was vacant and therefore available for allocation; that upon payment of the requisite fees, the property was surveyed by the Government and a Deed Plan and a grant issued in its favour and that it remains in possession of the suit property to date while discharging its obligations by paying land rates and land rents.

77. The 1st Defendant adduced into evidence the letter of allotment dated 22nd March, 1991; payment receipt dated the 10th June, 1992; Grant No I.R 83012; bundle of rates payment request forms; land rent payment request forms; cheques for rates payments; rates clearance certificates and KRA rent pay in slip dated the 6th March, 2013 and 14th September, 2012.

78. The 2nd Defendant equally lays claim to the suit property. He asserts that he is the legitimate owner thereof having been allotted the same vide a letter of allotment dated 9th May, 1991; that he paid stamp duty of Kshs 400,000/=, rent and conveyancing fees; that he got possession of the land and processed the title which he was issued with for a term of 99 years from the 1st March, 1990 and that he took possession of the land and developed the structures thereon for his workers.

79. He adduced into evidence Grant I.R 53129, L.R No. 15207 issued to him on 15th July, 1991; letter of allotment dated 9th May, 1991; cheque for Kshs 507, 050 dated 25th May, 1991 and statements and receipts of payment of rates and photographs.

80. The 3rd and 4th Defendants, through DW3, testified that as per their records, the Plaintiff holds the legitimate title to the suit property, its Deed Plan having been issued by the survey office.

81. Through DW3, the 3rd and 4th Defendants adduced into evidence the Department of Lands-Nairobi City Part Print No 107554/4A prepared in respect of Plot Numbers F1, F2 and F3; Director of Surveys letter Ref No. CR/34/VOL.30/3896 dated the 25th June, 1991; Cadastral Plan Number F/R No 217/41; Cadastral Plan Number F/R No 212/52; Deed Plan Number 156279 and Deed Plan Register containing the details of preparation and issuance of Deed Plan No 156279 to the Commissioner of Lands by the Director of Surveys.

82. From the above, it is evident that this is a dispute involving three parties, each asserting ownership over the same parcel of land. In determining the matter, the court remains mindful of the evidentiary burden that each party must discharge to substantiate their claim. This position is succinctly captured in Section 107, 109 and 112 of the *Evidence Act*. The said Section 107 provides as follows:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

83. And Sections 109 and 112 of the same Act which states;

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

84. Claims of fraud have been raised by the parties as against each other. A fundamental principle of law is that fraud must be specifically pleaded and proved. This was aptly expressed by the Court of Appeal in Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

> "It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently."

85. Indeed, fraud is not supposed to be inferred from facts. In Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, the Court of Appeal observed as follows:

> "In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud..."

86. As regards the burden of proof in matters fraud, the same is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal cases, being beyond reasonable doubt.

87. The Plaintiff, the 1st Defendant and the 2nd Defendant have each presented to this court a Certificate of Title in respect of L.R 15207-Nairobi. It need not be restated that three parties having a title to one parcel of land is a legally untenable situation.

88. Whereas ordinarily, a Certificate of Title would prima facie evince legitimate ownership of property, it is in itself insufficient in such circumstances, and the court is mandated to conduct an investigation into the root of the titles to establish the genuine owner. This position was enunciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others[2016] eKLR, where Munyao J succinctly held as follows:

> "A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

89. The Court of Appeal in Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, had earlier opined that where a registered proprietor's title is under challenge, it is not enough to dangle the instrument of title as proof of ownership.

90. The Plaintiff has presented to Court the Certificate of Title in respect to the suit property, initially in the name of Lesmat Limited being Grant I.R 53129 for a term of 99 years from 1st March, 1990 issued on the 15th July, 1991. Entry No 4 shows the transfer of the title to the Plaintiff was done on 16th July, 1997.

91. On the other hand, the 1st Defendant has adduced a title in its names under Grant I.R 83012 for term of 99 years from the 1st April, 1991 issued on 27th November, 1998. The 2nd Defendant has on his part adduced the title in its name Grant No I.R 53129 for a term of 99 years from 1st March, 1990 issued on 15th July, 1991.

92. The Plaintiff traces its acquisition of the property to Lesmat Limited contending that it acquired the same from Lesmat by way of purchase. Having alleged defect in the title issued in the name of Lesmat Limited, the onus lay on the Defendants to prove the same. This they did not do.

93. Further, still, it was the evidence of the 3rd and 4th Defendants that after perusing the Deed Plans adduced by the parties, the Deed Plan number 156279 dated the 4th July, 1991 annexed to Grant No I.R No 53129 registered on the 16th July, 1991 in favour of Lesmat Limited is authentic, the same being a replica of the official office copy of the Deed Plan held by the Director of Surveys.

94. Moving now to the Plaintiff's acquisition, the sale has been impugned by the 1st Defendant who was categorical that it is defective, evinced by the fact that the agreement was undated, unsigned and unsealed by the purchaser, unsealed by the vendor, unwitnessed by an Advocate and the names of the Directors of the two companies who signed are not captured in the jurat and that as a consequence, the Plaintiff's title is a nullity.

95. Section 3(3) of the *Law of Contract Act*, Cap 23 establishes the legal requirements for a valid agreement where the disposition of an interest in land is concerned. It provides that such a contract must be in writing, signed by all involved parties, and attested by a witness present at the time of signing. The provision expressly states as follows:

> " 3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless —(a)the contract upon which the suit is founded—(i)is in writing; (ii)is signed by all the parties thereto; and
>
> (b)the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

96. It is however not lost on the court that the sale agreement relied on by the Plaintiff was prepared in 1997 while Section 3(3) of the *Law of Contract Act*, as currently framed, came into force in June 2003. As such, the Section is inapplicable. Section 3(7) is instructive in this respect and provides as follows:

> " The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection."

97. So what did the previous Section 3 of the *Law of Contract Act* provide? It read as follows:

> " No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some Memorandum or note, thereof is in writing and is signed by the party to be charged or by some person authorised by him to sign it.

Provided that such a suit shall not be prevented by reason of the absence of writing, where an intended purchaser or lessee who has performed or is willing to perform his part of a contract-

i.Has in part performance of the contract taken possession of the property or any part thereof; or ii.Being already in possession, continues in possession in part performance of the contract and had done some other act in furtherance of the contract."

98. Speaking to this, the Court of Appeal in Peter Mbiri Michuki vs Samuel Mugo Michuki [2014]eKLR stated as follows:

> " Prior to the amendment of section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows...
>
> We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in1991. It is our view that Section 3 (7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the *Law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the *Law of Contract Act* applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the *Law of Contract Act*."

99. Having considered the sale agreement, it is indeed wanting in the particulars alluded to by the 1st Defendant. The omissions were however not fatal to the contract of sale. All that was required of the Plaintiff was to adduce evidence to support its contention that there was a contract to exchange the land with the vendor, and that there was part performance or that he was already in possession of the land and he continued to occupy the same.

100. Possession should be interpreted distinctly from occupation. Words and Phrases Legally Defined, Vo. 4 p 151 states as follows:

> " Possession" is a word of ambiguous meaning, and its legal senses do not coincide with the popular sense...The word "possession" is sometimes used inaccurately with the right to possession. This right to possess is a normal incident of ownership; but an owner's right to possess may be temporarily suspended, for example, he has bailed the goods to a bailee for a term; and, conversely, the right to possess may exist temporarily in one who is not the owner, for example, a bailee."

101. Halsbury's Laws of England 4th Edition at Paragraph 1111 states as follows regarding possession:

> " Possession" may mean legal possession: that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter

of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering..."

102. In WJ Blakeman Ltd vs Associated Hotel Management Services Ltd [1985] KECA 128 (KLR) Madan, JA (as he then was) stated as follows:

> " Possession' is a teasing topic whenever it arises. It does not hold one straight-forward meaning, it has various meanings different in different situations so that the ownership of property cannot be affixed with unencumbered ease.
>
> Possession is a word that, perhaps like a great many words, is incapable of an entirely precise and satisfactory definition, Stable J in Bank View Mill Ltd and Others v Nelson Corporation and Feyer & Co (Nelson) Ltd (1942) 2 All ER 476 at p 486 (E&F). The term 'possession' is always giving rise to trouble. Viscount Jowitt said in United States of America and Republic of France v Dolfus Mieg et Compagnie, SA & Bank of England (1952) 1 All ER 572 "The person having the right to immediate possession is, however, frequently referred in English law as being the "possessor" – in truth, the English law has never worked out a completely logical and exhaustive definition of "possession"". "For my part I approach this case on the basis that the meaning of possession depends on the context in which it is used", per Lord Parker CJ in Towers & Co Ltd v Gray (1961) 2 All ER 68 at p 71.
>
> The court recognized both actual and constructive possession in R v Cavendish (1961) 2 All ER 856 at page 858."

103. The evidence before the court shows that upon purchasing the suit property, the Plaintiff charged the same to Giro Bank on 2nd March, 2006, for the sum of Kshs 10,000,000; further charged it on the 28th May, 2007 for the sum of Kshs 20,000,000 and took out a second further charge dated 2nd February, 2011 for Kshs 60,000,000.

104. The Court of Appeal in Jamal Salim vs Yusuf Abdulahi Abdi & another [2018] KECA 14 (KLR) held as follows in demonstrating that possession does not need to be actual occupation:

> " In this case, it is not in dispute that Ester and Omar sold Plot Nos. 39 and 40 to the 1st and 2nd respondents. It is also common ground that the respective applications to change name in the City Council's register to reflect that position had been approved. From those circumstances, it can be deemed that the respondents were in possession of the said plots. The fact that the change of names had not been effected in the register did not derogate that they were in possession."

105. The Plaintiff, by charging the suit property, came into possession and control of the suit property. It is therefore the view of the court that the Plaintiff took possession of the suit property by causing it to be charged to Giro Commercial Bank which is an act in furtherance of the impugned agreement for sale as provided by section 3 (3) of the pre 2003 *Law of Contract Act*.

106. As regards allegations of non-payment of the purchase price, nothing much falls on the same. The sale agreement indicated that possession would only be granted upon payment, and without any evidence to the contrary, it will be presumed that all necessary payments were made. In any event, the vendor has not raised any issue in respect of the agreement and the payments.

107. It follows therefore that the Plaintiff has satisfied the requirements of Section 3(3) of the pre 2003 *Law of Contract Act* having demonstrated that it took possession of the suit property in performance of the sale agreement between itself and Lesmat. The Sale Agreement is valid.

108. On their part, the 1st and 2nd Defendants trace their root of acquisition of the suit property to the Government, contending that they were initially allotted the same leading to the issuance a certificate of lease in their favour. The Plaintiff and each of the Defendants challenge the process leading to the issuance of the other Defendant's title.

109. It is trite law that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offeror and the offeree and does not confer interest in land. In the case of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane), suing on behalf of the Estate of Mohamed Haji Dagane) vs Hakar Abshir & 3 Others [2021]eKLR, the court succinctly set down the procedure for the issuance of a certificate of lease arising from a letter of allotment thus:

> " Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate."

110. Similarly, the Supreme Court in Torino Enterprises Limited vs Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) held as follows:

> " The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the Registration of Titles Act cap 281 (Repealed) on April 26, 2001.
>
> 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."

111. The Defendants, therefore, must show that they complied with the conditions contained in the allotment letters evidenced in court and on which they seek to rely on.

112. It is noted that the 1st Defendant adduced the letter of allotment dated the 22nd March, 1991. The 2nd Defendant on the other hand has adduced the letter of allotment dated 9th May, 1991 in respect of Plot L.R No 15207. Prima facie, at the time of the issuance of the 2nd Defendant's allotment, the property having already been allotted to the 1st Defendant was un-available for allotment.

113. Speaking to this, the Court of Appeal in Philemon L Wambia vs Gaitano Lusitsa Mukofu & 2 Others [2019] eKLR expressed itself as follows:

> "From the foregoing statement, the trial court arrived at a finding of fact that the first allotment was to Mr. Joseph Muturi Muthurania... On our part, we have considered the evidence on record on the two letters of allotment. The evidence on record shows that the first allotment to the suit property was to Mr. Joseph Muturi Muthurania. In Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, this Court stated that an allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the second letter of allotment to the appellant did not attach in rem to any land since there was no parcel upon which the allotment could attach. The first allotment to Mr. Joseph Muturi Muturania effectively made the suit property unavailable for allotment to the appellant the more when the first allottee had fulfilled the terms and conditions of the allotment."

114. Taking a similar position, the Court of Appeal in Waterfront Holdings Limited vs Kandie & 2 Others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment) noted:

> "Where an allotment is made to two competing parties one of whom pays for the allotment before the other one, this Court in Kenya Ihenya Company Limited & another v Njeri Kiribi (supra) held that;"... it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor."
>
> The position reflects the equitable maxim that where there are equal equities, the first in time prevails."

115. It was DW1's testimony that the 1st Defendant paid in cash, an amount that was acknowledged by a receipt dated 10th June 1992 from the Ministry of Lands. The 2nd Defendant on his part paid by cheque on 25th May, 1991.

116. Considering the two scenarios, it is immediately apparent that the 1st Defendant's payment was outside the thirty (30) days acceptance period set out in the allotment letter. So what is the consequence of this? The Court of Appeal Waterfront Holdings Limited (supra) discussing a similar situation noted as follows:

> "From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment... The question however is whether the failure to comply with the requirement for payment of stand premium automatically cancels the offer or something more is required to be done by the allotting authority to denote that cancellation. To answer this question, we need to interrogate the legal status of the letter of allotment... Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

While the allotment letter is dated December 19, 1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty- seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant.

117. Other than not complying with the terms of the letter of allotment, the 1st Defendant did not annex an approved Part Development Plan, which ought to have accompanied the letter of allotment, a requirement as stated in the case of Ali Mohamed Dagane(supra). Ultimately, the court finds that the 1st Defendant's root of title is materially wanting, leading to the conclusion that its title was issued un procedurally.

118. Regarding the 2nd Defendant's allotment, whereas as aforesaid the payment was done within the 30 days acceptance period, a scrutiny of the allotment letter raises doubts as to its legitimacy. First, the letter of allotment does not indicate the County Council on whose behalf the same was issued. Second, the same purports to contain a land reference number, which land reference number would ordinarily be at the tail end of the process of allocation of un-alienated Government land.

119. In Dina Management Ltd vs County Government of Mombsasa and 5 others [2023] KESC 30 the Supreme Court held that:

> " The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 Others v 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 un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed.'This process is restated in African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa, HCCC No.276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot."

120. DW2 testified that at the time the suit property was allotted to him, it was un-surveyed. However, the letter of allotment shows that the land was surveyed and allocated a land reference number. Further, he also did not exhibit the Part Development Plan which accompanied the letter of allotment.

121. Further still, there is the evidence of DW3, who stated that the Deed Plans relied on by the 1st and 2nd Defendants did not match their records, and that the same are forgeries. Section 22 of the *Survey Act* provides that:

> " Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the *Land Consolidation Act* (Cap. 283) or the *Land Adjudication Act* (Cap. 284)) shall be carried out under and in accordance with the directions of the Director."

122. And Section 30 of the *Survey Act* provides as follows:

> " (1) Every surveyor who executes any survey in accordance with the provisions of this Act and of any regulations made thereunder shall send to the Director all plans, field notes and computations relating thereto, and all such plans, field notes and computations shall be deposited in the Survey Office and shall become the property of the Government.
>
> (2) No plan deposited in the Survey Office in accordance with subsection (1) shall be altered or amended in any way without the permission of the Director."

123. The office of the Director of Surveys, therefore, holds or should hold records of all surveys done in relation to any land transaction. The said office is the custodian of such records and unless evidence is adduced as to the inadequacy or irregularity of the documents held by the office, the court will accept the records presented by the office as a true reflection of the records and transactions.

124. In taking this position, the Court finds comfort in the provisions of Section 86 of the *Evidence Act* which provides as follows:

1. The court shall presume the genuineness of every document purporting to be-
    a. the London Gazette, the Edinburgh Gazette, or the official Gazette of any country in the Commonwealth;
    b. a newspaper or journal;
    c. a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.
2. Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

125. And Section 89(1) of the *Evidence Act* which provides:

> " The court shall presume that maps or plans purporting to be made or published by the authority of the Government, or any department of the Government, of any country in the Commonwealth were so made or published and are accurate."

126. While the claim of forgery alluded to by DW3 with respect to the signature on the 1st Defendant's Deed Plan has not been demonstrated, the 3rd and 4th Defendants' evidence that only the Deed Plan leading up to the issuance of the title held by Lesmat Limited matches their records has not been controverted.

Indeed, the Defendants did not call the surveyors who prepared their Deed Plans to rebut the Director of Survey's evidence.

127. Ultimately, of the three parties, only the Plaintiff has managed to establish, on a balance of probabilities that its title is legitimate.

128. In conclusion, the Court finds that the Plaintiff in ELC 1085 of 2013 has established its case on a balance of probabilities and proceeds to make the following final orders:

    a. ELC Case No. 691 of 2012 be and is hereby dismissed with costs.

    b. ELC Case No. 598 of 2013 be and is hereby dismissed with costs.

    c. ELC Case No. 1085 of 2013 is found to be merited and the court makes the following determinations:

        i. The 1st Defendant's counterclaim be and is hereby dismissed with costs.

        ii. A declaration does hereby issue that the Plaintiff, Intex Construction Limited, is the lawfully registered proprietor of all that piece of land situate in the City of Nairobi known as L.R No 15207.

        iii. A permanent injunction does hereby issue barring the 1st and 2nd Defendants or any person under them from further occupying, constructing, modifying, transferring or claiming ownership or in any other way dealing with or interfering with the Plaintiff's ownership of all that piece of land situate in the City of Nairobi area known as L.R No 15207.

        iv. The Plaintiff, Intex Construction Limited, be and is hereby granted vacant possession of all that piece of land situate in the City of Nairobi area known as L.R No 15207.

        v. An order is hereby issued directing the 4th Defendant to cancel and revoke the titles held by the 1st and 2nd Defendants and to nullify any such transfers of all that piece of land situate in the City of Nairobi area known as L.R No 15207 Nairobi.

        vi. The Plaintiff, Intex Construction Limited, shall have the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nguri for Mr. Kagaka for Plaintiff

Mrs Waweru for Gachomo for 2nd Defendant

Mr. Allan Kamau for Attorney General

Mr. Mwangi for Ingutya for 1st Defendant

Court Assistant: Tracy