



REPUBLIC OF KENYA



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**Lagat & 20 others v Traneshvi Limited & 5 others (Environment & Land
Case E247 of 2022) [2024] KEELC 5773 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E247 OF 2022**

**JO MBOYA, J
AUGUST 9, 2024**

BETWEEN

ALFRED KIPROTICH LAGAT 1ST PLAINTIFF
GIDEON MUTHAMA MUANGE 2ND PLAINTIFF
SANGS HEIGHTS LIMITED MUANGE 3RD PLAINTIFF
JOHN MWANGI MUCHIRI MUANGE 4TH PLAINTIFF
HELLEN WANGOI MUCHIRI MUANGE 5TH PLAINTIFF
HEDRICK HILDAH MUSONYE MUANGE 6TH PLAINTIFF
FRANCIS GICHUGU KINYANJUI MUANGE 7TH PLAINTIFF
JACKSON KIPLIMO CHEBETT 8TH PLAINTIFF
RACHEL GATHONI MUIRURI 9TH PLAINTIFF
MICHEAL OUMA OPIYO 10TH PLAINTIFF
JULIET AKINYI KONJE 11TH PLAINTIFF
EDWIN ARTHUR OJWANG AGUKO 12TH PLAINTIFF
DAVID NYAMAI KASUKI 13TH PLAINTIFF
HELLEN AMIDIONG OKWAKOL 14TH PLAINTIFF
JACOB RAJAB MBEYA 15TH PLAINTIFF
MARY NJOKI MBEYA 16TH PLAINTIFF
ELAM MUCHIRA MURIUKI 17TH PLAINTIFF
CAROLINE MACHAKI MUCHIRA 18TH PLAINTIFF
KELVIN YUMBYA WAMBUA 19TH PLAINTIFF



TOM MBADI OLWERO 20TH PLAINTIFF
LUCY NYAMBURA GITONGA 21ST PLAINTIFF

AND

TRANESHVI LIMITED 1ST DEFENDANT
JAYESH VIJAY PATEL 2ND DEFENDANT
VIJAYKUMAR SHAMJI PATEL 3RD DEFENDANT
JOSEPH KIARIE 4TH DEFENDANT
MUNDRIKA PATEL 5TH DEFENDANT
THE OWNER'S SECTIONAL PLAN NO.145 6TH DEFENDANT

JUDGMENT

Introduction And Background:

1. The Plaintiffs herein who are unit owners of apartments at the development known as Viraj Gardens Apartment [hereinafter referred to as the Suit Property] approached the court vide the Plaint dated 21st day of July 2022; and in respect of which same [Plaintiffs] sought for various reliefs.
2. Subsequently, the Plaintiffs sought for and obtained leave to file and serve an amended Plaint. In this regard, the Plaintiffs thereafter proceeded to and filed an amended Plaint dated the 8th September 2023 and wherein the Plaintiffs have sought for the following reliefs'[verbatim]:
 - a. A declaration that the Defendants are in breach of Sections 17, 20,24,26, 27,28and 3I of the Sectional Properties Act as well as Section 74 and 85 of the Water Act 2016;
 - b. A declaration that the Board of Management formed during the purported Annual General Meeting of 18th July 2020 is illegal;
 - c. An order of permanent injunction restraining the Is', 2nd, 3rd, 4'h and 5th Defendants whether by themselves, their agents, servants, employees, proxies and/or any person claiming under them from managing and controlling the affairs of the Management Corporation known as the Owners Sectional Plan Number 145.
 - d. An order of permanent injunction restraining the Is, 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents, servants, employees, proxies and/or any person claiming under them from interfering, disconnecting or discontinuing the services to the Unit Owwners including electricity supply to common areas, water supply to all units and common areas, cleaning and security services;
 - e. A mandatory injunctive order do issue directing the 1s, 2nd and 3rd Defendants to convene an Annual General Meeting within seven (7) days of the judgment of the court and to circulate with the Notice, an agenda for the Annual General Meeting called, that includes, as the main agenda, the formation of the Board of Management in accordance to with Section 26 of the Sectional Properties Act, with all unit owners being notified of their right to vote;



- f. An Order do issue compelling the I", 2nd and 3rd Defendants to account for the Service Charge collected from the Plaintiffs from 2014-2021 within Thirty (30) Days of the judgment of this Honourable Court;
 - g. A mandatory order do issue compelling the I", 2nd and 3rd Defendants to effect immediate transfer of the electricity and water accounts to the Corporation as well as handover all the necessary record is and documents, statements of accounts and contracts of service for all the services provided for the common areas at Viraj Gardens and material to the Management Corporation;
 - h. An order do issue granting leave to the Plaintiffs to pay and deposit the Service Charge for the maintenance of the common areas in an escrow account opened by four (4) representatives of the Unit Owners pending the hearing and determination of the present suit;
 - i. General damages for breach of statutory obligations, harassment and inconvenience;
 - j. Costs of this suit together with interest thereon at court rates until payment in full;
 - k. Such other or further relief as this Honourable Court may deem fit and just to grant.
3. Upon being served with the original Plaint, the Defendants duly entered appearance and filed a statement of defence on the 18th October 2022. Nevertheless, the statement of defence was subsequently amended culminating into the filing of the amended statement of defence and counterclaim dated the 24th July 2023.
 4. For coherence, the 6th Defendant herein has sought for Judgment to be entered against the various Plaintiffs in the following manner;
 - i. As against the 1st Plaintiff, judgment for the sum of Kshs. 141,844.00;
 - ii. As against the 2nd Plaintiff, judgment for the sum of Kshs.97,846.00;
 - iii. As against the 3rd Plaintiff, judgment for the sum of Kshs.106,613.00;
 - iv. As against the 4th and 5th Plaintiff, judgment for the sum of Kshs. 146,852.00;
 - v. As against the 6th Plaintiff, judgment for the sum of Kshs. 123,441.00;
 - vi. As against the 7th Plaintiff, judgment for the sum of Kshs. 88,303.00;
 - vii. As against the 8th Plaintiff, judgment for the sum of Kshs.88,303.00;
 - viii. As against the 9th Plaintiff, judgment for the sum of Kshs.118,956.00;
 - ix. As against the 10th Plaintiff, judgment for the sum of Kshs. 149,011.00;
 - x. As against the 11th and 12th Plaintiffs, judgment for the sum of Kshs.134,311.00;
 5. Suffice it to point out that the Plaintiffs herein proceeded to file a Reply to the amended statement of defence and defence to the counterclaim dated the 7th June 2023 and wherein the Plaintiffs denied inter-alia the claims [Reliefs] sought at the foot of the counterclaim.
 6. Thereafter the pleadings in respect of the instant matter closed and same [suit] was fixed for pretrial directions. In this regard, the parties herein confirmed that same had duly filed and exchanged all the requisite pleadings and documents and thereafter the matter was fixed for hearing.



EVIDENCE BY THE PARTIES:

a. PLAINTIFFS' CASE:

7. The Plaintiffs' case revolves around the evidence of two witnesses, name Juliet Akinyi Konje and David Nyamai Kasuki, who testified as PW1 and PW2, respectively.
8. It was the testimony of PW1 [Juliet Akinyi Konje] that same is one of the unit owners at the development known as Viraj Gardens Apartment, situated along Laikipia Road within Kileleshwa in the City of Nairobi. Furthermore, the Witness averred that by virtue of being one of the apartment owners, same [witness] is therefore conversant with the facts of the subject matter.
9. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 21st July 2022 and which statement the witness sought to adopt as her evidence in chief. Instructively, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
10. Additionally, the witness averred that same has also filed a list and bundle of documents dated the 21st July 2022 and containing a total of 15 documents. In this regard, the witness sought to adopt and produce the various documents under reference as exhibits on behalf of the Plaintiffs.
11. Suffice it to point out that the documents at the foot of the list dated the 21st July 2022 were thereafter admitted and produced in evidence as Exhibits P1 to P15, respectively.
12. It was the further testimony of the witness that the Plaintiffs also filed an amended Plaint dated the 8th September 2023 and which amended plaint same [Witness] sought to adopt and rely on. For coherence, the witness implored the court to grant the reliefs sought at the foot of the amended Plaint.
13. Furthermore, it was the testimony of the witness that the Plaintiffs herein also filed an authority whereby the rest of the Plaintiffs authorized and mandated same [witness] to attend court and testify on their behalf. In this regard, the witness adverted to the authority which had been duly filed.
14. On cross examination by learned counsel for the Defendants, the witness herein averred that same bought her apartment from the 1st Defendant. Furthermore, the witness added that the apartment was purchased in the year 2017.
15. Whilst under further cross examination, the witness averred that even though same [witness] bought her apartment in 2017, same [witness] have neither tendered nor produced a copy of the sale agreement before the court.
16. It was the further testimony of the witness that same is aware that the rest of the Plaintiffs bought their apartments from the 3rd Defendant herein. In this respect, the witness adverted to a copy of the sale agreement contained at page 30 of the Plaintiff list and bundle of documents and thereafter confirmed that the seller [Vendor] of the designated apartments was the 3rd Defendant.
17. Additionally and whilst under further cross examination, the witness averred that same is aware that the Plaintiffs herein had filed a previous suit before the Chief Magistrate's at Milimani. Besides, the witness added that there were orders of temporary injunction which were issued by the Chief magistrate's court.
18. Furthermore, it was the testimony of the witness that the Plaintiffs herein have employed and/or engaged own security to help same [Plaintiffs] to open and close the gate. At any rate, the witness averred that the security guards employed by the Defendants have variously declined to offer services to the Plaintiffs herein.



19. On further cross examination, the witness averred that even though the Plaintiffs have employed and engaged a security firm, same [witness] has not tendered a copy of the agreement before the court.
20. It was the further testimony of the witness that the Plaintiffs and the Defendants herein held a meeting wherein the main agenda was the formation of the management committee and elections of the Board Members. However, the witness averred that the meeting was not fruitful insofar as there was no consensus pertaining to and concerning the composition of the board of management.
21. On the other hand, it was the testimony of the witness that a further meeting was also convened to resolve the stalemate pertaining to the composition of the board management. However, the witness added that even the subsequent meeting also failed to resolve the stalemate and impasse.
22. Whilst under further cross examination, the witness averred that there are a total of 60 apartments, but the Plaintiffs herein own 16 apartments only. In any event, the witness added that the rest of the apartments are owned by the Defendants.
23. It was the further evidence of the witness that the rest of the unit owners, including the Defendants would also have a right to participate in the management of the affairs of the Corporation.
24. Whilst under further cross examination, the witness averred that during the convened meeting, the 13th Plaintiff herein was the chairperson. Nevertheless, the witness added that the meeting did not resolve the stalemate/ impasse pertaining to the composition of the board of management.
25. Other than the foregoing, it was the testimony of the witness that same [witness] has been paying service charge to the management company. However, the witness added that same [witness] last paid service charge in April 2023.
26. It was the further testimony of the witness that the rest of the Plaintiffs also paid service charge up to and including April 2023. For good measure, the witness clarified that after the month of April 2023, the Plaintiffs have not paid service charge.
27. On further cross examination, it was the testimony of the witness that same [witness] is not obliged to pay for water. Nevertheless, the witness herein added that same is ready to pay for water services towards the maintenance of the borehole. Further and in addition, the witness averred that same is also ready to pay for the electricity.
28. On the other hand, it was the testimony of the witness that the Defendants herein undertook some repair works on the suit property. However, the witness clarified that the repair works were undertaken without notice to and involvement of the Plaintiffs.
29. On re-examination, the witness stated that same has been paying the service charge. Besides, the witness added that the Plaintiffs should indeed pay for the service charge.
30. Whilst under further re-examination, the witness averred that same [Plaintiffs] are ageable to pay the item relating to service charge and sewerage charges. Other than the foregoing, it was also the testimony of the witness that there were certain repairs that were carried out and undertaken by the Defendants on the suit premises.
31. However, the witness averred that the repairs were undertaken without the involvement of the Plaintiffs. For good measure, the witness averred that the Plaintiffs were never consulted as pertains to the repairs which were being undertaken by the Defendants.
32. The second witness who testified on behalf of the Plaintiffs was one David Nyamai Kasuki. Same testified as PW2.



33. It was the testimony of the witness [PW2] that same is the unit owner of apartment number E50 situate at Viraje Gardens Apartment along Laikipia Road, Kileleshwa within the City of Nairobi. In this regard, the witness averred that same is therefore conversant with and knowledgeable of the facts pertaining to the subject matter.
34. On the other hand, the witness averred that same has since recorded a witness statement dated the 21st July 2022 and which witness statement same [witness] sought to adopt and rely on as his evidence in chief. Instructively, the witness statement dated the 21st July 2022 was thereafter adopted and constituted as the evidence in chief of the witness.
35. Additionally, the witness averred that same [witness] has also filed a further witness statement dated the 7th June 2023 and which witness statement the witness also sought to adopt and rely on. For good measure, the further witness statement under reference was adopted and constituted as further evidence on behalf of the witness.
36. Furthermore, the witness adverted to a supplementary witness statement dated the 8th September 2023 and which witness statement the witness also sought to adopt and rely on as further evidence in chief. Suffice it to point out, that the supplementary witness statement was thereafter adopted and constituted as further evidence of the witness.
37. On the other hand, the witness referenced the list and bundle of document dated the 21st July 2022 and containing a total of 15 documents. Nevertheless, the witness pointed out that the documents under reference had been tendered and produced before the court by PW1.
38. Other than the foregoing, the witness also referenced the further list and bundle of documents dated the 7th June 2023 and which contained a total of 23 documents. Furthermore, the Witness sought to adopt and produce same before the court.
39. There being no objection to the production of the documents at the foot of the further list and bundle of documents dated the 7th June 2023, same [documents] were duly admitted and marked as Exhibits P16 to P38, respectively.
40. Additionally, the witness [PW2] also referenced the amended Plaintiff and sought to adopt and rely on the contents thereof. Besides, the witness implored the court to grant the reliefs sought thereunder.
41. On cross examination by learned counsel for the Defendants, the witness averred that same purchased his apartment from the 3rd Defendant herein. Furthermore, the witness added that the rest of the Plaintiffs also purchased their apartments either from the 3rd Defendant or the 1st Defendant.
42. Whilst under further cross examination, it was the testimony of the witness that the Plaintiffs herein have since employed and engaged the services of a security Firm to provide services unto them [Plaintiffs]. It was the further testimony of the witness that same is aware of the suit which was filed at the chief magistrate's court. Nevertheless, the witness added that the Plaintiffs herein are not parties to the suit.
43. On further cross examination, it was the testimony of the witness that the Plaintiffs and the Defendants herein held an annual general meeting of the management company. However, the witness averred that the annual general meeting hit an impasse/ stalemate as pertains to the composition of the board of directors.
44. In particular, it was the testimony of the witness that the Plaintiffs and the Defendants herein were unable to agree on the composition and election of the board of directors of the Management Corporation.



45. Whilst under further cross examination, the witness herein averred that same [witness] is aware of a counterclaim which has been filed by and on behalf of the 6th Defendant. Furthermore, the witness averred that the counterclaim under reference relates to and or concerns a claim for service charge. It was the further testimony of the witness that same [witness] has not paid for water ever since same [Plaintiffs] filed the suit before the court.
46. On further cross examination, it was the testimony of the witness that same is aware that some of the payments [service charge] are supposed to address the water charges.
47. Other than the foregoing, it was the testimony of the witness that the rest of the Plaintiffs and himself [Witness] have paid the service charge.
48. On further cross examination, the witness averred that there were some renovations that were done on the premises. Furthermore, the witness confirmed that the renovations were undertaken by the Defendants. Nevertheless, the witness clarified that the Plaintiffs were neither consulted nor involved in the impugned renovations.
49. On re-examination, the witness reiterated that the Plaintiffs herein have indeed retained the services of a security firm to offer security services. Furthermore, the witness added that same [witness] has been paying the security services.
50. Other than the foregoing, the witness averred that same is aware that the rest of the Plaintiffs herein have been paying for the service charge. Furthermore, the witness added that the borehole requires to be serviced and maintained.
51. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. DEFENDANTS' CASE:

52. The Defendant's case revolves around the evidence of one [1] witness, namely, Jayesh Vijay Patel. Same testified as DW1.
53. It was the testimony of the witness that same is the 2nd Defendant in respect of the instant matter. Furthermore, the witness added that by virtue of being the 2nd Defendant, same [witness] is therefore conversant with the facts of the instant matter.
54. Additionally, the witness averred that same [witness] has since recorded a witness statement dated the 18th October 2022. In this regard, the witness sought to adopt and rely on the contents of the said witness statement. Consequently and at the instance of the Witness, the witness statement dated the 18th October 2022 was thereafter adopted and constituted as the evidence in chief of the witness.
55. On the other hand, the witness adverted to a further witness statement dated the 8th August 2023 and thereafter sought to adopt and rely on the same. For good measure, the further witness statement dated the 8th August 2023 was thereafter constituted as the further evidence in Chief of the witness.
56. Additionally, the witness alluded to the list and bundle of documents dated the 18th October 2022 and thereafter sought to adopt and to produce the various documents as exhibits before the court. There being no objection to the production of the documents under reference, same [documents] were produced and admitted as exhibits on behalf of the Defendants.
57. Furthermore, the witness adverted to the amended statement of defence and counterclaim dated the 24th July 2023 and sought to adopt and rely on the contents thereof. Besides, the witness implored the court to proceed and grant the reliefs sought thereunder;



58. On cross examination by learned counsel for the Plaintiffs, the witness intimated that same purchased his units from the 3rd Defendant. Nevertheless, the witness averred that the 3rd Defendant is a majority shareholder in the 1st Defendant. For good measure, the witness added that the 3rd Defendant holds 99% in the 1st Defendant company.
59. Whilst under further cross examination, the witness averred that the common areas of the suit property have been under his [witness] management. Instructively, the witness confirmed that it is him who has been running/managing the common areas..
60. On further cross examination, the witness averred that there was a meeting that was held on the 8th July 2021 and wherein same [witness] was re-elected as the chairperson of the 6th Defendant. Furthermore, the witness herein has averred that the minutes relating to the said meetings have been tendered and produced before the court.
61. It was the further testimony of the witness that the 6th Defendants also has bylaws and copies of the said bylaws have been tendered and produced before the court. However, the witness clarified that the bylaws of the 6th Defendants which have been tendered and produced before the court have not been signed by the Plaintiffs.
62. On further cross examination, the witness averred that there was a notice for the convention of the meeting held on the 8th July 2021 and the notice in question was duly served upon the Plaintiffs. In this regard, the witness averred that the Plaintiffs herein were thus knowledgeable of the convened meeting.
63. Whilst under further cross examination, the witness averred that the 10th Plaintiff attended the scheduled meeting. However, the Witness confirmed that the rest of the Plaintiffs did not attend the meeting held on the 8th July 2021.
64. It was the further testimony of the witness that the rest of the Plaintiffs intimated that the notice was too short and hence [rest of the Plaintiffs] could not attend the scheduled meeting.
65. Be that as it may, the witness averred that the meeting which was convened on the 8th July 2021 proceeded and that the meeting relating thereto have been tendered and produced before the court.
66. Furthermore, it was the testimony of the witness that the meeting in question was attended by 40-unit owners.
67. Other than the foregoing, it was the testimony of the witness that the meeting under reference was convened with the agenda of electing the board of directors of the Management Corporation of the 6th Defendant herein. In any event, the witness added that same was re-elected as the chairperson of the board of management of the 6th Defendant.
68. On further cross examination, the witness averred that same was first elected as the chairperson of the 6th Defendant in the year 2014. However, the witness was unable to confirm the exact date and timeline on when same was first elected as the chair of the 6th Defendant.
69. Whilst under further cross examination, the witness averred that the service charge has been variously paid in cash. In any event, the witness added that the service charge was being received by the 6th Defendant.
70. Be that as it may, the witness averred that the 6th Defendant has variously rendered services in respect of the common arrears. Furthermore, the witness averred that same has since tendered and produced before the court accounts on behalf of the 6th Defendant.



71. Nevertheless, the witness added that the accounts which have since been tendered and produced before the court are not audited. On the other hand, it was the testimony of the witness that the 1st Defendant has various employees, who are being paid salaries.
72. It was the further testimony of the witness that the Plaintiffs herein have not been paying service charge and water charges. In any event, the witness added that same has since tendered before the court a report detailing the service charge arrears which are due and owing from the Plaintiffs. In particular, the witness averred that the report before the court relates to the period when the Plaintiffs did not pay the service charge.
73. On the other hand, it was the testimony of the witness that same is aware of the order of the court which was issued on the 18th January 2023 and wherein the court directed the parties [Plaintiffs and Defendants] to convene and hold the requisite annual general meeting of the 6th Defendant. In any event, the witness added that an attempt was made to convene an annual general meeting but the parties were unable to agree on the composition on the board of directors.
74. Additionally, it was the testimony of the witness that the co-owners of the units can be on the board of management at the same time. Nevertheless, the witness averred that the stalemate pertaining to and concerning the composition of board management was never resolved.
75. While under further cross examination, it was the testimony of the witness that the convened annual general meeting failed to materialize because of the Plaintiffs herein. Other than the foregoing, it was the testimony of the witness that same [witness] undertook renovations on the suit property which included general painting of the outside [exterior areas] as well as the children playing field. For good measure, the witness averred that the renovation[s] were undertaken for the benefit of the owners of the apartments.
76. Be that as it may, it was the testimony of the witness that same [witness] has neither tendered nor produced any receipts pertaining to the expenses incurred at the foot of the renovations. Nevertheless, the witness stated that the renovations under reference were carried out to the requisite standard.
77. On re-examination, it was the testimony of the witness that the meeting that was convened on the 8th July 2021 was attended 40-unit owners. Furthermore, the witness also averred that there were proxies [Representatives] of Unit Owners, who attended the said annual general meeting.
78. It was the further testimony of the witness that same is aware that the court ordered and directed re-connection of water supplies and Electricity to the Plaintiffs. In this regard, the witness added that the Defendants thereafter proceeded to and complied with the orders.
79. Other than the foregoing, it was the testimony of the witness that the annual general meeting which was ordered pursuant to the order of the court aborted because the parties could not agree on the composition of the board of management and the voting rights of the parties. In any event, the witness added that the Plaintiffs herein were demanding a 50/50 sharing of the slots of the board of management.
80. Finally, the witness averred that the renovations were undertaken on the suit property because the Plaintiffs herein had been complaining about the state of repairs of the suit property. In any event, the witness added that the renovations were satisfactory.
81. With the foregoing testimony, the Defendant's case was duly closed.



PARTIES'SUBMISSIONS:

82. Following the close of the Defendants' case, the advocate for the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
83. Pursuant to and in line with the directions of the court, the Plaintiffs herein proceeded to and filed two [2] sets of written submissions dated the 22nd May 2024 and supplemental/rejoinder submissions the 21st June 2024; and in respect of which, the Plaintiffs herein have highlighted a total of six [6] issues for consideration and determination by the court.
84. On the other hand, the Defendants filed written submissions dated the 7th June 2024 and wherein same have similarly highlighted and canvassed six [6] issues for determination inter-alia, whether the honourable court is seized of the jurisdiction to determine and/or set the number of board members and the composition of the board of directors of the management company under the *Sectional Properties Act*, 2020 [2022].
85. Suffice it to point out that the three [3] sets of written submissions [details in terms of the preceding paragraphs] form part of the record of the court and in any event, the court has had occasion to appraise same.
86. Nevertheless, it is imperative to point out and underscore that even though the court has not rehashed and reproduced the submissions in the body of the Judgment, the contents thereof and more particularly, the issues highlighted thereunder, have been duly noted and taken into account [considered].
87. Furthermore, the court is extremely grateful to the advocates for the respective parties for the elaborate, well researched and comprehensive submissions which have highlighted and amplified the issues in controversy.

ISSUES FOR DETERMINATION:

88. Having appraised and reviewed the pleadings filed, namely, the Amended Plaintiff and the Amended Statement of Defence and Counter-claim, as well as the evidence tendered and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the 3rd Defendant as the developer of the sectional properties indeed complied with the provisions of Section 27 of the *Sectional Properties Act* 1987, now repealed as pertains to the convention of the meeting of the board of corporation or otherwise.
 - ii. Whether the annual general meeting held on the 8th July 2021 and the elections arising therefrom were lawful and legitimate.
 - iii. Whether an appropriate and lawful annual general meeting Ought to be convened and if so, the timelines for such convention.
 - iv. What is the composition of the board of directors of the management company in terms of the regulations under the Sectional Properties Regulations 2021.
 - v. What is the extent and scope of the voting rights of the unit owners and whether the voting rights are affected by the number of units owned or otherwise.
 - vi. Whether the Plaintiffs are entitled to the reliefs sought or otherwise.



- vii. Whether the counterclaim by and on behalf of the 6th Defendant is meritorious or otherwise.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1 Whether the 3rd Defendant as the developer of the sectional properties indeed complied with the provisions of Section 27 of the Sectional Properties Act 1987, [now repealed] as pertains to the convention of the meeting of the board of corporation or otherwise.

89. It is common ground that the development known as Viraj Gardens Apartments which comprises of Sectional properties, was developed by the 3rd Defendant herein. Subsequently, the 3rd Defendant sold and transferred certain units to and in favour of inter-alia the Plaintiffs and the 1st Defendant, respectively.
90. Nevertheless, it was incumbent upon the 3rd Defendant, as the developer of the units in question, to ensure that same [3rd Defendant] complied with and/or adhered to the provisions of the Sectional Properties Act, 1987 [now repealed] and in particular, the convention and holding of the meeting of the Management Corporation.
91. Pertinently, it behooved the 3rd Defendant as the developer of the units, to ensure that same called and convened a meeting of the management corporation, chargeable with managing the Sectional units situate on the suit property within the timelines prescribed vide Section 27 of the Sectional Properties Act, 1987 [now repealed].
92. For good measure, it was incumbent upon the 3rd Defendant as the developer to convene the meeting of the corporation either within 90 days from the date when 50% of the residential [sectional units] were sold or better still within 180 days from the date when the 1st residential [sectional units was sold]. For coherence, the timeline for the convention and holding of the 1st annual general meeting is statutorily circumscribed and well defined under the law.
93. To this end, it is imperative to reproduce the provisions of Section 27 of the Sectional Properties Act, 1987 [now repealed].
94. Same are reproduced as hereunder;
27. Convening of meetings of the Corporation When a developer registers a sectional plan, he shall within—
- (a) ninety days from the day that fifty percent of the residential units are sold; or
 - (b) one hundred and eight days from the day that the first residential unit is sold, whichever is sooner, convene a meeting of the Corporation at which a board shall be elected.
95. Having taken cognizance of the import and tenor of the provisions of Section 27 [supra], it is now worthy to revert to the instant matter and ascertain whether the 3rd Defendant, who was the developer, indeed complied with the prescriptions alluded to and espoused vide the named provisions.
96. To start with, evidence was tendered by the Plaintiffs that the development in question was undertaken and concluded on or about the year 2014 and thereafter the 3rd Defendant sold out the first units on or about the September 2014. For good measure, evidence was tendered to the effect that the first units were sold and registered in favour of inter-alia Hellen Wangui Mwangi and John Mwangi Muchiri on the 4th September 2014.



97. Premised on the foregoing, it was therefore incumbent upon the 3rd Defendant [the Developer of the Units] to convene the meeting of the corporation within 180 days from the date of the sale of the first residential units.
98. In my humble view, the computation of the 180 days from the sale of the first residential units would be reckoned from the 4th September 2014 or thereabouts; and thus the statutory 180 days would lapse and/or stand extinguished on or about the 4th day of March 2015.
99. Consequently and in the premises, there is no gainsaying that the 3rd Defendant was obligated to ensure that the statutory meeting underpinned vide the provisions of Section 27 [a] of the *Sectional Properties Act*, 1987 [now repealed] ought to have been convened and held prior to and before the end of March 2015.
100. Notwithstanding the foregoing, it is imperative to underscore that despite evidence being tendered and availed before the court as pertains to when the first residential [units] was sold, the 3rd Defendant herein did not endeavour to demonstrate that indeed same [3rd Defendant] called and convened the requisite statutory meeting in accordance with the law.
101. On the other hand, the 3rd Defendant as the developer was also at liberty to convene and call for the meeting of the corporation within 90 days from the date of sale of 50% of the residential [sectional units]. For good measure, evidence was tendered that all the units that were developed by the 3rd Defendant were eventually sold to various unit owners, inter-alia the Plaintiffs, the 1st Defendant and other parties whose details have been highlighted at the foot of paragraph 4 of the amended statement of defence and counterclaim.
102. Pertinently, there is no gainsaying that all the residential [sectional units] that were developed by the 3rd Defendant have since been sold. Nevertheless, no evidence was tendered by the Defendants and in particular, the 3rd Defendant to demonstrate that same endeavoured to convene the statutory meeting within the set timeline.
103. Suffice it to point out that DW1 [Jayesh Vijay Patel] testified before the court and intimated that same was elected as the chairperson of the management corporation, namely, the 6th Defendant herein on or about the year 2014. Nevertheless, it is not lost on the court that the said DW1 conceded that same had not tendered and/or produced before the court any notices convening the said statutory meeting and/or the minutes pertaining to [sic] his election or at all.
104. Worse still, DW1 was unable to recall when same [DW1] was elected as the chairperson of the 6th Defendant.
105. In this respect, it is imperative to reproduce the salient aspects of the evidence of DW1 whilst under cross examination by learned counsel for the Plaintiffs.
106. Same [DW1] stated as hereunder;

I do confirm that there are 60 units. The units are owned separately by the owners. However, I wish to state that there was a general meeting and not a board meeting. Furthermore, I do confirm that the agenda was for the election of the board of management. The minutes confirm that I was re-elected as the chairperson. I was first elected in the year 2014. However, I cannot recall the date of the first election.
107. Simply put, the burden of demonstrating that the first general meeting of the management corporation was convened and held in accordance with the provisions of Section 27 of the *Sectional Properties Act*, 1987 [now repealed] was cast upon the Defendants and in particular the 3rd Defendant herein.



For good measure, the Defendants were called upon to tender and place before the court credible [plausible] evidence to demonstrate that such a meeting was called for and convened. [See the provisions of Sections 107,108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya].

108. Unfortunately, no credible and/or plausible evidence was placed before the court or at all. In this regard, it is my finding and holding that the Defendants herein and in particular the 3rd Defendant breached and violated the provisions of Section 27 of the Sectional Properties Act, 1987 [now repealed], which was the relevant and applicable statute at the point in time when the suit development was concluded.
109. Arising from the foregoing discussion, my answer to issue number one [1] is to the effect that the Defendants and in particular the 3rd Defendant [developer] breached and violated the mandatory provisions of Section 27 of the Sectional Properties Act, 1987.

ISSUE NUMBER 2: Whether the annual general meeting held on the 8th July 2021 and the elections arising therefrom were lawful and legitimate.

110. DW1 testified before the court and contended that the 6th Defendant herein called for, convened and held an annual general meeting on the 8th July 2021 and that arising from the said general meeting same [DW1] was [sic] re-elected as the chairperson of the 6th Defendant.
111. Furthermore, it was the testimony of DW1 that same [DW1] issued and served notices relating to the convention of the annual general meeting to be held on the 8th July 2021 upon the Plaintiffs herein. Nevertheless, the witness [DW1] contended that save for the 10th Plaintiff who attended the scheduled meeting the rest of the Plaintiffs boycotted same.
112. Be that as it may, whilst under cross examination by learned counsel for the Plaintiffs, DW1 conceded that the scheduled meeting was convened on short notice and in any event, that the rest of the Plaintiff [save for the 10th Plaintiff] protested the short notice that was issued as well as intimated that the date and timelines fell on a working day, when the rest of the Plaintiffs were engaged at work.
113. To appreciate the circumstances attendant to the convention and the holding of the annual general meeting on the 8th July 2021, it suffices to take cognizance of the evidence of DW1 whilst under cross examination by learned counsel for the Plaintiffs.
114. For good measure, DW1 stated as hereunder;

The notice that convened the meeting was duly issued and availed to the Plaintiffs. The notices were duly served upon the Plaintiffs. I do confirm that the Plaintiffs were aware of the convened meeting. I wish to add that the meeting was attended by the 10th Plaintiff. I also do wish to confirm that the rest of the Plaintiffs did not attend the meeting. The rest of the Plaintiffs indicated that the notice was too short.

115. On the other hand, PW2 pointed out and testified that the meeting under reference was convened on the basis of a two [2] day notice, which was neither acceptable to nor convenient to the rest of the Plaintiffs.
116. To start with, it is not in dispute that the annual general meeting which was called for and convened on the 8th July 2021, was premised on the basis of a letter [sic Notice] dated the 5th July 2021. Notably, the letter in question only gave to the Plaintiffs two days notice to attend the annual general meeting.
117. To my mind, the notice convening an annual general meeting of a management corporation, the 6th Defendant herein not excepted, is regulated under the law. In this respect, the provisions of Regulation



- 22 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS] suffice.
118. For the sake of brevity, it is imperative to reproduce Regulation 22 [Supra].
119. Same are reproduced as hereunder;
22. Notice of meeting (1) When an annual general meeting or any other meeting is to be convened, the Board shall, not less than twenty-one days prior to the day on which the meeting is to be convened, give each owner written notice of the meeting stating—
- (a) the place, date and time at which the meeting is to be convened; and
 - (b) the nature of any special business, if any, to be brought forth at the meeting.
- (2) On being notified by a chargee entitled to vote under section 24 of the Act that the charge wishes to be notified on meetings, the board shall give to that chargee the same notices required to be given to the owner under paragraph (1).
- (3) At annual general meeting or any other meeting or anything done at that meeting is not invalid by reason only that a person did not receive a notice given under paragraph (1) in respect of that meeting.
120. My reading of the provisions [supra] drives me to the conclusion that the 6th Defendant herein which is the Management Corporation and on whose behalf the annual general meeting was being convened, was obligated to issue and serve a notice giving not less than 21 days prior to the return date, namely, the Date of the Scheduled meeting.
121. Pertinently, the timeline/duration of the notice convening the annual general meeting or any other meeting of the corporation is statutorily circumscribed and hence it was incumbent upon [behooved] the 2nd Defendant to comply with and/or abide by the law.
122. Having taken cognizance of the peremptory provisions of Regulation 22 [supra], the question that does arise is whether the notice dated the 5th July 2021 which called for the annual general meeting on the 8th July 2021, was lawful and legitimate.
123. To my mind, the duration that was given vide the impugned notice amounted to two [2] days, which is far less than the minimum of 21 days underpinned by Regulation 22 of SECTIONAL PROPERTIES CORPORATION BY-LAWS.
124. Owing to the fact that the impugned notice was contrary to and in contravention of the law, there is no gainsaying that same [notice] was therefore illegal and invalid.
125. Further and at any rate, where a person[s] who is entitled to notice are not given and/or issued with the requisite notice in accordance with the law; then such persons, in this case the Plaintiffs, are at liberty to approach the court and challenge not only the notice, but also the proceeding[s] and decisions arising therefrom. [See the provisions of Article 47 of *the Constitution*, 2010; as read together with the Provisions of the Fair Administrative Actions Act, 2015].
126. Furthermore and to buttress the foregoing exposition of the law, it suffices to take cognizance of the holding in the case of the County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the Court of Appeal stated and held thus;
1. The primary meaning of the rule of law as anybody who has anything to do with the law knows, “is that everything must be done according to law.” In relation to governmental power, this



means that every government authority must justify its action, which deprives an individual of his right or infringes his liberty, as authorized by law. This “is the principle of legality.”

2. But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, “that government should be conducted within a framework of recognized rules and principles which restrict discretionary power.” This is the principle of due process.
3. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
4. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v. Government of Malaya*

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

127. Additionally, to the extent that the impugned notice was illegal and invalid, then the proceedings and decisions that arose from the convened meeting, are no doubt, invalid and illegal. For good measure, no legal and lawful decision could arise and/or emanate from an illegitimate meeting. Instructively, the Doctrine of *Ex Nihilo nihil fit* [Out of Nothing comes nothing] suffices.
128. Notably, my attention is drawn to the dictum of Lord Denning [MR] in the case of *Benjamin Leonard Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169; where the Judge delivered the opinion of the Privy Council at page 1172 (1) and state thus;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

129. In a nutshell, my answer to issue number two is twofold. Firstly, the impugned annual general meeting that was called for and held on the 8th July 2021, was illegal, unlawful and thus invalid, for noncompliance with the provisions of Regulation 22 of the Sectional Property Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].



130. Secondly, to the extent that the impugned annual general meeting was illegal and unlawful, what was birthed out of same, including the purported election or [sic] re-election of the 2nd Defendant as the chairperson of the 6th Defendant was similarly void and a nullity, for all intents and purposes.

ISSUE NUMBER 3 Whether an appropriate and lawful annual general meeting Ought to be convened and if so, the timelines for such convention.

131. Notwithstanding the fact that the purported annual general meeting held on the 8th July 2021, has been found and declared to have been illegal, it is instructive to note that the 6th Defendant herein is still obligated to convene and hold the requisite annual general meeting in accordance with the law.

132. Pertinently, the provisions of Sections 26 and 27 of the *Sectional Properties Act*, 2020 [2022] [which replaced the previous Act], underscore the necessity for the convention and holding an annual general meeting of the management corporation.

133. For good measure, the provisions of Section 26 and 27 [supra] are highlighted as hereunder;

26. Board of management:

(1) A Corporation shall have a board of management that shall be constituted as provided by the by-laws of the Corporation.

(2) A Corporation shall, within fifteen days of a person becoming or ceasing to be a member of the board, file at the land registry a notice in the prescribed form stating the name and address of that person and the day that the person became or ceased to be, as the case may be, a member of the board.

(3) The powers and duties of a Corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the board of the Corporation.

(4) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

27. Convening of meetings of the Corporation When a developer registers a sectional plan, he shall within—

(a) ninety days from the day that fifty percent of the units are sold; or

(b) one hundred and eighty days from the day that the first unit is sold, whichever is sooner, convene a meeting of the Corporation at which a board shall be elected.

134. Flowing from the provisions of Sections 26 and 27 [which have been reproduced herein before], there is no gainsaying that the board of management of the corporation is a crucial and critical organ in the management of the affairs of the corporation and hence it behooves the corporation, namely, the 6th Defendant herein to ensure that there is a functional board of directors.

135. At any rate, it is worth recalling that vide the ruling dated the 18th January 2023, this court ordered and directed the convention/ holding of the annual general meeting of the 6th Defendant with a view to electing the directors and/or formation of a proper board of management in accordance with the provisions of Section 26 of the *Sectional Properties Act* 2020 [2022].



136. Suffice it to point out that the ruling in question was neither appealed against nor reviewed. Consequently, the import and tenor of the said ruling remain and same [Ruling] is thus binding of the Defendants and in particular, the 6th Defendant.
137. Be that as it may, it suffices to underscore that the 6th Defendant herein endeavoured and indeed convened an annual general meeting with a view to complying with the tenor of the ruling of the court, but the convened annual general meeting aborted because the parties could not agree on the composition of the board of director[s], as well as the voting rights of the Parties.
138. Arising from the foregoing, this court finds and holds that the orders directing the Defendants and in particular the 6th Defendant, to call for and convene the requisite annual general meeting subject to issuance of the requisite notice remains in situ and hence same should be complied with.
139. Furthermore, it is necessary to underscore that prior to and before convening the intended annual general meeting, the Defendants herein and in particular the 6th Defendant, shall be obliged to comply with and adhere to the provisions of Section 27 of the Sectional Properties Act, 2020 [2022]; as read together Regulation 22 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].
140. To surmise, it is important to reiterate that the affairs of the 6th Defendant can only be managed, supervised and superintended by a board of directors that was duly and lawfully elected in the manner prescribed under the law.
141. Pertinently, once the Board of Directors are duly elected, same [Directors] are thereafter tasked to manage the affairs of the Corporation. Furthermore, the said Directors would be accountable to the Members/ shareholders of the Corporation, namely, the Unit Owners, by rendering inter-alia, Statements of Accounts during the Annual General meetings or such other Meetings, as may be called by the Corporation.
142. Before departing from this issue and to amplify the significance of the Annual General Meeting of the Corporation, it suffices to cite and reference the decision in the case of Jenerus Wanjau Wanderi & 7 others v Kiru Investments Co. Ltd [2019] eKLR, where the court stated and held thus;
21. The dispute as pleaded in the plaint revolves around governance and the management of an incorporated public company. A company is an inanimate legal person. The centre piece of corporate governance is the AGM. It is at that meeting that the directors account to the members and the latter get a say on the management of their company. So critical is the AGM that under the Companies Act 2015, failure to hold the meeting attracts criminal sanctions.

ISSUE NUMBER 4 What is the composition of the board of directors of the management company/ Corporation in terms of the Regulations under the Sectional Properties Regulations 2021.

143. Following the ruling of this court issued on the 18th January 2023, the Defendants herein were obligated to call for and convene an annual general meeting of the 6th Defendant with a view to undertaking the requisite election of the board of directors of the Management Corporation.
144. Instructively, evidence abound that the Defendants herein proceeded to and indeed called for and convened the annual general meeting of the 6th Defendant. However, even though the annual general meeting was convened, the Plaintiffs and the Defendants could not agree on the composition of the board of directors.
145. To this end, it is worthy to rehash/ highlight the evidence of PW2 whilst under cross examination by learned counsel for the Defendant.



146. Same stated as hereunder;

I do confirm that we held an annual general meeting for the management company. I do wish to state that the parties got into and ran into an impasse. The impasse touched on and concerned of the elections of the official to the managing company. The parties herein were not able to agree. The meeting beforehand was thereafter postponed.

147. Notably, the annual general meeting which was called for and convened pursuant to the ruling of 18th January 2023, collapsed because the parties were unable to agree on inter-alia the composition of the board of directors.

148. Be that as it may and for good measure, I am of the humble view, that had the advocates [Learned Counsel] for the respective parties guided the parties, the stalemate that occasioned the collapse of the annual general meeting, would have been averted and/or resolved.

149. Suffice it to point out that the composition of the board of directors and by extension, the eligibility for election of a board member, is statutorily prescribed [circumscribed] under the [Sectional Properties Act, 2020](#).

150. In particular, Regulation 6 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].

6. Election of the Board

(1) The Board shall consist of not less than three and not more than nine persons.

(2) Notwithstanding paragraph (1), if there are not more than two owners, the Board may consist of all the owners.

(3) A person shall not be a member of the Board unless that individual has attained the age of eighteen years.

(4) [The constitution](#) of the Board shall, where practicable, comply with the requirements of [the Constitution](#) of Kenya relating to gender and shall ensure balanced and wider representation of various types of unit owners in the property.

(5) In determining the number of owners for the purposes of this by-law and of by-law 5, the co-owners of a unit or more than one unit shall be deemed to be one owner and a person who owns more than one unit shall also be deemed to be one owner.

151. My reading and construction of the provisions of Regulation 6 [supra] drives me to the conclusion that the number of board of directors is statutorily prescribed. For good measure, the unit owners and the corporation are at liberty to elect [choose] to have a minimum of three or a maximum of nine board members.

152. Additionally, the persons who are eligible to be elected as members of the board are the owners of the units [owners of the apartments]. In any event, it is imperative to underline that where two or more persons co-own one Unit, same [such co-owners] are treated as one; and where one owns more than one unit [Multiples units] same shall also be deemed to be one owner for purposes of election to the board of directors.

153. To my mind, the contention that the parties could not agree on the composition of the board of directors was/is actually informed by a slanted or skewed understanding, interpretation and application of the provisions of Rule 6 [supra].



154. Be that as it may, it behooves the parties [Plaintiffs and Defendants] to agree on the numbers of the board of directors, taking into account that the statutory minimum and the statutory maximum, [namely, the floor and the ceiling] underscored by the law.
155. Other than the foregoing, it is also common ground that the persons who can be elected to the board of directors are the unit owners and for good measure, where a person owns more than one unit [Multiple Units] same [such a person] shall be deemed to be one owner, for purposes of eligibility to the Board of the Corporation.
156. Nevertheless, I beg to clarify that eligibility to the board of directors, which exclusively belongs to the owners of the units, is separate and distinct from voting rights, the latter, which relates to the voting capacity [number of votes] of the Unit Owners or their proxies; and which is impacted upon by the number of unit[s], or better still, the Unit factor.
157. In a nutshell, my answer to issue number Four [4] is to the effect that the board of directors can be comprised of a minimum of three [3]; of a maximum of nine, depending on the decision of the unit owners, as well as the Management corporation.
158. Secondly, eligibility to election as a board owner is governed by ownership of a unit or units. Nevertheless, for purposes of election as a board member, whether one owns one or more [Multiple] units same [such a person] shall be deemed to be one owner.

ISSUE NUMBER 5 What is the extent and scope of the voting rights of the unit owners and whether the voting rights are affected by the Unit factor [number of units owned] or otherwise.

159. Other than the disagreement pertaining to the composition of the board of directors, which has been addressed and discussed in the preceding paragraphs, evidence was also tendered that the parties herein could not agree on the voting rights.
160. Similarly, I beg to underscore that the question of voting rights could also have been easily resolved had the legal counsel for the respective parties paid keen attention to the provisions of Section 24 of the Sectional Properties Act 2020 [2022]; which highlights the question of voting and whether same [voting] is weighted or otherwise.
161. For ease of reference, Section 24 [supra] states as hereunder;
 24. Voting rights:
 - (1)) The voting rights of the owner of a unit shall be determined by the unit factor for his unit.
 - (2) When an owner's interest is subject to a registered charge, a power of voting conferred on an owner by this Act or the by-laws—
 - (a) if a unanimous resolution is required, may not be exercised by the owner, but is exercisable by the registered chargee first entitled in priority; and
 - (b) in other cases, is exercisable by the chargee first entitled in priority and may not be exercised by the owner if the chargee is present personally or by proxy.
 - (3) Subsection (2) does not apply unless the chargee has given written notice of his charge to the Corporation
 - (4) An owner or chargee, as the case may be, may exercise his right to vote personally or by proxy



162. On the other hand, voting rights of the unit owners is also captured and addressed by Regulations 8 and 30 of the Sectional Properties Regulations, respectively. For ease of reference, the said provisions are reproduced as hereunder;

8. Voting

- (1) At an election of members of the Board, each person entitled to vote may vote for the same number of nominees as there are vacancies to be filled on the Board.
- (2) Where a meeting is held virtually, owners or proxies may vote virtually.

25. Voting

- (1) At an annual general meeting or at any other meeting a resolution shall be voted on by a show of hands unless a poll is demanded by a person entitled to vote and present in person or by proxy, and unless a poll is so demanded, a declaration by the chairperson that a resolution has on the show of hands been carried is conclusive proof of the fact without proof of the number or proportion of votes recorded in favour of or against resolution.
- (2) If a person demands a poll, that person may withdraw that demand and on the demand being withdrawn the vote shall be taken by a show of hands.
- (3) A poll, if demanded, shall be conducted in a manner directed by the chairman, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.
- (4) In the case of a tie in a vote taken at an annual general meeting or at any other meeting, whether on a show of hands or on a poll, the chairman of the meeting is entitled to a casting vote in addition to his original vote.

30. Restriction on voting

- (1)) Except as provided for in paragraph (2) of this by-law or section 24 of the Act, there are no restrictions or limitations on an owner's right to vote at an annual general meeting or at any other meeting.
- (2) If, at the time of an annual general meeting or of any other meeting an owner has not paid to the Corporation all contributions that are due and owing in respect of his unit, that owner shall be ineligible to cast a vote at that meeting in respect of any resolution other than a special resolution or a unanimous resolution.
- (3) An owner's ineligibility to cast a vote does not affect the right of the chargee first entitled in priority in respect of a charge registered against the title of that owner's unit to vote in accordance with the Act.

163. Having highlighted the foregoing provisions and upon taking into account, the tenor thereof, it is my finding and holding that whereas the owner of a number of units is deemed to be one owner for purposes of eligibility in terms of composition on the board of directors, however, the owner of more than one unit, has multiple rights in voting depending on the number of units. Instructively, this is what is referred to as the unit factor in Section 24 of the Sectional Property Act [supra].



164. Put differently, where one owns two or more units, the number of units owned by such a person would confer and vest in such a person the right to votes times the numbers of units owned, in the course of election of board of directors or determination of an issue being deliberated upon.
165. Consequently and in my humble view, the number of units owned by such a person bestows/ confers upon the person [Multiple Unit owner] weighted capacity/capability, during the voting. Notably, this is the import of the Unit factor.
166. Pertinently, I come to the conclusion that the owner of more than One Unit [Multiple Units] is entitled to multiple votes, taking into account the number of units on the basis of Section 24 of the Act; which underscores that the voting rights of the owner of a unit shall be determined by the unit factor.
167. To my mind, the usage of the word factor of his units denotes the number of the units owned by such a person and the influence the number of units have as pertains to voting Rights.
168. Arising from the foregoing, my answer to issue number Five [5] is to the effect that the unit owners who co-own units, shall be deemed to have one vote; whereas a unit owner who owns multiple units shall be deemed to hold multiple rights [votes]; depending on the number of units. [See Section 24[1] of the [Sectional Properties Act](#) as read together with Regulation 30 of the Sectional Property Regulation].

ISSUE NUMBER 6 Whether the Plaintiffs are entitled to the reliefs sought or otherwise.

169. The Plaintiffs herein have sought for a plethora of reliefs at the foot of the amended Plaint dated the 8th September 2023. Given the number of reliefs that have been highlighted thereunder, it suffices to address same verbatim [sequentially] and to discern whether same [reliefs] are maintainable or otherwise.
170. To start with, the Plaintiffs herein have sought for a declaration that the Defendants are in breach of various provisions of the [Sectional Properties Act](#), 1987 [now repealed and replaced by the [Sectional Properties Act](#) 2020].
171. Notably, whilst discussing issue number one, this court addressed the import and tenor of Section 27 of the [Sectional Properties Act](#), 1987 [now repealed] which essentially stipulates the timeline for holding the first general meeting of the Corporation and the election of the Members of the Board of Management.
172. Without belabouring the point, the court found and held that the 3rd Defendant [who was the Developer] had failed to comply with and adhere to with the timelines prescribed vide Section 27 of [Sectional Properties Act](#), 1987, now repealed. Consequently and in this regard, the declaration sought vide prayer [a] is meritorious.
173. Secondly, the Plaintiffs also sought for a declaration that the annual general meeting held on the 18th July 2020; but which turned out to be 8th July 2021, was illegal and unlawful. Instructively, the court has also found and held that the impugned annual general meeting was convened and held in contravention of Section 27 of the [Sectional Properties Act](#), 2020 as read together with Regulation 22 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].
174. In a nutshell, it is my finding and holding that the declaration touching on and concerning the annual general meeting of the 18th July 2020 [but which turned out to be 8th July 2021] is similarly, merited. For good measure, the impugned Annual General Meeting was indeed illegal and unlawful.



175. Other than the foregoing, the Plaintiffs herein have sought for an order of Permanent injunction to restrain the 1st, 2nd, 3rd, 4th and 5th Defendants from managing and/or controlling the affairs of the 6th Defendant. However, it is imperative to point out that the affairs of the 6th Defendant are to be managed, controlled and supervised by the board of directors elected in accordance with the provisions of inter-alia Section 27 of the [Sectional Properties Act, 2020](#) [2022].
176. Additionally, it is not lost on this court that the 1st, 2nd, 3rd, 4th and 5th Defendants, either as unit owners or duly appointed proxies of the unit owners, are eligible to contest directorship and once elected same have the capacity to manage the affairs of the 6th Defendant.
177. Furthermore, there is no gainsaying that the 6th Defendant is a body corporate by dint of Section 26 of the [Sectional Properties Act](#) 2020 [2022] and thus same is separate and distinct from the 1st, 2nd, 3rd, 4th and 5th Defendants.
178. Arising from the foregoing, I am unable to grant the orders of permanent injunction in the manner sought in terms of prayer [c] of the amended Plaint. For coherence, the issuance of such an order may be deployed to deprive and/or deny the 1st, 2nd, 3rd, 4th and 5th Defendants of their liberty [constitutional Rights] to contest election as directors of the 6th Defendant.
179. Furthermore, the Plaintiffs have also sought for an order of permanent injunction to restrain the 1st, 2nd, 3rd, 4th and 5th Defendants from inter-alia interfering with, disconnecting or discontinuing services to the unit owners including electricity supply to common areas, water supply to all units and common areas, cleaning and security services.
180. In respect to prayer [d] of the amended Plaint, it suffices to reiterate that vide the ruling rendered on the 18th January 2023, this court ordered and directed reconnection of electricity and water supply to the common areas and to the units owned by the Plaintiffs.
181. Pertinently, DW1 tendered evidence that pursuant to and in compliance with the ruling of the court rendered on the 18th January 2023, both electricity and water supply were duly reconnected. In this regard, the order of permanent injunction sought herein appears to have been rendered moot, otiose and redundant.
182. Nevertheless, the court is still inclined to decree that a permanent injunction shall issue to restrain the disconnection complained of in the future, provided that the Plaintiffs pay and settle the service charges and water charges in the manner prescribed vide the bylaws of the 6th Defendant.
183. Additionally, the Plaintiffs herein sought for a mandatory injunction to compel the 1st, 2nd, 3rd, 4th and 5th Respondent to call for and convene an annual general meeting of the 6th Defendant within [sic] 7 days of the Judgment.
184. Suffice it to underscore that this court has since held and found that the annual general meeting of the 6th Defendant is necessary and paramount. In addition, the court ventured forward and directed that such an annual general meeting be called for and convened subject to the provisions of Section 27 of the [Sectional properties Act](#) 2020 [2022] as read together with Regulations 22 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].
185. Consequently and in my humble view, whereas a mandatory injunction suffices to compel the convention of annual general meeting, same however, cannot be convened within [sic] 7 days of the Judgment in the manner sought by the Plaintiff. For coherence, such a timeline would be contra-statute and in particular, the Provisions of Regulation 22 of the By Laws of the Corporation.



186. On the other hand, the Plaintiffs herein have sought for an order compelling the 1st, 2nd and 3rd Defendants to account for the service charge collected from the Plaintiffs from the year 2014 to 2021 respectively. However, in my humble view, the prayer of rendition of account is misconceived and devoid of merits on three fronts [perspective].
187. Firstly, any party, the Plaintiffs not excepted, who is desirous to procure an order for accounts is called upon to take out appropriate summons for provisions of accounts upon the filing of a suit. However, in respect of the instant matter, no such application was ever filed and/or instituted with the court. [See Order 20 of the Civil Procedure Rules 2010].
188. For ease of reference, the provisions of Order 20 of the Civil Procedure Rules, 2010; are reproduced as hereunder;
- [Order 20, rule 1.] Order for accounts.
1. Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.
- [Order 20, rule 2.] Order for accounts on counterclaim.
2. A defendant to an action commenced by plaintiff, and who has filed a counterclaim which includes a claim for an account or a claim which necessarily involves taking an account, on –
 - (a) the plaintiff;
 - (b) any other party; or
 - (c) any person who becomes a party by virtue of such service, may apply for an order under this rule.
189. Secondly, a significant portion or segment of the Plaintiffs' claim founded on Accounts, is similarly time-barred vide the Provisions of Section 4[1] of the Limitation of Action Act, Chapter 22 Laws of Kenya.
190. Quite clearly, no order for accounts can issue for the duration between 2014 to 2018 insofar as such a cause of action is statute barred and thus legally untenable. [See the holding of the Court of Appeal in Gathoni versus Kenya Cooperative Creameries Limited [1982] eklr].
191. Thirdly, even though the Plaintiffs have sought for accounts for the duration between 2014 to 2021, evidence abound that some of the Plaintiffs herein [indeed, a majority of same] purchased their units in the year 2017 and thereafter and hence, there arises the question of locus standi.
192. Be that as it may, I beg to underscore that the prayer for provision of accounts is not only vague and omnibus, but same also does not accord with the provisions of Order 20 of the Civil Procedure Rules, 2010.
193. Furthermore, the Plaintiffs herein have also sought for an order of mandatory injunction to compel the 1st, 2nd and 3rd Defendants to transfer the electricity and water account to the corporation as well as to hand over necessary records and documents to the management corporation. However, in my humble view, the issues pertaining to the transfer of records and documentation, etc, can very well be dealt with and addressed by the management corporation subject to the convention of the annual general meeting and election of the board of directors.



194. At any rate, the Plaintiffs herein, who are not the elected Board Members of the Corporation, can not be heard to usurp the mandate and powers of the Corporation; and purport to speak for the Corporation. Simply put, the prayer under reference, is equally misplaced and misconceived.
195. The other order that has been sought for by the Plaintiffs relates to Leave being granted to the Plaintiffs to pay and deposit service charge for the maintenance of the common areas in an Escrow account opened and operated by 4 representatives of the unit owners pending the hearing and determination of the present suit.
196. Nevertheless, my answer to the prayer under reference is twofold. Firstly, the mandate to levy service charge and to maintain the common areas is the preserve of the management corporation. [See the provisions of Section 26 of the *Sectional Properties Act*, 2020 [2022].
197. Secondly, the prayer under reference has been rendered moot and thus overtaken by events, insofar as same was to suffice during the pendency of the suit. However, there is no gainsaying that the suit has been heard and determined and hence such an order is now moot and otherwise, otiose.
198. Finally, the Plaintiffs herein sought for General damages for breach of statutory obligation, harassment and inconvenient.
199. In answer to this prayer, I find and hold that even though there are aspects of breach of statutory obligations, the Plaintiffs herein appear to have acquiesced in the breach insofar as same [Plaintiffs] failed to take out Judicial proceedings to compel compliance with the various provisions of the Statute [Sectional Property Act].
200. Other than the foregoing, I beg to point out that no evidence was tendered by and on behalf of the Plaintiffs to demonstrate harassment and inconvenience, or otherwise. If anything, the Plaintiffs herein appear to have taken the law in their own hands and thereafter incorporated a company known as Laikipia Park Ltd contrary to and in violation of the provisions of *Sectional Properties Act*, 2020 [2022].
201. Furthermore, it is also not also lost on the court that the Plaintiffs herein unilaterally decided to withhold the payment of service charge and water charges to the 6th Defendant which then catapulted the 6th Defendant to resort to disconnection of the Water supply to the Units belonging to the Plaintiffs and Electricity to the common areas.
202. Nevertheless, it suffices to underscore that the question of the disconnection of water and Electricity, was addressed vide the Ruling of the Court rendered on the 18th day of January 2023. In any event, evidence abound that the Defendants re-connected the Water and Electricity supply in compliance with the Order of the Court.
203. Arising from the foregoing discussion, I am not disposed to make any orders as pertains to [sic] general damages either in the manner sought or at all.

ISSUE NUMBER 7 Whether the counterclaim by and on behalf of the 6th Defendant is meritorious or otherwise.

204. The 6th Defendant, which is a body corporate by dint of Section 26 of the *Sectional Properties Act*, 2020 [2022], filed a counterclaim and in respect of which same [6th Defendant] sought for various orders pertaining to the service charge and water charges that had not been paid by the various Plaintiffs.
205. It is instructive to state and underscore that upon her incorporation, the 6th Defendant is obligated to run and manage the affairs of the designated Sectional Property and in the course of doing so, same [6th Defendant] is at liberty to levy service charge as well as other statutory charges where appropriate.



206. Additionally, once the corporation levies the service charge and other attendant statutory levies, it is incumbent upon the unit owners, in this case the Plaintiffs, to adhere to and comply with such regulations and in particular payments.
207. On the other hand, it is worth pointing out that where an issue does arise pertaining to the quantum of the service charge and other expenses; or better still, the question of accountability, such issues ought to be raised and addressed with the board of directors of the Corporation vide an Annual General Meeting, or such other Meeting, albeit in accordance with the Law.
208. Nevertheless, I beg to underscore that it was not within the mandate of the Plaintiffs herein to refuse to pay the service charge, water charge and other levies in the manner that same did. Understandably, there were questions pertaining to the legality of the board, but as long as the board remained in place the actions thereof were insulated vide the provisions of Section 26[4] of the *Sectional properties Act*.
209. Notwithstanding the foregoing, evidence abound taking into account the testimony of PW1 and PW2 that same had failed to pay the service charge and the water charge from April 2023.
210. To this end, I beg to highlight [rehash] the salient aspects of the evidence of PW1 whilst under cross examination by learned counsel for the Defendant.
211. Same [PW1] stated thus;
- I have been paying service charge to the managing company. I last paid service charge in April 2023.
212. Whilst under further cross examination, PW1 also stated thus;
- I do confirm [Plaintiffs] paid the service charge up to and including April 2023. Subsequently i have not paid any service charge after the month of April 2023.
213. On his part, PW2 stated as hereunder whilst under cross examination by learned counsel for the Defendants;
- I am aware of the counterclaim filed by the Defendants. I do confirm that the same relates to a claim for service charge. I have not paid for water ever since we filed the case before the court.
214. From the evidence on record, including the aspects that have been highlighted in the preceding paragraphs, there is no gainsaying that the Plaintiffs herein failed, neglected and/or refused to pay service charge and water levies to the 6th Defendant; and in this regard, the Claim at the foot of the Counter-claim is merited.
215. In a nutshell, it is my finding and holding that the Plaintiffs herein are obliged to pay the service charge and the water Bills adverted to vide the counterclaim. Consequently and in this regard, it is my finding that the counterclaim by and on behalf of the 6th Defendant as pertains to service charge and the outstanding water Bills, is proved.
216. In premises, I am disposed to enter Judgment in favour of the 6th Defendant on account of service charge and water bill in terms of paragraph 24 of the amended statement of defence and counterclaim.



FINAL DISPOSITION:

217. Flowing from the discussion [details highlighted in the body of the Judgment], it must have become crystal clear, nay, evident that the Plaintiffs' have succeeded on a number of claims and are therefore entitled to reliefs on designated aspects of the amended Plaint.
218. On the other hand, the 6th Defendant [being the management corporation] has also succeeded on the basis of the counterclaim and essentially on the question of recovery of service charge and water bills, which had been withheld by the Plaintiffs.
219. Consequently and in the premises, the final orders that commend themselves to the court are as hereunder;
- a. Judgment be and is hereby entered in favour of the Plaintiffs' in the following terms;
 - i. A declaration be and is hereby issued to the effect that the Third Defendant, who was the developer of the Sectional Properties in question failed to comply with and/or adhere to the provisions of inter-alia Section 27 of the *Sectional Properties Act* 1987 [now repealed] and replaced by the *Sectional Properties Act*, 2020.
 - ii. A declaration be and is hereby issued that the annual general meeting which was called for, convened and held on the 8th July 2021 [and not on the 18th July 2020] was illegal, unlawful and thus invalid for all intents and purposes.
 - iii. Furthermore, a declaration be and is hereby issued that the proceedings and the elections arising from the impugned annual general meeting [sic] held on the 8th July 2021 are similarly illegal, unlawful and void.
 - iv. A declaration that the Board of Management formed during the purported Annual General Meeting of 8TH day of July 2021; is illegal;
 - v. An order of permanent injunction be and is hereby issued restraining the Ist, 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents, servants, employees, proxies and/or any person claiming under them from, disconnecting water and electricity supply to the common areas and to the units owned by the Plaintiffs herein, provided that the Plaintiffs shall continue to pay and settle the requisite service charge and water bill, as and when same are duly notified by the 6th Defendant.
 - vi. For the avoidance of doubt, the Plaintiffs herein are obligated and obliged to pay and/or settle the service charge and water bills once duly notified by the 6th Defendant subject only to such resolutions that may be issued by the board of management of the corporation during the annual general meeting or such other meeting, convened and held in accordance with the provisions of *Sectional Properties Act*, 2020.
 - vii. Furthermore, a mandatory injunction be and is hereby issued directing the 1st, 2nd and 3rd Defendants and in particular, the 6th Defendant to call for, convene and hold an Annual General Meeting, subject to issuance and service of the requisite notice in accordance with the provisions of Sections 26 and 27 of the *Sectional Properties Act*, as read together with Regulation 22 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS].
 - viii. For the avoidance of doubt, the designated annual general meeting shall be convened subject to issuance and service of the notice giving the unit owners, the Plaintiffs not



excepted, not less than 21 days notice before the date of the scheduled annual general meeting.

- ix. To avert further delay and dithering, the notice convening the intended annual general meeting shall issue and/or be issued within 14 days from the date of the Judgment herein.
 - x. The composition of the Board of Management of the corporation shall be agreed upon by the parties subject to the provisions of Rule 6 of the Sectional Properties Regulation 2021 [SECTIONAL PROPERTIES CORPORATION BY-LAWS.
 - xi. Additionally, the voting rights of the parties [unit owners] shall be guided by the provisions of Section 24 of the *Sectional Properties Act*, 2020 [2022] and in particular the voting rights shall be impacted upon by the unit factor [number of units owned].
 - xii. The prayer seeking for provision of accounts for the period running between the year 2014 to 2021 be and is hereby declined.
 - xiii. The prayer for permanent injunction to bar and/or prohibit the 1st, 2nd 3rd, 4th and 5th Defendants from [sic] interfering with the affairs of the 6th Defendant, which is a separate and distinct body corporate is hereby declined.
 - xiv. The prayer for general damages for breach of statutory obligation, harassment and inconvenience, is similarly dismissed.
 - xv. The prayer for a mandatory order to issue compelling the 1st, 2nd and 3rd Defendants to effect immediate transfer of the electricity and water accounts to the Corporation as well as hand over all the necessary records and documents; statements of accounts; and contracts of service for all the services provided for the common areas at Viraj Gardens and material to the Management Corporation be and is hereby declined;
 - xvi. The prayer for an order to issue granting Leave to the Plaintiffs to pay and deposit the Service Charge for the maintenance of the common areas in an escrow account opened by four (4) representatives of the Unit Owners pending the hearing and determination of the present suit, is moot and otiose and same be and is hereby declined;
- b. Judgment be and is hereby entered in favour of the 6th Defendant and on the basis of the counterclaim in the manner following;
- i. As against the 1st Plaintiff, judgment for the sum of Kshs. 141,844.00;
 - ii. As against the 2nd Plaintiff, judgment for the sum of Kshs.97,846.00;
 - iii. As against the 3rd Plaintiff, judgment for the sum of Kshs.106,613.00;
 - iv. As against the 4th and 5th Plaintiff, judgment for the sum of Kshs. 146,852.00;
 - v. As against the 6th Plaintiff, judgment for the sum of Kshs. 123,441.00;
 - vi. As against the 7th Plaintiff, judgment for the sum of Kshs. 88,303.00;
 - vii. As against the 8th Plaintiff, judgment for the sum of Kshs.88,303.00;
 - viii. As against the 9th Plaintiff, judgment for the sum of Kshs.118,956.00;
 - ix. As against the 10th Plaintiff, judgment for the sum of Kshs. 149,011.00;



- x. As against the 11th and 12th Plaintiffs, judgment for the sum of Kshs.134,311.00;
- c. Nevertheless, if the Plaintiffs or any of the Plaintiffs has since paid service charge and water bills relative to the period captured vide the counterclaim, then the amounts so far paid [if any] shall be discounted against the Judgment sum.
- d. The monies in terms of [b] shall be paid by the Plaintiffs to the 6th Defendant within 30 days from the date hereof.
- e. In default by the Plaintiffs to pay and/or liquidate the decretal sum of in terms of clause [b] hereof within the stipulated 30 days hereof, the 6th Defendant [Decree Holder], shall be at liberty to execute.
- f. For good measure, both parties have won and lost in equal measure; and hence the appropriate order on costs is to the effect that each party do bear own costs of the suit and the counterclaim, respectively.

220. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF AUGUST 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Brian – Court Assistant.

Ms Wanja h/b for Mr. Edward Mungai for the Plaintiffs.

Mr. John Ochwo for the Defendants.

