



Ethics & Anti-Corruption Commission v Agwata & 4 others; I&M Bank Limited & 2 others (Plaintiffs to the Counterclaim); Ethics and Anti-Corruption Commission & 4 others (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 56 of 2019) [2024] KEELC 7404 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 56 OF 2019**

**JO MBOYA, J
NOVEMBER 7, 2024**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**ZABLON MABEA AGWATA 1ST DEFENDANT
IKM PLACE 2ND DEFENDANT
WILSON GACANJA 3RD DEFENDANT
ARROW CENTRE LIMITED 4TH DEFENDANT
INVESTMENT AND MORTGAGE BANK LIMITED 5TH DEFENDANT**

AND

**I&M BANK LIMITED PLAINTIFF TO THE COUNTERCLAIM
IKM PLACE LIMITED PLAINTIFF TO THE COUNTERCLAIM
ARROW CENTRE LIMITED PLAINTIFF TO THE COUNTERCLAIM**

AND

**ETHICS AND ANTI-CORRUPTION COMMISSION DEFENDANT TO THE COUNTERCLAIM
MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT DEFENDANT TO THE COUNTERCLAIM
CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM
NATIONAL LAND COMMISSION ... DEFENDANT TO THE COUNTERCLAIM**



**THE HONOURABLE ATTORNEY GENERAL DEFENDANT TO THE
COUNTERCLAIM**

JUDGMENT

Introduction and Background:

1. The Plaintiff herein, namely, the Ethics & Anti-Corruption Commission [which is an Independent Constitutional Commission] commenced the instant suit vide Plaint dated the 20th February 2019 and in respect of which same [Plaintiff] has sought for the following reliefs;
 - i. A declaration that the letter of allotment dated 27th day of September, 2019 issued by the First Defendant allotting Shariff Nassir land parcel referred to as L.R. No.209/6237 is null and void incapable of conferring any interest to Shariff Nasir and/or any other person whatsoever:
 - ii. A Declaration that the Grant No.IR 69883 issued by the Second Defendant and registered on 28th day of February, 1996 in the name of the Shariff Nassir and subsequent transfer to the Third Defendant is null and void incapable of conferring ant interest to the Third Defendant and/or any other person whatsoever:
 - iii. A Declaration that the Grant No. IR 68738 issued by the Second Defendant and registered on the 08th day of March, 1996 in respect of LR 209/12965 in the name of Shariff Nasir and subsequent transfer to the Fourth Defendant is null and void incapable of conferring any interest to the Fourth Defendant and/or any other person whatsoever:
 - iv. A Declaration that the creation of parallel Deed Plans Numbers 203410 and 203409 in respect of the area contained in deed plain number 79162 creating LR. 209/12966 and LR 209/12965 is null and void incapable of conferring any interest to the Third Defendant, Fourth Defendant, Fifth Defendant and/or any other person whatsoever;
 - v. A Declaration that the creation and registration of the charge over LR 209/12966 is null and void and incapable of conferring any interest or right in favour of the Fifth Defendant.
 - vi. The registration of the Third Defendant as the guarantee and/or proprietor of LR 209/12966 be and is hereby cancelled.
 - vii. The registration of the Fourth Defendant as the guarantee and/or proprietor of LR 209/12965 be and is hereby cancelled.
 - viii. The registration of the charge over LR 209/12965 in favour of the fifth Defendant be and is hereby cancelled.
 - ix. An order of eviction directing the Third and Fourth Defendants servants, agents or assigns to vacate LR 209/12966 and LR 209/12965, respectively, forthwith, be and is hereby issued.
 - x. An order of a permanent injunction restraining the Defendants, their servants and/or agents from alienating, encumbering, disposing off, wasting, entering and trespassing and/or in any other way dealing with LR 209/12966 and LR 209/12965; and
 - xi. The costs of the suit.
2. Upon being served with the Plaint and summons to enter appearance [STEA], the 1st Defendant duly entered appearance and thereafter filed a statement of defence. Instructively, the 1st Defendant denied



the allegations adverted to at the foot of the plaint. In any event, the 1st Defendant contended that the impugned letters of allotment were as a result of a direct allocation [DA] under the hand of His Excellency the president of the republic of Kenya.

3. On the other hand, the 2nd Defendant similarly entered appearance and filed a statement of defence and wherein same [2nd Defendant] also denied the allegations by and on behalf of the Plaintiff. At any rate, the 2nd Defendant intimated that the Plaintiff shall be invited to strict proof.
4. The 3rd Defendant similarly entered appearance and filed a statement of defence and counterclaim dated the 10th June 2019. Nevertheless, the statement of defence and counterclaim was thereafter amended culminating into the amended statement of defence and counterclaim dated the 2nd February 2023 and wherein same [3rd Defendant] has sought for the following reliefs;
 - a. A declaration that the Plaintiff (the 1st Defendant in the counterclaim) has no powers under *the Constitution*, the Ethics and Anti-Corruption Act or the *Anti-Corruption and Economic Crimes Act* to initiate an action for recovery of public land unless, it is investigating a-corrupt act except in accordance with the law:
 - b. The original suit herein be dismissed as it discloses no cause of action having been brought to impeach the title of the 3rd Defendant without jurisdiction 2nd Plaintiff (in the counterclaim) contrary to the provisions of the law;
 - c. A declaration that there is misjoinder of causes of action as between the claim against the 3rd & 4th Defendants in the counterclaim;
 - d. The suit herein is bad in law-having-been brought to impeach the title of the Deceased without joining his estate-as a party and thereby condemning him unheard;
 - e. A declaration that the 3rd Defendant-2nd Plaintiff in the counterclaim is the absolute and indefeasible owner of L.R. No 209/12966 (I.R. 69883).
 - f. A permanent injunction restraining the 1st Defendant in the counterclaim from in any way interfering with the 2nd Plaintiff in the counterclaim's rights or interest in the property L. R. No. 209/12966 (I.R. 69883)
 - g. In the alternative to prayer (a) above, the 2nd and 3rd Defendants in the counterclaim jointly and severally do indemnify the 3rd Defendant/2nd Plaintiff in the counterclaim for the value of the property L. R. No. 209/12966 (I.R. 69883) in the sum of Kshs.876,000,000 together with interest thereon from the date of judgment until payment in full.
 - h. An order directing the 2nd and 3rd Defendants in the counterclaim jointly and severally to indemnify the 3rd Defendant/2nd Plaintiff in the counterclaim for loss of rental income in respect of the property L. R. No. 12966 (I.R. 69883) in the sum of Kshs. 5,314,739.33 per month from the date of appropriation of the title until payment of the value of the IKM property.
 - i. Costs of this suit be awarded to the 3rd Defendant/2nd Plaintiff in the counterclaim.
 - j. Interest to be provided.
5. The fourth Defendant duly entered appearance and thereafter filed a statement of defence dated 23rd April 2019. Subsequently, the statement of defence was amended culminating into the filing of an amended statement of defence and counterclaim dated 3rd July 2023, and in respect of which the 4th Defendant sought for the following reliefs;



- a. A declaration that the actions of the First Defendant in the Counterclaim with the complicity of the Second, Third and Fourth Defendant in the Counterclaim purporting to effectively deprive the Plaintiff in the Counterclaim of its title to the property comprised in LR 209/12965 IR 68738 by the cancellation thereof are illegal and unconstitutional.
 - b. A declaration that the Plaintiff in the Counterclaim is the absolute and indefeasible owner of the property comprised in LR 209/12965 IR 68738.
 - c. A permanent injunction restraining the Defendants in the counterclaim from interfering in any manner whatsoever with the Plaintiff in the counterclaim's rights and interest in the property comprised in LR No 209/12965 IR 68738 and its quiet possession and enjoyment thereof.
 - d. In the alternative to the foregoing this Honourable Court be pleased to issue order directed jointly and severally to the Defendants in the Counterclaim compelling them to indemnify and compensate the Plaintiff in the Counterclaim for:
 - i. The value of the property comprised in LR 209/12965 IR 68738 together with the developments thereon in the sum of Kshs.260,000,000.00 as at 14th day March 2019 together with interest thereon until payment in full.
 - ii. The value of lost earnings in the sum of Kshs.3,000,000.00 per month such other sum as this Honorable Court shall deem award for the remainder of the unexpired term of the title to LR 209/12965 IR 68738 together with interest thereon until payment in full.
 - e. The costs of the counterclaim be awarded to the Plaintiff in the Counterclaim.
 - f. Any other Order that this Honorable Court shall deem just in the circumstances thereof. The Second, Third and Fourth Defendants in the Counterclaim have not filed any defence to the Counterclaim by the Fourth Defendant/Third Plaintiff
6. On the other hand, the 5th Defendant entered appearance and filed a statement of defence and counterclaim dated the 20th May 2019 and wherein the 5th Defendant [who is also the 1st counter-claimant] sought for the following reliefs;
- a. A declaration that the Chargor is the absolute owner of that whole parcel of land known as L.R No. 209/12966.
 - b. A declaration that the Plaintiff has indefeasible Chargee's rights over the suit property known as L.R No. 209/12966.
 - c. A permanent injunction restraining the Defendants, their agents, servants and/or employees from interfering with the Chargor's absolute ownership of the property known as L.R 209/12966.
 - d. A declaration that the Charges created by the Plaintiff over the property known as L.R. No. 209/12966 are validly registered as encumbrances over the property.
 - e. A permanent injunction restraining the Defendants, their agents, servants and/or employees from interfering with the Plaintiff's interest over the property known as L.R 209/12966 as a Chargee.



- f. In the alternative to prayers a, b, c d and e, the Defendants be ordered to jointly and severally indemnify the Plaintiff the sum of USD 456,806.000 and KES 97,391,427.41 being the outstanding balance of the facilities advanced to the Chargor as at 9th April 2019 together with interest at the Plaintiff's commercial rates until payment in full as compensation.
- g. Costs against the Defendants on a full indemnity basis until payment in full.
7. It is instructive to point out that the Defendants to the counterclaim variously entered appearance and filed their statement of defence to the counterclaim. Suffice it to underscore that the Honourable Attorney General duly entered appearance and filed a statement of defence on behalf of the 2nd, 3rd and 5th Defendants to the counterclaim.
8. Subsequently, the subject matter was set down for pretrial directions on the 27th July 2020 whereupon the advocates for the parties confirmed that same [advocates] had filed and exchanged the requisite pleadings; list and bundle of documents as well as the witness statements. In this respect, the court proceeded to and confirmed the matter as being ready for hearing. Thereafter the matter was set down for hearing.

Evidence by the Parties:

a. Plaintiff's Case:

9. The Plaintiff's case revolves and gravitates around the evidence of four [4] witnesses, namely, Zakayo Mwendwa Mwenga, Justus Waweru Mwangi, Paulin Nyagutu Murithia and James Nyaga Kithinji, respectively. Same testified as PW1, PW2, PW3 and PW4, respectively.
10. It was the testimony of PW1 [Zakayo Mwendwa Mwenga] that same is a retired deputy director of survey. The witness further averred that by virtue of being a senior deputy director of survey, same is conversant with survey matters. In addition, the witness avers that same was responsible for performing various duties including examining files and making decisions relating to land survey.
11. Other than the foregoing, the witness averred that same is conversant with the facts of this matter. Furthermore, the witness averred that same [PW1] has since recorded a witness statement dated the 25th July 2019 and which witness statement the witness sought to adopt and rely on his [witness] statement in chief. In this regard, the witness statement dated the 25th July 2015 was thereafter adopted and constituted as the evidence in chief of the witness.
12. Additionally, the witness averred that same [witness] has referenced various documents in his witness statement. In this regard, the witness adverted to documents numbers 9, 14, 17, 26, 29 and 30 at the foot of the list and bundle of documents. Thereafter the witness sought to tender and adduce the various documents as evidence before the court.
13. Suffice it to point out that the various documents that were alluded to by the witness were thereafter tendered and produced before the court as exhibits P9, P14, P26, P29B and P30B, respectively.
14. It was the further testimony of the witness that folio register number 294 and register number 198 relates to two [2] plots, namely, L.R No. 209/12965 and 209/12966, respectively. Besides, it was the testimony of the witness that the two [2] plots, namely, L.R No. 209/12965 and 209/12966, respectively, arose from the subdivision of L.R No. 209/6237.
15. It was the further testimony of the witness that exhibit 14 relates to the folio register number 98 and which register represents two [2] properties, namely, L.R No. 209/6237 and L.R No. 209/6238, respectively.



16. Furthermore, the witness averred that the two [2] parcels of lands, namely, L.R No. 209/6237 and L.R No. 209/6238, respectively emanated from L.R No. 209/298.
17. Other than the foregoing, the witness averred that folio registers are available to members of the public. Further and at any rate, the witness averred that the members of the public can purchase and/or acquire the folio register upon payment of the requisite court fees.
18. It was the further testimony of the witness that from his [witness] experience, only the registered owner of the land can apply for subdivision of the land. In any event, the witness stated that upon the application for subdivision, the directorate of survey would proceed to issue the requisite deed plan depending on the user captured in the special conditions.
19. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that folio register number 98 is a photocopy. However, the witness added that the photocopy is not complete.
20. It was the further testimony of the witness that if a party is carrying out and or undertaking a subdivision a Part Development Plan [PDP] must be prepared and approved by the directorate of physical planning.
21. Whilst under further cross examination, the witness averred that even though same [the witness] has referenced folio number 294, and register number 198 [which have been produced] as exhibits 26, same [witness] has however not come across the authority under which the subdivision was undertaken.
22. Nevertheless, it was the testimony of the witness that upon cross checking the original of exhibit number 14, same [witness] has now been able to establish the authority under which the subdivisions was undertaken. In this regard, the witness has alluded to approval number C.T/143/194 of 5th August 1969. In addition, it was the testimony of the witness that subsequently, two [2] deed plans were prepared in respect of the subdivisions.
23. On cross examination by learned counsel for the 3rd Defendant, the witness averred that the operations of the directorate of survey are guided by the Survey Act, Chapter 299, Laws of Kenya. In this regard, the witness testified that it is the survey Act that regulates the operations of the director of survey. Nevertheless, the witness averred that the Survey Act does not contain any legal frame work for official search by members of the public.
24. On the other hand, the witness averred that L.R No. 209/6237 was sub-divided into two [2] parcels. In this regard, the witness has testified that the resultant title numbers are L.R No. 209/12965 and L.R No. 209/12966, respectively.
25. Besides, it was the evidence of the witness that the subdivision in question were thereafter examined and registered by the director of survey. In any event, the witness has averred that at the time of registration the director of survey had no issue with the survey because there was a letter of allotment authorizing the survey.
26. Whilst under further cross examination by Learned Counsel for the 3rd Defendant, the witness averred that the approval towards the subdivision was given by the director of survey on the 27th February 1996.
27. It was the further testimony of the witness that a letter of allotment was similarly issued. In this regard, the witness averred that the letter of allotment was dated the 8th March 1996. At any rate, the witness added that the letter of allotment was accompanied with a Deed plan.



28. Whilst under further cross examination, the witness averred that the preparation of the Part Development Plan [PDP] was the duty and/or mandate of the directorate of physical planning. In this respect, the witness averred that the director of physical planning generated a letter forwarding the Part Development Plan [PDP] No. 42/62/90/01, which related to the subdivisions scheme in respect of L.R No. 209/6237.
29. It was the further testimony of the witness that the suit property was subdivided. Furthermore, the witness added that the subdivision of the suit property was approved by the director of survey.
30. Additionally, it was the testimony of the witness that the directorate of survey is also responsible for preparation and examination of survey plans. In any event, the witness added that it was his duty or obligation to examine the survey document to confirm that the necessary approval[s] are duly appended thereto.
31. On the other hand, the witness averred that the requirement for Part Development Plan [PDP] was brought forth and/or created pursuant to the physical planning Act 1996. Be that as it may, the witness added that upon the approval of exhibit P14, the two separate plots were created.
32. On cross examination, by learned counsel for the 5th Defendant, the witness averred that exhibit number 29 is a grant. Furthermore, the witness added that the grant under reference has a deed plan for the title. Besides, the witness also averred that the deed plan held by the Land Register is supposed to be a duplicate of what the directorate of survey has. In any event, the witness averred that once a deed plan has been prepared a copy of the deed plan is availed to the land registry.
33. On cross examination by learned counsel for the 1st Defendant, the witness averred that the PDP is prepared by the directorate of physical planning. In this case, the witness averred that a Part Development Plan [PDP] was indeed prepared and same is indeed dated the 15th February 1996.
34. Whilst under further cross examination, the witness averred that thereafter a letter of allotment was issued and that the letter of allotment is dated the 8th March 1996. In this regard, the witness averred that the letter of allotment came after the preparation of the Part Development Plan [PDP].
35. It was the further testimony of the witness that the letter of allotment was signed by Mr. F. K Orioki on behalf of the commissioner of land.
36. On the other hand, it was the testimony of the witness that the deed plans were prepared as a result of the two letters of allotment. In this respect, the Witness clarified that the deed plans are dated the 27th February 1996.
37. Furthermore, it was the testimony of the witness that the letters of allotment were not signed personally by the 1st Defendant.
38. The second witness who testified on behalf of the Plaintiff was Justus Waweru Mwangi. Same testified as PWs.
39. It was the testimony of the witness that same is currently the deputy director of estates working with the state department of housing and urban development. In this regard, the witness averred that by virtue of his portfolio, same is conversant with the facts of the instant matter.
40. On the other hand, the witness has averred that same has since recorded and filed a witness statement dated the 29th July 2019. Furthermore, the Witness sought to adopt and rely on the contents of the witness statement. Suffice it to point out that the witness statement under reference was thereafter adopted and constituted as the Evidence-in chief of the Witness.



41. On the other hand, the witness averred that same [PW2] has referenced various documents at the foot of his witness statement. In this regard, the witness alluded to documents number 18, 19 and 21. Thereafter the witness sought to tender and produce the said documents to court. For coherence, the named documents were produced and marked as Plaintiff's exhibits 18, 19 and 21, respectively.
42. It was the further testimony of the witness, that same has since alluded to the existence of a house sitting on LR.No 209/6237; and which the Witness states is a government house. Furthermore, the witness averred that the government house standing in L.R 209/6237 has never been deleted from the government building register. In any event, the witness averred that the process of deleting a house from the government building register would require boarding to be done. Instructively, the witness added that boarding is a process which entails the formation and convening of a board of survey.
43. It was the further testimony of the witness that once a board of survey is formed and/or convened, then the board will review the recommendation[s] made by the inspecting officer and thereafter discern/ascertain whether the reasons for the removal are reasonable
44. In addition, the witness averred that if the board is satisfied with the recommendations, then boarding would be approved and form F058 would be signed and thereafter escalated to the National Treasury for concurrence.
45. On cross examination by learned counsel for the 3rd Defendant, the witness averred that same was promoted to the position of principal officer around 2015. It was the further testimony of the witness that by virtue of his portfolio [Office] same is conversant with the law relating to government houses. However, the witness averred that the Building Register is not provided for under the Law.
46. Whilst under further cross examination, the witness averred that the particular house namely, House Number HG613 was entered into the register on the 26th March 1980. Nevertheless, the witness stated that the letter of allotment was issued on the 27th September 1995. Furthermore, the witness clarified that the letter of allotment was issued in favour of Honourable Shariff Nassir. Besides, the witness stated that the authority under which the letter of allotment was made is also indicated. Furthermore, the witness added that the authority number is 104729/31/DA/VIII/66 SLO [N290].
47. Whilst under further cross examination, the witness averred that Hon Shariff Nassir wrote a letter dated the 12th February 1996 and wherein Hon Shariff Nassir was seeking the authority to subdivide the land which had been allocated to him. Furthermore, the witness stated that the request for subdivision was acted upon culminating into the director of physical planning forwarding the requisite Part Development Plan [PDP] relating to the proposed subdivisions.
48. It was the further testimony of the witness that the letter from the directorate of physical planning granted approval for the subdivision. Whilst under further cross examination, the witness averred that same is not aware whether the treasury held a prior certificate of title to the suit property.
49. On further cross examination by learned counsel for the 3rd Defendant, the witness averred that same is conversant with the provisions of the Government *Land Act*, Chapter 280 Laws of Kenya [now repealed]. In particular, the witness stated that same is conversant with the meaning of what constitutes unalienated government land. In any event, the witness averred that the suit property was no longer unalienated government land.
50. On the contrary, the witness averred that the land in question had long been alienated by the government and that titles had been issued in the name of East African common services authority.



51. Nevertheless, it was the testimony of the witness that East African common services authority collapsed and ceased to exist.
52. On the other hand, it was the testimony of the witness that same is aware of a letter dated the 2nd October 2007. The witness averred that the letter under reference was written by Mr. Onesmus Nzwili, who is said to have been the Chief buildings surveyor. According to the witness, the letter in question confirms that the suit property was lawfully alienated to Hon Shariff Nassir.
53. It was the further testimony of the witness that the letter dated the 2nd October 2007 did not allude to and/or state that the alienation was irregular. Whilst under further cross examination, the witness testified that same had testified and/or given evidence in another case relating to L.R no. 209/6238.
54. In any event, the witness stated that the chief building surveyor wrote to the principal Kenya School of Law. The witness also averred that same also testified in that other case and confirmed that L.R No. 209/6237 had been allocated to Hon Shariff Nassir, now Deceased.
55. Whilst under further cross examination, the witness averred that same has seen a letter from the firm of M/s Iseme Kamau & Maema Company Advocates addressed to the commissioner of lands regarding the intended purchase of the subdivisions title. Furthermore, the witness added that same [Witness] has since seen a clearance letter from the commissioner of lands and which is addressed to the said advocates.
56. It was the further testimony of the witness that there is no responsibility on the part of the general public on how the Government deals with and handles its property.
57. On cross examination by learned counsel for the 1st Defendant, the witness averred that same has come to court to testify on behalf of the Plaintiff. Furthermore, the witness avers that the position held by same [witness] is a position in the government.
58. Whilst under further cross examination, the witness averred that same is aware that the president had powers and mandate to alienate government land under the Government Lands Act, now repealed. In any event, the witness said that land alienation by the president would be undertaken through the department of land.
59. On the other hand, it was the testimony of the witness that same has seen the letter of allotment dated the 27th September 1995. The witness has averred that the letter of allotment was issued by the ministry of land. However, the witness has stated that the said letter of allotment was not signed by the 1st Defendant herein.
60. It was the further testimony of the witness that letters of allotment would be processed through the ministry of land. However, the witness added that the processing of the Letter of allotment would be subject to authority.
61. On cross examination by learned counsel for the 2nd Defendant, the witness stated that the role of his [witness] department in relation to allotment of government land relates to government buildings. In this regard, the witness averred that the role of his ministry is to give concurrence. Nevertheless, the witness stated that it was the duty and mandate of the commissioner of land to process letter of allotments.
62. Whilst under further cross examination, the witness averred that the minute[s] relating to boarding are ordinarily forwarded to the relevant principal secretary. However, the witness clarified that he [PW2] does not know who was in charge of boarding in September 1995.



63. On cross examination by learned counsel for the 4th Defendant, the witness averred that the letter of allotment dated the 8th march 1996 relates to L.R No. 209/12965. Furthermore, the witness added that he [witness] was not privy to the subdivision of L.R No. 209/6237.
64. On the other hand, it was the testimony of the witness that government buildings are supposed to be inspected regularly. Besides, the witness has testified that the buildings are supposed to be entered into the register of government buildings.
65. It was the further testimony of the witness that same [witness] is not aware of when the building on L.R No. 209/6337 was last inspected.
66. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that the process of boarding of government houses can be resorted to for various reasons. Furthermore, the witness highlighted that boarding could be undertaken with a view to deletion of an assets from the register or for purposes of development of the site or for sale.
67. It was the further testimony of the witness that same is aware of the existence of a building register wherein the details of government houses are recorded. In this regard, the witness adverted to house HG/613 which the witness stated was entered into the registered on the 26th March 1980.
68. It was the evidence of the witness that before a house can be removed from the register there must be the process of boarding. Furthermore, the witness stated that the authority to board must be given by the accounting officer. Besides, the witness also stated that the reasons for boarding must also be given.
69. On cross examination by learned counsel for the 5th Defendant, the witness stated that he [Witness] has been able to read the witness statement of Mr. Zablun Agwata Mabeya. Furthermore, the witness averred that the statement of Zablun Mabeya indicates that the suit property was allocated to Hon Shariff Nassir vide a presidential approval. However, the witness added that same is not conversant with the issue of presidential allotment.
70. Whilst under further cross examination, the witness averred that same did not verify whether there was no presidential authority [PA] or otherwise. On the other hand, the witness averred that same is aware that the property known as L.R No. 209/12966 is currently charged to the 5th Defendant.
71. On re-examination, the witness averred that the process of boarding is not captured in any law. However, the witness added that the process is stipulated in the government financial regulations and procedures, 1989 edition. On the other hand, it was the further testimony that the house sitting on the suit property was entered in to the building registered on the 26th March 1980. Besides, the witness indicated that prior to that date, the building and the suit land belonged to the East Africa Common services Authority [Community].
72. The third witness who testified on behalf of the Plaintiff was Pauline Nyagutu Murithia. Same testified as PW3.
73. It was the testimony of the witness [PW3] that same is conversant with the facts of this matter. Furthermore, the witness posited that same has since recorded a witness statement in respect of the instant matter. To this end, the witness adverted to the witness statement dated the 23rd July 2019.
74. Suffice it to point out that the witness therefore sought to adopt and rely on the witness statement. In any event, the witness statement dated the 23rd July 2019 was duly admitted and constituted as the evidence in chief of the witness.



75. It was the further testimony of the witness that same was hitherto the acting Chief Land Registrar in the ministry of lands housing and physical planning. Nevertheless, the witness averred that currently same is the Chief state counsel-department for devolution.
76. It was the testimony of the witness that at the foot of her witness statement same has referenced various documents. In particular, the witness adverted to a total of 17 documents and which documents the witness sought to tender and produce before the court.
77. There being no objection to the production of the various documents contained at the foot of the list of documents dated the 29th July 2019, the various documents were duly admitted and constituted as exhibits on behalf of the Plaintiff.
78. On cross examination by learned counsel for the 1st Defendant, the witness averred that whenever there was an application for allocation of land, the directorate of physical planning would be called upon to generate a Part Development Plan [PDP]. Thereafter the Part Development Plan [PDP] would be subjected to the process of approval before being escalated to the commissioner of land.
79. It was the further testimony of the witness that in respect of the letter of allotment dated the 27th September 1995 same [letter of allotment] was signed by Zablon Mabeya. Nevertheless, it was the testimony of the witness that same is aware that there was another letter of allotment issued on the 8th March 1996. To this end, the witness averred that the letter of allotment dated the 8th March 1996 was signed by F.K Orioki, on behalf of the Commissioner of Lands.
80. Whilst under further cross examination, the witness averred that there was yet another letter of allotment dated the 28th February 1996. The witness stated that the said letter of allotment related to L.R No. 209/12966. In any event, it was the testimony of the witness that the letter of allotment was issued to Honourable Shariff Nassir.
81. It was the further testimony of the witness that the letter of allotment that were issued in the year 1995 and 1996 were not supposed to be issued because the land in question had already been allocated for a public purpose. In this regard, the witness added that the land in question was therefore not available for alienation.
82. It was the further testimony of the witness that under the Government *land Act*, now repealed; the authority to allocate land was given to the Commissioner of Lands.
83. On cross examination by learned counsel for the 3rd Defendant, the witness stated that the land in question was indeed allocated by the commissioner of land. Besides, the witness averred that by allocating the land, the commissioner of lands was exercising delegated mandate.
84. On further cross examination, the witness averred that same is not aware whether the allocation of the land in question was sanctioned/authorized by the president. Nevertheless, the witness added that same has seen an aspect showing that the land was allocated to Honourable Shariff Nassir vide direct allocation [DA].
85. Whilst under further cross examination, the witness stated that even though there are allegations that the land was allocated pursuant to presidential authority, same [witness] has never interrogated the authority in question. In this regard, the witness stated that same [witness] cannot confirm whether the president authorized the allocation or otherwise.
86. It was the further testimony of the witness that the land in question could not have been allocated in 1996. In fact, the witness averred that the land was already alienated and reserved for public purpose.



87. It was the further testimony of the witness that once land is allocated, the land in question ceases to be available for subsequent allocation or alienation. In this regard, the witness averred that once alienated the land could not be alienated a second time.
88. On further cross examination the learned counsel for the 3rd Defendant, the witness stated that the land was allocated on the 28th March 1996. Furthermore, the witness added that the land was unalienated government land since 1962. However, the witness quickly made an about-turn and stated that the land in question was not unalienated government land since 1962. In particular, the witness stated that the land had been alienated. In any event, the witness added that the land in question had long been allotted to the East African common service authority.
89. On the other hand, it was the testimony of the witness that East Africa common service authority ceased to exist. Furthermore, the witness added that the assets of the said authority reverted to and were vested in the government.
90. On the other hand, the witness averred that upon the vesting of the assets of east African common service authority in the government, the assets including the suit property, became the properties of the government.
91. It was the further testimony of the witness that the land in question was not available for alienation. In any event, the witness referenced Section 3 of the Government [Land Act](#), Chapter 280 Laws of Kenya, now repealed.
92. Whilst under cross examination, the witness stated that same [witness] was aware of the powers of the commissioner of lands. In this regard, the witness averred that same is aware that the commissioner of lands was the custodian of public land. Furthermore, the witness has added that the commissioner of land was the one who was advising the president on the land which was available for alienation or otherwise.
93. On the other hand, it was the testimony of the witness that same is aware that there was a request for subdivision of the land which had been allocated to Honourable Shariff Nassir. In this regard, the witness adverted to the letter requesting for subdivision. Furthermore, the witness confirmed that the request for subdivision was approved by the commissioner of lands.
94. Additionally, it was the testimony of the witness that the land was thereafter subjected to subdivision leading to the preparation of two separate deed plans. Besides, it was the testimony of the witness that prior to the subdivision of the land in question, the directorate of physical planning also prepared and approved Part Development Plans [PDP].
95. Whilst under further cross examination, the witness averred that the Part Development Plan [PDP] that underpins the allocation of the suit property to Honourable Shariff Nassir have never been recalled. Furthermore, the witness has also confirmed that the grant in favour of Hon Sharif Nasir has also never been recalled. On the contrary, it was the testimony of the witness that the grant in favour of Honourable Shariff Nassir was issued by the commissioner of lands.
96. Upon being referred to the statement of defence filed by the honourable attorney general for and on behalf of the 2nd, 3rd and 5th Defendants to the Counter-claim, the witness stated that the statement of defence adverts to the fact that the land in favour of Honourable Sharif Nasir was a direct allocation.
97. Other than the foregoing, it was the testimony of the witness that same has also seen the letter by M/s Iseme Kamau & Maema Advocates seeking the approval from the commissioner of land to undertake a charge over and in respect of the suit property, namely, L.R Noi. 209/12966.



98. It was the further testimony of the witness that the commissioner of lands sanctioned and authorized the transfer of the suit property to the 3rd Defendant. Furthermore, the witness stated that the approvals by the commissioner of land have neither been recalled nor revoked at all.
99. Other than the foregoing, it was the testimony of the witness that the 3rd Defendant was not a purchaser for value without notice. However, the witness conceded that same does not have any document/ evidence to show that the 3rd Defendant had noticed of any defect in the title of the suit property.
100. Upon being referred to the letter at page 75 of the Plaintiff's bundle of documents, the witness confirms that the said letter emanates from the ministry of lands. In addition, the witness has stated that the letter in question was addressed to the Plaintiff herein, namely, the Ethics and Anti-Corruption Commission. Furthermore, the witness averred that the contents of the letter speaks to the fact that the land in question was allocated to Honourable Shariff Nassir.
101. On cross examination by learned counsel for the 4th Defendant, the witness averred that East Africa common service authority ceased to exist. Besides, the witness averred that same is aware that East Africa common services authority had various assts across the three countries of East Africa.
102. It was the further testimony of the witness that upon the collapse of the East Africa common services authority, the assets of East African common services authority reverted to and vested in the government.
103. Whilst under further cross examination, the witness averred that the land in question was however not unalienated government land. To the contrary, the witness stated that the land stood alienated. In any event, the witness added that the commissioner of lands did not follow the correct procedure in alienating the land.
104. On further cross examination, the witness averred that the 4th Defendant is not a bona fide purchaser for value without notice. However, the witness clarified that same has no documents or evidence to show that the 4th Defendant was aware of any defect in the title of her predecessor, namely, Honourable Shariff Nassir.
105. On cross examination by learned counsel for the 5th Defendant, the witness averred that L.R No. 209/12965 and 209/12966, respectively emanated from L.R No. 209/6237.
106. It was the further testimony of the witness that the suit property is currently charged to the 5th Defendant, namely, I and M Bank Limited.
107. On cross examination, by learned counsel for the 2nd, 3rd and 5th Defendants to the Counter-claim [the Honourable Attorney General] the witness averred that the land in question had already been allocated to the East African common services authority. In particular, the witness clarified that the land was allocated 1962.
108. Furthermore, the witness stated that upon the allocation of the land in question to the East African Common authority, the authority duly generated a letter of acceptance.
109. It was the further testimony of the witness that a grant was prepared and registered in favour of the East African common services authority. In this regard, the witness stated that the grant was registered on the 10th September 1962. Furthermore, it was stated that the terms of the grant was 99 years w. e. f 1st July 1953.



110. It was the further evidence of the witness that the term of the grant which was issued in favour of the East African common services authority is still running to date. In this regard, the witness averred that the same land could not be the subject of the letter of allotment dated the 17th September 1995.
111. Whilst under further cross examination, it was the testimony of the Witness that the letter of allotment that was issued in favour of Honourable Shariff Nassir related to land that has since been extinguished.
112. On re-examination, the witness averred that the letter of allotment at page 77 of the Plaintiff's bundle of documents relates to L.R No. 209/6237. Furthermore, the witness added that the letter of allotment is/was in favour of Honourable Shariff Nassir. On the other hand, it was the testimony of the witness that though the commissioner of land had the authority to allocate land, the authority was circumscribed. In any event, it was stated that the commissioner of land could only act under the direction of the president.
113. The witness also adverted to the provisions of Section 44 of the Registration of Titles Act, Chapter 281, Laws of Kenya; and stated that the said Section underpins surrender. However, the witness averred that surrender can only take effect upon registration in accordance of the law.
114. The fourth witness who testified on behalf of the Plaintiff was James Nyaga Kithinji. Same testified as PW4.
115. It was the testimony of the witness [PW4] that same is an investigator attached to the Ethics & Anti-Corruption Commission. Furthermore, the witness averred that same had been attached to the Ethics & Anti-Corruption Commission since the year 2015.
116. It was the further testimony of the witness that same was assigned the investigations pertaining to and concerning the allotment of L.R No. 209/6237. In this regard, the witness averred that same commenced the assignment and collected various documents attendant to and concerning the impugned allotment. Besides, the witness also stated that same also recorded statement from various witnesses.
117. Other than the foregoing, the witness averred that same has also recorded a witness statement dated the 25th July 2019 pertaining to the subject matter. In this regard, the witness sought to adopt and rely on the witness statement. Instructively, the witness statement dated the 25th July 2019 was thereafter adopted and constituted as the evidence in chief of the witness.
118. On the other hand, the witness adverted to a list and bundle of documents dated the 4th March 2019 and thereafter sought to tender and produce the various documents thereto an exhibit[s] before the court.
119. There being no objection to the production of the said documents under reference, same were tendered as exhibits on behalf of the Plaintiff. Additionally, the witness adverted to a further list and bundles of documents dated 2nd August 2019 and thereafter sought to tender the various documents as exhibits before the court.
120. However, an objection was taken by Mr. George Orara [SC] on behalf of the 3rd Defendant to the production of the documents at the foot of the list dated the 2nd August 2019.
121. Nevertheless, the court thereafter rendered a ruling and the objection under reference was dismissed. Suffice it to point out that the documents at the foot of the list dated the 2nd August 2019 were thereafter admitted as exhibits on behalf of the Plaintiff.



122. On cross examination by learned counsel for the 3rd Defendant, the witness stated that same [witness] is a registered valuer. Furthermore, the witness added that same is duly registered and gazetted as a valuer.
123. It was the further testimony of the witness that same [witness] was tasked to investigate the authenticity of the allotment of the suit property. In addition, the witness averred that thereafter same proceeded on the basis that the suit property was public land.
124. It was the further testimony of the witness that in the course of his investigations he[PW4] procured and obtained certified copies of the title over and in respect of the suit property. However, the witness added that same did not procure the original titles of the suit property. Nevertheless, the witness averred that the original title of the suit property are with the ministry of lands.
125. Whilst under further cross examination, it was the testimony of the Witness that the original title in respect of the suit property was registered in the name of East Africa Services Authority. However, the Witness added that the authority is now defunct.
126. It was the further testimony of the witness that the assets of the authority thereafter reverted to and vested in the government of Kenya. Furthermore, the witness added that the property vested in the government of Kenya vide a vesting order.
127. Whilst under further cross examination, the witness averred that in the course of his investigations, same [Witness] did not come across the East African Community Mediation Act. In this regard, he [Witness] stated that he is not conversant with the import and tenor of the said Act.
128. Nevertheless, upon further cross examination, the witness stated that the assets and properties of the community vested in the government.
129. It was the further testimony of the witness that same [witness] came across the letter at page 75 of the Plaintiff's bundle of documents. In particular, the witness averred that the letter in question was signed by one Mr. Njwiri. Furthermore, the witness averred that the author of the letter describes himself as the chief building surveyor. It was the further testimony of the witness that the chief building surveyor wrote to the Plaintiff herein[EACC] and indicated that the land in question had been lawfully allocated to Honourable Shariff Nassir.
130. On further cross examination, the witness averred that the letter at page 76 of the Plaintiff's bundle of documents is a letter of allotment. Furthermore, the witness averred that the letter in question was issued by the commissioner of land. In any event, the witness clarified that the letter was signed by the 1st Defendant albeit on behalf of the commissioner of lands and not in his personal capacity.
131. Whilst under further cross examination, the witness averred that the letter was not issued by the commissioner of lands in person. In any event, the witness clarified that same did not find any communication to show that the 1st Defendant did not have the authority to issue the letter of allotment.
132. Other than the foregoing, it was the testimony of the witness that same did not investigate the authority shown at the foot of the letter of allotment. Nevertheless, it was the testimony of the witness that paragraph 7 of the statement of defence by the Honourable Attorney General confirms that the allotment of the land in question was a direct allocation by the president.
133. Whilst under further cross examination, the witness averred that same did not investigate the averments by the Honourable Attorney general. However, the witness indicated that same is disputing the averments by and on behalf of the attorney general.



134. Additionally, it was the testimony of the witness that the land in question had long been alienated and in this regard, the witness averred that the land was therefore not available for further alienation or allocation. Nevertheless, the witness averred that the land in question reverted to the government of Kenya and hence same became government land.
135. On the other hand, it was the testimony of the witness that upon the issuance of the letter of allotment to Honourable Shariff Nassir, same [Hon Sharif Nasir] wrote a letter requesting for subdivision of the land. In this regard, the witness posited that the letter was addressed to the commissioner of lands. Besides, the witness also averred that the request for subdivision of lands was approved by the commissioner of land.
136. Additionally, it was the testimony of the witness that the directorate of physical planning also prepared the requisite subdivision scheme and same was approved. However, the witness stated that same [witness] does not vouch for the authenticity of the approved subdivisions scheme.
137. On further cross examination, it was the testimony of the witness that even though the Part Development Plan [PDP] was signed by the Commissioner of lands, the same did not bear the approval number. However, the witness stated that he did not investigate why there is no physical planning approval number shown on the Part Development Plan [PDP].
138. It was the further testimony of the witness that same discovered that a deed plan was also prepared by the directorate of survey. Furthermore, the witness added that the deed plan was done in accordance with the approval at the foot of the Part Development Plan [PDP].
139. Other than the foregoing, the witness averred that the letter of allotment in favour Honourable Shariff Nassir contains an authority at the foot thereof. Furthermore, the witness added that the authority is a presidential approval. Besides, the witness also added that Honourable Shariff Nassir was subsequently issued with a grant in respect of the suit property.
140. Whilst under further cross examination, the witness averred that same has not come across any challenge of the powers of the president to issue the grant which is contained at page 88 of the Plaintiff's bundle. In any event, the witness added that same has also not come across any challenge pertaining to the exercise of any powers of the president to issue the grant.
141. It was the further testimony of the witness that the letter at page 31 of the Plaintiff's bundle of documents is a letter from the 3rd Defendant and addressed to the commissioner of lands. Furthermore, the witness averred that the letter in question attracted a response from the commissioner of lands. In particular, the witness averred that the response from the commissioner of lands shows that there was no objection to the transfer of the suit property in favour of the 3rd Defendant.
142. Whilst still under cross examination, the witness averred that on the basis of the letter at page 31, it is evident that the commissioner of land approved the sale of the suit property to the 3rd Defendant.
143. On further cross examination, it was the testimony of the witness that the state department of housing is the one that mounted a complaint with the Plaintiff. However, the witness stated that same does not have any letter from the state department of housing to show that there was such a complaint.
144. Upon being referred to the letter at page 75 of the Plaintiff's list and bundle of documents, the witness confirmed that the said letter emanated from the ministry of lands and housing. Furthermore, the witness confirmed that the contents of the letter indicated that the plot was lawfully alienated to Hon Sharif Nasir.



145. On cross examination by learned counsel for the 4th Defendant, the witness stated that same is a registered and gazetted valuer. Furthermore, the witness added that same is also a designated investigator with the Plaintiff. In this regard, the witness posited that same has been trained as an investigator by the Ethics & Anti-Corruption Commission.
146. It was the further evidence of the witness that the various letters of allotment were signed on behalf of the commissioner of lands. For good measure, the witness clarified that the letters of allotment were not signed by the 1st and 2nd Defendants in their personal capacities.
147. Whilst under further cross examination, the witness averred that the land in question reverted back and vested in the government. In this regard, the witness clarified that the land was therefore government land.
148. On the other hand, it was the testimony of the witness that same is aware of the letter at page 75 of the Plaintiff's list and bundle of documents and same confirms that the letter emanates from the ministry of housing. Furthermore, the witness averred that the contents of the letter indicate that the suit property was lawfully allocated to Sharif Nassir.
149. On further cross examination, the witness stated that he does not agree with the contents of the letter. However, the witness added that he has no letter from the ministry of housing recanting/ countermanding the position adverted to in the letter under reference.
150. It was the further testimony of the witness that the alienation of the suit property to and in favour of Honourable Shariff Nassir was fraudulent and illegal. In any event, the witness clarified that the allotment was fraudulent and illegal because the land was already alienated.
151. It was the further testimony of the witness that the land in question was allocated to East African common Services Authority and that upon the death/ collapse of the authority the land reverted to the government.
152. It was the further testimony of the witness that the Plaintiff's case before the court is to the effect that the 2nd letter of allotment could not be issued over the suit property during the existence of the title of East African Community Services. Furthermore, the witness added that the land still belongs to the East African Common services Authority [the Community].
153. On cross examination by learned counsel for the 5th Defendant, the witness averred that same [witness] did not investigate about the presidential authority. In any event, the witness added that he did not call for the authority file.
154. Whilst under further cross examination by the 5th Defendant, the witness averred that it is the Plaintiff's case that the suit property should revert to East African Community. In any event, the witness reiterated that the land belongs to the community.
155. It was the further testimony of the witness that the lease in favour of the East African Common services Authority [Community] still exists.
156. Other than the foregoing, it was the testimony of the witness that the plot which he [Witness] valued is owned by the East African Common Services Authority. However, when the witness was pressed further same [witness] changed tune that the land in question is currently owned by the 3rd Defendant.
157. It was the further testimony of the witness that when he undertook the valuation, same only valued the land and disregarded the improvement[s] thereon.



158. Upon being referenced to the statement of defence by the Hon Attorney General filed on behalf of the 2nd, 3rd and 5th Defendants to the Counter-claim, the witness testified that same is not aware of the position taken by the honourable attorney general. Nevertheless, upon his attention being drawn to the admission by the attorney general, the witness testified that same is disputing the authenticity of the averment by the attorney general.
159. It was the further testimony, that the certificate of title which have been produced before the court by the Defendants show that same emanated from the government of Kenya. Nevertheless, the witness stated that the genuine title is still registered in the name of the East African Common Services Authority.
160. On cross examination by learned counsel for the 1st Defendant, the witness averred that the 1st Defendant was acting on behalf of the commissioner of land. Furthermore, the witness has stated that the 1st Defendant was not acting on his own behalf.
161. Upon being referred to paragraph 14 of the Plaintiff, the witness clarified that acts complained of were undertaken and carried out by the 1st Defendant on behalf of the commissioner of lands. However, the witness clarified that the actions by the 1st Defendant were in disregard of the law.
162. It was the further testimony of the witness that the 1st Defendant should have written back to the commissioner of land to confirm same that the land was not available.
163. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the plot in question had a direct approval [DA] and the authority has been quoted on the face of the allotment.
164. Whilst under further cross examination, the witness averred that the letter of allotment in favour of Honourable Shariff Nassir was also approved by the Minister. Nevertheless, the witness stated that the approval by the minister has neither been recalled nor reviewed.
165. Additionally, the witness testified that the permanent secretary also approved the letter of allotment. In any event, it was the testimony of the witness that the approval by the permanent secretary and the minister have not been rescinded. Furthermore, the witness also testified that the minister and permanent secretary have not been sued.
166. It was the further testimony of the witness [PW4] that same has sued the 2nd Defendant because the 2nd Defendant ought to have advised the permanent secretary and the minister that the land in question was not available for alienation.
167. It was the further testimony of the witness that the 2nd Defendant has also been sued because he is the one who signed the Part Development Plan [PDP]. However, the witness conceded that same [witness] has not sued the director of physical planning.
168. Whilst under further cross examination, the witness averred that even though the Part Development Plan [PDP] was prepared by the directorate of physical planning, it is the 2nd Defendant who was chargeable with the requisite mandate to oversee the alienation of the government land.
169. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim [namely, the Attorney General] the witness averred that the letter of allotment dated the 27th September 1995 was issued in favour of Honourable Shariff Nassir. However, the witness averred that despite the fact that the letter was issued in favour of Honourable Shariff Nassir, same [letter of allotment] was neither paid for nor accepted. In any event, the witness averred that same did not come across any letter of acceptance.



170. On further cross examination, the witness averred that the document at page 57 of the Plaintiff's list and bundle of documents is a grant in favour of East Africa Common Services Authority. Furthermore, the witness averred that the grant in question was for a duration of 99 years, commencing the 1st July 1953.
171. It was the further testimony of the witness that the grant in question was in respect of L.R No. 209/6237. Whilst under further cross examination, the witness averred that same also came across Part Development Plan [PDP] that was prepared by the directorate of physical planning. However, the witness added that the Part Development Plan [PDP] does not bear the plan number.
172. In respect of the letter of allotment, it was the testimony of the witness that the letter of allotment bore an authority reflected at the foot thereof. However, the witness stated that same did not authenticate the veracity of the authority alluded to and reflected at the foot of the Letter of allotment.
173. On further cross examination, it was the testimony of the witness that during the course of his investigations, same [witness] did not come across the minutes relating to the boarding of the house on the suit property. Furthermore, the witness also averred that same did not come across any boarding over and in respect of the house situate on the suit property.
174. Additionally, it was the evidence of the witness that subsequent to the issuance of the letters of allotment in favour of Honourable Shariff Nassir, same [Nassir] was issued with a grant. Furthermore, the witness averred that it is the grant in question that was subsequently transferred to and in favour of both the 3rd and 4th Defendants.
175. In particular, the witness averred that the grant in respect of L.R No. 209/12966 was registered on the 11th July 1996. However, the witness added that same was thereafter transferred to and registered in the name of the 3rd Defendant on the 30th September 2004.
176. Other than the foregoing, the witness averred that same also established that there was a Deed plan which was prepared in respect of the sub-division of L.R No. 209/6237. Furthermore, the witness added that the deed plan in respect of L.R No. 209/12965 is number 203410.
177. Whilst still under cross examination, the witness averred that the Plaintiff herein wrote a letter dated the 8th February 2019 and in respect of which the Plaintiff called upon the 3rd and 4th Defendants to surrender the title to the suit property. However, the witness added that the certificate of titles have not been surrendered to date.
178. It was the further testimony of the witness that the Plaintiff herein also wrote a letter dated the 6th February 2019 and wherein the Plaintiff sought to register an inhibition over and in respect of L.R No 209/12965 and 209/12966, respectively.
179. On the other hand, it was the testimony of the witness that same carried out and undertook valuation in respect of the suit properties. In this regard, the witness averred that same deployed the comparable approach with a view to arriving at the value of the properties.
180. On re-examination by learned counsel for the Plaintiff, the witness averred that same did not investigate the whereabouts of the original certificate of title in the name of East African Community Services. At any rate, the witness averred that same did not investigate the whereabouts of the said title because when he [witness] wrote to the chief land registrar, same [witness] was availed certified copies thereof.
181. Whilst under further re-examination, the witness averred that same has seen the contents of the letter by the chief building surveyor which is contained at page 75 of the Plaintiff's list and bundle of documents. Nevertheless, the witness averred that the contents thereof are not legitimate.



182. On the other hand, the witness also indicated that though there was an authority shown at the foot of the letter of allotment same [witness] did not investigate the veracity of the said authority. In any event, the witness averred that he [witness] did not investigate the said authority because the authority file was not availed to him.
183. It was the further testimony of the witness that the property that was being allocated to Honourable Shariff Nassir was not available for allocation. In any event, the witness averred that the land in question had already been allocated to East Africa Common Services Authority.
184. Other than the foregoing, it was the testimony of the witness that the Plaintiff herein is pursuing the recovery of the land in the interests of justice and for the public benefit. At any rate, the witness has posited that no officer of the commission [the Plaintiff] has an interest over and in respect of the suit properties.
185. Finally, the witness averred that the lease over the suit properties in favour of East Africa Common Services Authority is still in existence and hence the land in question could not be re-allocated or re-alienated. In this regard, the witness avers that the impugned letter[s] of allotments are therefore illegal.
186. With the foregoing testimony, the Plaintiff's case was duly closed.

b. 1st Defendant's Case:

187. The 1st Defendant's case revolves and gravitates around the evidence of one witness, namely, Zablon Mabea Agwata. Same testified as DW1.
188. It was the testimony of the witness [DW1] that same was formerly the commissioner of lands. Furthermore, the witness averred that by virtue of being the commissioner of lands, same [DW1] was tasked with various mandates and/or obligations pursuant to the provisions of the Government [Land Act](#), Chapter 280 Laws of Kenya [now repealed].
189. Additionally, the witness averred that same is conversant with the facts of the instant matter. In this regard, the witness stated that same has since recorded a witness statement dated the 21st May 2021. Suffice it to state that the witness sought to adopt and rely on the witness statement under reference. Instructively, the witness statement was thereafter admitted and constituted as the evidence of the witness.
190. On cross examination by learned counsel for the Plaintiff, the witness averred that same [witness] was employed by the ministry of lands in October 1981. Furthermore, the witness stated that same worked with the ministry of Lands and Physical Planning for a duration of more than 33 years.
191. Whilst still under further cross examination, the witness averred that same was appointed as the commissioner of lands in July 2007. In any event, the witness added that same remained the commissioner of lands up to January 2014.
192. It was the further testimony of the witness that if any person was desirous to access and peruse documents from the ministry of lands, it would be incumbent upon the person [Applicant] to make the requisite application.
193. It was the further evidence of the witness that the document at page 153 of the Plaintiff's bundle of documents is a letter from the Plaintiff. furthermore, the witness averred that the letter under reference, is dated the 8th February 2019. Besides, the witness averred that the letter was written in respect of L.R No's 209/12965 and 209/12966, respectively.



194. Additionally, the witness averred that the letter under reference, namely, the letter dated the 8th February 2019 sought to have the chief land registrar to register a caution/restriction on the suit properties.
195. Other than the foregoing, the witness averred that the properties, namely, L.R No. 209/12965 and 209/12966, respectively, were allocated to Honourable Shariff Nassir by way of a direct approval [DA] by the president.
196. It was the further evidence of the witness that prior to the allocation of the suit properties, the protocol/ procedures attendant to allocation of government land were complied with.
197. It was the further testimony of the witness that there was a government house that was standing on the suit property. In any event, it was the testimony of the witness that before allocation of land containing a government house can be undertaken, there is need for survey of the land, constitution of the board of survey and thereafter issuance of a letter of allotment.
198. On further cross examination, the witness averred that same [witness] is aware that a letter of allotment could be issued before boarding of the house on the land. In this respect, the witness averred that a letter of allotment was duly issued.
199. It was the further testimony of the witness that prior to issuing the letter of allotment in favour of Honourable Shariff Nassir, there was another letter of allotment. In this regard, the witness referenced the letter of allotment at page 30 of the Plaintiff's bundle of documents. In any event, the witness added that the said letter of allotment was issued in favour of East African Common Services Authority.
200. Whilst under further cross examination, the witness stated that other than the letter of allotment which was issued in favour of the East African Common Services Authority, the Authority was also issued with a Grant. Furthermore, the witness indicated that the Grant in favour of East African Common Services Authority was for a duration of 99 years.
201. It was the further testimony of the witness that though the land was allocated to East African Common Services Authority, the Authority collapsed in the year 1977. Besides, the witness testified that upon the collapse of the East African Common Services Authority, the assets of the said Authority reverted to and vested in the government of Kenya. In this regard, the witness added that the suit properties therefore became government land.
202. On the other hand, it was the testimony of the Witness that Honourable Shariff Nassir was issued with two letters of allotment. Furthermore, the witness posited that the letters of allotment were issued in the year 1996. In addition, it was the testimony of the witness that the letters of allotment that was issued in the year 1996 was duly accepted by the allottee and thereafter same were paid for.
203. It was the further testimony of the witness that the letters of allotment were issued in terms of the provisions of Section 3, 4 and 7 of the Government *Land Act*, now repealed. In any event, the witness clarified that the proviso of Section 3 of the Government *Land Act* prohibited the commissioner of lands from exercising certain powers that were exclusively vested in the president of the republic of Kenya.
204. Nevertheless, it was the testimony of the witness that the issuance of the letters of allotment in favour of Honourable Shariff Nassir were underpinned by presidential approval. In this regard, the witness added that it is the president who authorized the allocation.
205. On further cross examination, the witness averred that the allottee duly complied with the terms of the letter of allotment. Thereafter it was stated that the allottee was issued with a Grant by the president.



- In particular, the witness pointed out that the Grant in question was issued under the hand of the president.
206. It was the further testimony of the witness that the authority of the president was contained and indicated at the foot of the letter of allotment. In any event, the witness added that the authority of the president is ordinarily abbreviated as D/A. Furthermore, the witness added that D/A means direct allocation.
207. In answer to a question pertaining to the meaning of an unalienated government land, the witness averred that an unalienated government land refers to land that has not been alienated and is in the hands of the government. On the contrary, the witness averred that alienated land is one in respect of which a letter of allotment has since been issued or where a Grant has been perfected.
208. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that same was duly appointed as the commissioner of lands. At any rate, the witness added that his appointment as the commissioner of lands was pursuant to a written memorandum.
209. Whilst still under cross examination, the witness averred that the issuance of the letter of allotment in 1996 were lawful and same were undertaken on the basis of presidential approval. Furthermore, the witness added that direct allocation by the president is kept in a particular file at the office of the commissioner of land.
210. It was the further testimony of the witness that the file for the direct allocation was available in the office. However, the witness added that the file for direct allocation has not been brought to court. In any event, it was the testimony of the witness that it was the obligation of the Plaintiff to procure the file from the ministry of lands.
211. On the question, of whether the direct approval and allocation could take place before boarding of the house, the witness pointed out that there are instances where boarding of the house would come after the issuance of a letter of allotment.
212. Whilst still under cross examination, the witness averred that though Honourable Shariff Nassir had previously been issued with a letter of allotment in 1995, the letter of allotment was not complied with. In this regard, the witness averred that the terms of the letter of allotment thereafter lapsed.
213. In respect of whether or not a Paert Development Plan [PDP] was drawn in respect of the suit properties, the witness averred that indeed Part Development Plan [PDP] was drawn. Furthermore, the witness added that Part Development Plan [PDP] were also subjected to approval.
214. It was the further testimony of the witness that the value of the house which was standing on the suit property was duly taken into account at the time of the issuance of the letter of allotment. In any event, it was the testimony of the witness that the land in question together with the house were duly valued by a government valuer.
215. On cross examination by learned counsel for the 3rd Defendant, the witness averred that having been appointed as the commissioner of lands, same [witness] was vested with certain powers over government land. It was the further evidence of the witness that the powers which were vested upon him [included] alienation and/or allocation of government land. In particular, the witness referenced the provisions of Section 5 of the said Act as the basis for the exercise of his [witness] authority.
216. Additionally, it was the testimony of the witness that the powers of the commissioner of lands were delegated powers. In this regard, the witness testified that there were instances when the allocation of public land was delegated.



217. It was the further testimony of the witness that the land in question is the same land that had previously been allocated to the East African Commons Services Authority. Nevertheless, the witness added that the letter of allotment and the Grant were the same ones which were issued to and in favour of Honourable Shariff Nassir. Nevertheless, the witness pointed out that Hon Sharif Nasir sought for and obtained the presidential authority.
218. Other than the foregoing, it was the testimony of the witness that whilst exercising the constitutional mandate to alienate land, same [witness] could be at liberty to issue letters of allotment on behalf of the president.
219. It was the further testimony of the witness that whilst discharging his powers as the commissioner of land, same [witness] was not obligated to look at the government building register before allocating the land. In any event, the witness averred that there were no regulation[s] which required him [witness] to call for the building register from the ministry of works.
220. Whilst under further cross examination, the witness averred that the vesting of the land of the East African Community Services into the government made the land under reference to be unalienated government land. In this regard, the witness averred that the land which had reverted back to the government was therefore available for allocation.
221. Other than the foregoing, it was the testimony of the witness that Honourable Shariff Nassir [the allottee] applied for the subdivision of the plot that had been duly allocated to same. In this regard, the witness posited that the application for subdivision was thereafter approved. Furthermore, the witness added that the subdivision scheme was also approved culminating into the preparation of the Part Development Plan [PDP].
222. Whilst still under cross examination, the witness averred that subsequently, the allottee [Hon Shariff Nasir] was issued with a Grant. Furthermore, the witness averred that the grantor was the president of Kenya. At any rate, it was the evidence of the witness that the document at page 81 of the Plaintiff's bundle of documents was the direct authority from the president. At any rate, the witness clarified that direct authority refers to a direct approval by the president as pertains to allocation of land.
223. On further cross examination, the witness averred that the allottee proceeded to and accepted the terms of the letter of allotment. In this regard, the witness confirmed that the acceptance was duly received by the office of the commissioner of land.
224. It was the further testimony of the witness that the land which was allocated to Honourable Shariff Nassir was unalienated government land. For good measure, the witness clarified that the land in question was not alienated public utility.
225. Whilst under cross examination by learned counsel for the 4th Defendant, the witness averred that the letter of allotment was issued on the instructions of the president. In this regard, the witness reiterated that the allotment in question was a direct allotment.
226. Whilst still under further cross examination, the witness averred that the 4th Defendant herein lawfully and legally acquired L.R No. 209/12965.
227. On cross examination, by learned counsel for the 5th Defendant, the witness stated that Section 4 of the Mediation Agreement Act reverted and vested the suit property to the government. In this respect, the witness clarified that the land in question was unalienated government land.



228. Other than the foregoing, it was the testimony of the witness that the land in question had not been reserved for any public purpose. In any event, the witness added that there was no public purpose shown and/or described to be affecting the suit properties.
229. On further cross examination, it was the testimony of the witness that the land in question was a direct approval. In any event, the witness added that same [witness] has not seen any challenge to the direct approval [DA] by the president.
230. On re-examination, the witness stated that same [witness] received presidential approval. In this regard, it was the testimony of the witness that upon receipt of the presidential approval, the commissioner of lands was obligated to act in accordance with the presidential directions.
231. On the other hand, it was the testimony of the witness that the process of allocation of the suit properties was lawful. Besides, the witness added that the letters of allotment were also lawful.
232. With the foregoing testimony, the 1st Defendant's case was closed.

c. 2nd Defendant's Case

233. The 2nd Defendant herein intimated to the court that same [2nd Defendant] would not be calling any evidence. In this regard, the 2nd Defendant's case closed without any evidence having been tendered.

d. 3rd Defendant's Case

234. The 3rd Defendant's case revolves/ gravitates around the evidence of two witnesses, namely, James Mburu Kamau and James Njuguna. Same testified as DW2 and DW3, respectively.
235. It was the testimony of the witness [DW2] that same is an advocate of the high court of Kenya. Furthermore, the witness also averred that he is currently the managing partner in the law firm of M/s Iseme, Kamau & Maema Advocates. In addition, the witness testified that same is conversant with the facts of the instant matter.
236. It was the further testimony of the witness that same has since recorded a witness statement dated the 27th September 2019. In this regard, the witness sought to adopt the contents of the witness statement. For coherence, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
237. Furthermore, it was the testimony of the witness that same has also filed a list and bundle of documents. To this end, the witness adverted to the list and bundle of documents attached to the witness statement and thereafter sought to produce the documents in evidence. There being no objection to the production of the documents, same were duly tendered and admitted in evidence save for the valuation report prepared by Knight Frank Limited, the latter which was marked for identification.
238. It was the further testimony of the witness that same [witness] also filed a further witness statement dated the 15th January 2024. In this regard, the witness also sought to adopt and rely on the contents of the said witness statement. Suffice it to state that the witness statement dated the 15th January 2024 was thereafter adopted and constituted as the further evidence on behalf of DW2.
239. Other than the foregoing, the witness adverted to the amended statement of defence and counterclaim dated the 2nd February 2022. In this regard, the witness thereafter sought to adopt and reiterate the contents of the amended statement of defence and counterclaim



240. On cross examination, by learned counsel for the Plaintiff the witness averred that what constitutes L.R No. 209/12966 was previously allocated to Honourable Shariff Nassir. Thereafter the witness averred that the 3rd Defendant entered into a land sale agreement with the said Honourable Shariff Nassir in whose favour a Grant had been issued.
241. It was the further testimony of the witness that prior to the 3rd Defendant entering into the sale agreement with Honourable Shariff Nassir, the 3rd Defendant carried out and/or undertook due diligence to ascertain the propriety of the title of the suit property. Furthermore, the witness averred that prior to entering into the sale agreement, the directors of the 3rd Defendant held various meetings with Honourable Shariff Nassir. Besides, the witness posited that Honourable Shariff Nassir was residing on the suit property.
242. Whilst still under further cross examination, the witness averred that the suit property had a house/ building which was standing on the suit property. However, the witness added that the building in question was subsequently removed to pave way for the current building.
243. It was the further testimony of the witness that the 3rd Defendant undertook due diligence over and in respect of the suit property. However, the witness has averred that even though the 3rd Defendant procured and obtained a certificate of official search, the search has neither been tendered nor availed to the court.
244. Whilst still under cross examination, the witness stated that even though the 3rd Defendant entered into and executed a written sale agreement with Honourable Shariff Nassir, the sale agreement has not been availed before the court. At any rate, the witness stated that same was not able to trace/ locate the sale agreement.
245. On the other hand, it was the testimony of the witness that Honourable Shariff Nassir also applied for change of user in respect of the suit property. In any event, the witness averred that the application for change of user was allowed. Besides, the witness also stated that the 3rd Defendant also sought for and obtained approvals for development.
246. It was the further testimony of the witness that the 3rd Defendant was thereafter granted vacant possession of the suit property. In particular, the witness averred that vacant possession was granted by the vendor [Hon Sharif Nasir].
247. Other than the foregoing, it was the testimony of the witness that the 3rd Defendant procured and obtained development approvals. In this regard, the witness also averred that a change of user was also sought for and granted.
248. On cross examination by learned counsel for the 1st Defendant, the witness averred that the 3rd Defendant herein was not an allottee of the suit property. On the contrary, the witness averred that the 3rd Defendant was a purchaser of the suit property.
249. On cross examination by counsel for the 5th Defendant, the witness averred that same has seen the letter at page 154 of the Plaintiff's bundle of documents. In this regard, the witness stated that the letter under reference is dated the 4th February 2019. Furthermore, the witness has stated that the letter under reference contends that the Plaintiff herein was undertaking investigations in respect of the Grant belonging to East African Common Services Authority. In particular, the witness stated that the Plaintiff was purporting that the Grant in question belongs East Africa Common Services Authority.
250. Whilst under further cross examination, it was the evidence of the witness that the letter under reference indicates that the land in question was reserved for public purpose. Furthermore, it was



- contended that the public purpose alluded to was that the suit property belongs to East African common Services Authority.
251. Nevertheless, and whilst under further cross examination, it was the testimony of the witness that the East African commons services authority ceased to exist. At any rate, the witness added that the Mediation Agreement Act provided that the assets of East African common services authority reverted to and became the properties of the government.
 252. On the other hand, it was the testimony of the witness that the 3rd Defendant carried out and undertook due diligence in respect of the suit property. Thereafter, the witness averred that the 3rd Defendant proceeded to and entered into a lawful transaction over the suit property.
 253. It was the further testimony of the witness that the 3rd Defendant also sought for and obtained clearance from the commissioner of lands in respect of the suit property. In this regard, the witness added that the 3rd Defendant indeed received a confirmation that the alienation of the suit property was valid.
 254. On re-examination, the witness averred that the suit property was bought and/or purchased by the 3rd Defendant. Furthermore, the witness averred that the suit property was not included in the Ndungu Land Commission report.
 255. Other than the foregoing, it was the testimony of the witness that though the Plaintiff contends that the suit property belongs to East African commons services authority, the said authority collapsed in 1977. Furthermore, the witness added that the suit property was part of the assets of East African common services authority which reverted to and vested in the government of Kenya.
 256. Other than the foregoing, it was the testimony of the witness that the letter of allotment which was issued to and in favour of Honourable Shariff Nassir alludes to an authority number. In particular, the witness averred that the authority number is shown as number 102749/31/DA/VIII.
 257. Whilst still under re-examination, the witness averred that the allocation of the suit property to Honourable Shariff Nassir was underpinned by a direct approval [DA] of the president. Furthermore, the witness averred that same [witness] has not seen any challenge to the direct approval which underpinned the allocation of the suit property to Honourable Shariff Nassir.
 258. It was the further testimony of the witness that same has seen the letter at page 77 of the Plaintiff's bundle of documents. In particular, the witness has stated that the letter is dated the 2nd October 2007. Furthermore, the witness avers that the letter is addressed to the Plaintiff herein and same confirms that the suit property was lawfully allocated to Honourable Shariff Nassir.
 259. On the other hand, it was the testimony of the witness that Honourable Shariff Nassir [the allottee] indeed paid the stamp premium and the various statutory levies alluded to at the foot of the letter of allotment. In this regard, the witness adverted to the Grant which acknowledges that the payments were duly received.
 260. Additionally, the witness averred that the document at page 108 of the Plaintiff's bundle of documents relates to the consent from the commissioner of lands. In particular, the witness averred that the consent was given in favour of the 3rd Defendant. Furthermore, the witness also testified that the 3rd Defendant also procured and obtained the approvals from Nairobi City Council [now defunct].
 261. The 2nd witness who testified on behalf of the 3rd Defendant was one James Njuguna. Same tested as DW3.



262. It was the testimony of the witness [DW3] that same is a licenced and practising valuer. Furthermore, the witness stated that same holds a Bachelor's degree in Land Economics from the university of Nairobi.
263. It was the further testimony of the witness that same [DW3] works with M/s Knight Frank Limited which is a valuation company. In addition, the witness added that the Knight Frank Ltd was retained by the 3rd Defendant to undertake valuation in respect of the suit property. In this regard, the witness averred that same was thereafter tasked to undertake the valuation.
264. It was the further testimony of the witness that arising from the instructions, same [witness] proceeded to and carried out the valuation. In this regard, the witness tendered and produced the valuation report as an exhibit before the court.
265. On cross examination by learned counsel for the Plaintiff, the witness stated that Knight Frank Limited was instructed and retained to undertake valuation of the suit property. In this regard, the witness averred that same proceeded to and undertook the valuation. Furthermore, the witness stated that the values alluded to at the foot of the valuation report were arrived at on the basis of comparable.
266. Whilst still under cross examination, the witness testified that prior to preparing the valuation report, same [witness] visited and inspected the suit property.
267. It was the testimony of the witness that the purpose of the valuation was to ascertain the value of the property for purposes of compensation.
268. Other than the foregoing, it was the testimony of the witness that the valuation report has broken down the various values. In this regard, the witness has testified that there is a segment of the report that relates to the value of the building. There is also a segment that relates to the value of the land.
269. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that same is duly qualified and registered as a valuer. Furthermore, the witness also added that same is also a registered member of the institution of surveyors of Kenya. In this regard, it was the evidence of the witness that same was therefore competent to undertake the valuation.
270. It was the further testimony of the witness that prior to undertaking the valuation exercise, same did not do any due diligence. In particular, the witness averred that same did not procure and/or obtain a certificate of official search from the ministry of Lands.
271. Nevertheless, it was the testimony of the witness that same procured and obtained a copy of the Grant which was availed by the 3rd Defendant.
272. Whilst under further cross examination, it was the testimony of the witness that same did not procure and/or obtain copies of the approved building plans. Nevertheless, the witness added that he carried out inspection of the building on the suit property. Besides, the witness averred that same also took measurements of the length and width of the building.
273. On cross examination by learned counsel for the 5th Defendant, the witness averred that the values at the foot of the valuation report was based on the market value. Furthermore, the witness averred that the valuation report and the finding[s] thereunder were guided by the valuation standards which regulates the essential parameters to be taken into account.
274. On re-examination, by learned counsel for the 3rd Defendant, the witness stated that the purpose of the valuation was for purposes of compensation. Besides, upon being referred to the valuation report



by Mr. Nyaga Kithinji [PW4], the witness averred that the said valuation report does not contain any comparable.

275. Other than the foregoing, it was the testimony of the witness that same carried out and undertook due diligence in respect of the suit property. However, the witness added that the question of due diligence depends on each case scenario.
276. With the foregoing testimony, the 3rd Defendant's case was closed.

e. 4th Defendant's Case:

277. The 4th Defendant's case revolves around the evidence of two [2] witnesses, namely, Edwin Macharia and Rashida Mansurali Virani. Same testified as DW4 and DW5, respectively.
278. It was the evidence of the witness [DW4] that same is a registered and practising valuer. Furthermore, the witness added that same has been a valuer for the last 34 years. In addition, the witness averred that same was instructed to undertake the valuation of L.R No. 209/12965. In this regard, the witness averred that same thereafter proceeded to and undertook the valuation exercise.
279. It was the further testimony of the witness that upon undertaking the valuation exercise, same [Witness] prepared a valuation report dated 14th March 2019. Thereafter the witness sought to tender and produce the valuation report as an exhibit before the court. For good measure, the valuation report was tendered as exhibit D1 on behalf of the 4th Defendant.
280. On cross examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that same [witness] undertook the valuation exercise around the month of March 2019. Furthermore, the witness stated that same visited/inspected the suit property.
281. It was the further testimony that the suit property was being valued for purposes of compensation. In addition, the witness averred that after the preparation of the valuation report, same [valuation report] was forwarded to the 4th Defendant.
282. It was the further testimony of the witness that prior to undertaking the valuation exercise, same [witness] did not procure and/or obtain a copy of the certificate of official search. Nevertheless, the witness added that same was able to review copies of the cadastral/survey plan relative to the suit property.
283. Whilst under further cross examination, the witness averred that same [witness] has referenced surrender in the body of the valuation report. However, the witness clarified that same has not annexed a copy of the surrender instrument. Furthermore, the witness added that same also did not come across any surrender instrument.
284. Whilst under further cross examination, the witness stated that the valuations adverted to at the foot of the valuation report were arrived at on the basis of comparable[s]. However, the witness clarified that the report has not enumerated the comparable that were deployed in the process of ascertaining the value of the suit property.
285. On cross examination by learned counsel for the Plaintiff, the witness reiterated that same [witness] undertook the valuation of the suit property. Furthermore, the witness added that same relied on various documents including a copy of the certificate of title that had been handed over to him [witness] by the client [4th Defendant].
286. On re-examination by learned counsel for the 4th Defendant, the witness averred that same was duly registered and qualified to undertake the valuation. Furthermore, the witness added that the valuation



- report was prepared in accordance with the Valuation Act and the various standards prescribed under the law.
287. On the other hand, the witness averred that same reviewed and relied on the approved building plan[s] that were used to construct the building. In any event, the witness clarified that the valuation report was objective.
288. The 2nd witness who testified on behalf of the 4th Defendant was one Rashida Mansurali Virani. Same testified as DW5.
289. It was the testimony of the witness [DW5] that same is a director of the 4th Defendant. In this regard, the witness averred that by virtue of being a director of the 4th Defendant, same [witness] is conversant with the facts of the matter.
290. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 24th April 2019. In this regard, the witness sought to adopt and rely on the contents of the witness statement. Suffice it to point out that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
291. On the other hand, the witness adverted to the list and bundle of documents dated the 23rd April 2019. Thereafter the witness sought to tender and produce the various documents as exhibits before the court. Instructively, the documents in question were thereafter produced as exhibits D1 to D3, respectively on behalf of the 4th Defendant.
292. Other than the foregoing, the witness adverted to the amended statement of defence and counterclaim dated the 3rd July 2023. In this regard, the witness thereafter invited the court to grant the reliefs sought thereunder.
293. On cross examination, by learned counsel for the 1st Defendant, the witness [DW5] stated that same did not know the 1st Defendant in person. Furthermore, the witness also averred that same did not transact and/or deal with the 1st Defendant.
294. Whilst under further cross examination, the witness averred that the 4th Defendant carried out and undertook due diligence in respect of the suit property before the 4th Defendant commenced the process of purchasing same.
295. On cross examination, by learned counsel to the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that same was duly involved in the process of the acquisition of the suit property. In any event, the witness averred that the 4th Defendant got to know of the availability of the suit property from an Estate agent.
296. It was the further testimony of the witness that subsequently, the directors of the 4th Defendant met with Honourable Shariff Nassir and negotiated the purchase price. Furthermore, the witness added that the purchase price for the suit property was paid to and in favour of the vendors advocate.
297. Whilst under further cross examination, the witness stated that same had occasion to visit the suit property. In any event, the witness averred that it is Honourable Shariff Nassir who took her [witness] to the suit property.
298. On further cross examination, the witness stated that same undertook due diligence before acquiring the suit property. In addition, the witness averred that the suit property is currently developed with an apartment occupied by various tenants.



299. On cross examination by learned counsel for the Plaintiff, the witness averred that the 4th Defendant acquired the suit property from Honourable Shariff Nassir. Besides, the witness averred that prior to acquiring the suit property from Honourable Shariff Nassir, same [witness] undertook due diligence. In particular, the witness averred that same procured and obtained a copy of the letter of allotment which underpinned the allocation of the suit property in favour of Honourable Sharif Nassir.
300. On re-examination, the witness averred that the 4th Defendant relied on the due diligence that was carried out and undertaken by her [4th Defendant's] advocates. In any event, the witness added that same believed in the validity on the certificate of title that was acquired from the government.
301. On further re-examination, the witness stated that the suit property was previously charged in favour of the 5th Defendant. However, the witness added that the charge was discharged in the year 2009.
302. With the foregoing testimony, the 4th Defendant's case was closed.

f. 5th Defendant's Case:

303. The 5th Defendant's case is premised/ anchored on the evidence of one witness namely, Irene Situma. Same testified as DW6.
304. It was the testimony of the witness that same [witness] is an employee of the 5th Defendant. Besides, the witness averred that by virtue of being an employee of the 5th defendant same is conversant with the facts of the case. In addition, same has averred that she has since recorded a witness statement. In this regard, the witness adverted to the witness statement dated the 20th May 2019 and which witness statement the witness sought to adopt and rely on as her evidence in chief.
305. On the other hand, the witness testified that the 5th Defendant has also filed a list and bundle of documents. Instructively, the witness alluded to the list and bundle of documents dated the 20th May 2019. There being no objection to the production of the documents, same [documents] were tendered and produced as exhibits D1 to D14, respectively on behalf of the 5th Defendant.
306. Additionally, the witness averred that the 5th Defendant has also filed a statement of defence and counterclaim. In this regard, the witness adverted to the statement of defence and counterclaim dated the 20th May 2019. In particular, the witness implored the court to adopt the contents of the statement of defence and counterclaim and thereafter to grant the reliefs sought thereafter.
307. On cross examination by learned counsel for the 3rd Defendant, the witness stated that the 3rd Defendant approached the 5th Defendant for a banking facility. Thereafter, the witness averred that the 5th Defendant granted a letter of offer in favour of the 3rd Defendant.
308. In addition, it was the testimony of the witness that the 5th Defendant undertook due diligence as pertains to the validity of the certificate of title and thereafter proceeded to and disbursed the monies at the foot of the banking facility to the 3rd Defendant.
309. Whilst under further cross examination, the witness averred that the 5th Defendant also sought for and obtained a consent to transfer from the commissioner of lands. In particular, the witness reiterated that the 5th Defendant exercised due diligence prior to and before charging of the suit property.
310. On cross examination, by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness averred that same did not play any role in the perfection of the charge. However, the witness added that by virtue of her office she played a role in the documentation leading to the advancement of the facility.



311. Whilst under further cross examination, the witness averred that in the course of undertaking due diligence, the 5th Defendant obtained a certificate of official search over and in respect of the suit property. Furthermore, the witness added that the certificate of official search has been tendered and produced before the court. To this end, the witness referenced the search at page 174 of the Defendant's bundle of documents.
312. It was the further testimony of the witness that the bank undertook suitable due diligence. At any rate, it was the evidence of the witness that the due diligence was carried out at the relevant government offices/authorities.
313. On the other hand, it was the testimony of the witness that the 5th Defendant procured and obtained various consents to charge the suit property. In particular, the witness alluded to the consent to charge and the consent to transfer which have all been tendered and produced before the court.
314. On cross examination by learned counsel for the Plaintiff, the witness averred that the suit property was valued before the charge was affected against same. In any event, the witness testified that the 5th Defendant undertook due diligence.
315. Whilst under further cross examination, the witness averred that at the time of the valuation of the land, the land in question was vacant. In any event, the witness added that the purpose of the loan was to develop the suit property.
316. On re-examination, the witness testified that there was a change of user which converted the use of the property from residential to commercial. In particular, the witness averred that the documents relative to change of user were tendered and produced before the court by the Plaintiff.
317. Whilst still under re-examination, the witness averred that the registration of the charges has neither been challenged by the government or all. Furthermore, the witness clarified that the suit property remains charged to and in favour of the 5th Defendant.
318. Other than the forgoing, the witness averred that though the banking facility has not been fully paid, the 3rd Defendant has not defaulted. For good measure, the witness added that the 3rd Defendant has continued to meet and/or comply with her obligations under the charge.
319. Upon being referred to the contents of paragraph 8 of the statement of defence filed by the 2nd, 3rd and 5th Defendants to the counterclaim, the witness stated that the said paragraph admits the contents of paragraph 24 of the 5th Defendant's statement of defence and counterclaim, In particular, the witness avers that the said paragraph acknowledges the existence of a valid charge[s] over the suit property.
320. With the foregoing testimony, the 5th Defendant's case was duly closed.

g. 2nd, 3rd and 5th Defendants to the Counterclaim's Case:

321. The 2nd, 3rd and 5th Defendants to the counterclaim [hereinafter referred to as the said defendants] called two witnesses. The witnesses are Arthur Kanyanchwa Mbatia and Wilfred Muchai Kabue. Same testified as DWC 1 & 2, respectively.
322. It was the testimony of the witness [DWC1] that same is currently the Assistant director of physical planning in the ministry of lands, housing and urban development. Furthermore, the witness stated that by virtue of his office, same [witness] is therefore conversant with the facts of this matter.



323. Additionally, the witness averred that same has since recorded a witness statement over and in respect of the instant matter. To this end, the witness adverted to the witness statement dated the 28th July 2021 and which witness statement the witness sought to adopt as his evidence in chief.
324. Other than the witness statement, the witness adverted to a list and bundle of documents dated the 28th July 2021 and thereafter sought to tender and produce the documents contained thereunder. Suffice it to point out that the documents thereunder were produced and admitted as exhibits D1 and D2, respectively on behalf of the Defendants to the counterclaim.
325. On cross examination by learned counsel for the 3rd Defendant, the witness stated that by virtue of being the assistant director of physical planning same [witness] is therefore conversant with the process of alienation and allocation of land. Furthermore, the witness stated that in his witness statement same has referenced Section 9 of the Government Land Act.
326. Whilst under further cross examination, the witness averred that Section 9 of the Government Land Act Chapter 280 Laws of Kenya governs the alienation of unalienated government land. However, the witness stated that the land before the court was alienated and reserved for government purposes.
327. On further cross examination, the witness stated that even though same contends that the land before the court was alienated and reserved, same [witness] has never seen the title of the land. In any event, the witness added that the land did not have any certificate of title.
328. Whilst under further cross examination, the witness averred that same has tendered and produced various copies of documents from the directorate of physical planning. However, the witness clarified that he does not know who executed the documents that same [witness] has produced before the court.
329. Nevertheless, it was the testimony of the witness that the directorate of physical planning enclosed and forwarded two [2] sets to Part Development Plan[s] [2] to the commissioner of land. In addition, the witness has averred that the two sets that were forwarded to the commissioner of land have been duly certified.
330. Whilst still under cross examination, the witness stated that the documents which have since been tendered before the court are genuine. In any event, the witness averred that the Part Development Plan [PDP] before the court are genuine.
331. Additionally, and upon being referred to the document at page 78 of the Plaintiff's bundle of documents, the witness confirmed that the document is a letter that was generated by the director of physical planning. In any event, the witness added that the letter under reference is the one that forwarded the approved part development plan [PDP].
332. Other than the foregoing, the witness averred that the PDP which same has tendered and produced before the court were approved on the 20th February 1996. Furthermore, the witness averred that the approval was done by the commissioner of lands.
333. Whilst under further cross examination, the witness averred that the document at page 80 of the Plaintiff's bundle of documents is a forgery. In any event, the witness added that the only authentic document Part Development Plan [PDP] is the one that same has tendered and produced before the court.
334. Nevertheless, it was the further testimony of the witness that there was an approved Part Development Plan [PDP] that was forwarded to the commissioner of land for approval. Furthermore, the witness added that the commissioner of land was at liberty to approve the PDP.



335. It was the further testimony of the witness that it was the commissioner of lands who had the mandate to approve the Part Development Plan [PDP]. At any rate, the witness confirmed that in respect of the suit properties there was an approved PDP.
336. Other than the forgoing, it was the testimony of the witness that the survey cannot be carried out and undertaken without the approved Part Development Plan [PDP].
337. On cross examination by learned counsel for the 4th Defendant, the witness averred that the document at page 80 of the Plaintiff's bundle of documents is a forgery. However, the witness added that the document was never subjected to examination.
338. Whilst still under cross examination, the witness averred that the only valid PDP before the court is the one that same [witness] has tendered and produced before the court.
339. On cross examination by learned counsel for the 5th Defendant, the witness averred that same is aware that the suit property is currently charged in favour of the 5th Defendant. Furthermore, the witness stated that same has since tendered and produced various documents to show that the original parcel of land was subdivided into two portions. In addition, the witness stated that the document before the court demonstrate that the requisite Part Development Plan [PDP] were prepared and approved.
340. Whilst under further cross examination by learned counsel for the 5th Defendant, the witness averred that there is an approved PDP in respect of the suit properties. Furthermore, the witness averred that the titles held by the claimant herein are valid.
341. On cross examination by learned counsel for the Plaintiff, the witness averred that same is conversant with the process pertaining to alienation of government land. Furthermore, the witness added that the land in question was already alienated. In any event, it was the testimony of the witness that the land had a government house standing thereon.
342. Whilst under further cross examination, the witness averred that same [witness] is not conversant with the process to be undertaken before alienation of land with a government house.
343. On re-examination by learned counsel for the 2nd, 3rd and 5th Defendants to the counterclaim, the witness stated that the land before the court was unalienated government land. Furthermore, the witness added that there was a Part Development Plan [PDP] which was duly signed by the director of physical planning. In addition, the witness added that the director of physical planning duly approved the PDP.
344. The second witness who testified on behalf of the 2nd, 3rd and 5th Defendants to the counterclaim is Wilfred Kabue Muchai. Same testified as DWC2.
345. It was the testimony of the witness that same is currently the deputy director of survey. Furthermore, the witness also testified that same is also a licensed and registered surveyor. Besides, the Witness added the same [Witness] is also a member of the Institution of Surveyors of Kenya [ISK].
346. It was the testimony of the witness that by virtue of his office and portfolio, same [Witness] is familiar with matters pertaining to survey. In any event, the witness averred that same is conversant with the matters beforehand.
347. Other than the foregoing, the witness averred that same [witness] has since recorded a witness statement dated the 28th August 2021. In this regard, the witness sought to adopt and rely on the witness statement as his evidence in chief. Instructively, the witness statement was adopted and constituted as the evidence in chief.



348. Additionally, the witness adverted to the list and bundle of document dated the 27th August 2021 and thereafter same [DWC2] sought to tender and produce the documents as evidence before the court. There being no objection to the production of the documents, same were duly produced as exhibits D3 to D9, respectively.
349. On cross examination by learned counsel for the 3rd Defendant, the witness averred that same has produced a bundle of documents before the court including a copy of the Deed plan. Furthermore, the witness averred that the documents which same has produced before the court were procured from the directorate of survey.
350. Whilst under further cross examination, the witness stated that same has produced the various documents to assist the court. In any event, the witness has averred that same has also tendered before the court evidence to show that the subdivision of the original parcel of land was authentic. Besides, the witness also stated that the deed plans were prepared and signed in 1996.
351. Whilst under further cross examination, the witness averred that the directorate of survey proceeded to carry out survey. In this regard, the witness stated that the authority to undertake survey was the letter of allotment.
352. Besides, it was the testimony of the witness that the survey was also carried out on the basis of the authority from the directorate of physical planning.
353. On further cross examination, the witness stated that there were two [2] Part Development Plans [PDP's] which were prepared by the directorate of physical planning. Thereafter the directorate of survey proceeded to and prepared the requisite deed plans. At any rate, the witness clarified that the deed plans were lawfully issued.
354. With the foregoing testimony, the case for the 3rd, 3rd and 5th Defendants to the counterclaim was closed.

Parties' Submissions:

355. Upon the close of the hearing, the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court ventured forward and circumscribed the timelines for the filing and exchange of the written submissions.
356. First forward, the Plaintiff filed and served two [2] sets of written submissions dated the 13th June 2024 and the 19th September 2024, respectively. In respect of the maiden submissions, learned counsel for the Plaintiff has distilled five [5] salient issues, whether the land was alienated and thus unavailable for allocation to Shariff Nassir by the 1st and 2nd Defendants; whether the 3rd and 4th Defendants acquired a good title or were bona fide purchasers for value without notice of defect of title; whether the right to property under Article 40 to the constitution applies to the suit properties whose acquisition was illegal; whether there was fraud and illegality in the process of allocation of the suit properties and whether the 3rd and 4th Defendants [Counter-claimers] have legitimate expectation over the suit properties.
357. The 1st Defendant filed written submissions dated the 19th July 2024; and wherein same [1st Defendant] has highlighted and canvassed five [5] issues for consideration. For coherence, the issues highlighted by the 1st Defendant includes Whether the 1st Defendant could be sued in his personal capacity for actions discharged while in office; Whether the Presidential Authority had any legal effect on allocation of the property; Whether the letter of allotment signed by the 1st Defendant was of any legal effect in the allocation of the property; Whether the Plaintiff is deserving of reliefs sought against the Defendants;



- Whether the Plaintiff could sustain a suit against the Defendants; and Whether the Plaintiff is liable to the 1st Defendant for costs.
358. The 2nd Defendant filed written submissions dated the 11th September 2024; and wherein same [2nd Defendant] has canvassed one singular issue. For coherence, learned counsel for the 2nd Defendant has highlighted the issue as to whether the 2nd Defendant acted illegally and ultra vires the provisions of the Government Land Act, Chapter 280 Laws of Kenya [now repealed].
359. The 3rd Defendant/2nd Counter-claimer filed written submissions dated the 30th September 2024 and wherein same has highlighted three [3] salient issues for consideration. The issues highlighted by the 3rd Defendant include whether the 3rd Defendant has proved the claims at the foot of the counterclaim; whether the suit property [L.R No. 209/12966] was an unalienated government land and whether the 3rd Defendant was a bona fide purchaser for value and thus entitled to the requisite protection under the law.
360. On the other hand, the 4th Defendant filed written submissions dated the 13th September 2024 and wherein same [4th defendant] has highlighted and canvassed four [4] salient issues for consideration. The issues for consideration includes Whether the Vendor was capable of transferring LR No. 209/12965 to the Fourth Defendant/Third Plaintiff; Whether the Fourth Defendant/Third Plaintiff was an innocent purchaser for value without notice of any defect in title; Whether the Plaintiff has discharged its burden of proof on the issue of fraud and/or illegality in the process of allocation of the LR No. 209/12965 and Whether the Fourth Defendant/Third Plaintiff has a legitimate expectation over LR No. 209/12965.
361. The 5th Defendant/1st Counter-claimer filed written submissions dated the 10th July 2024. The 5th Defendant herein has distilled five [5] issues for consideration by the court. The issues on behalf of the 5th Defendant includes whether the suit property was available for alienation by government; whether the Plaintiff proved any fraud/corruption against the Bank; whether the Torrens system of land registration protect an innocent purchaser for value; whether the Plaintiff is entitled to cancellation of the securities created in favour of the Bank; and whether the bank is entitled to the reliefs in the counterclaim?
362. On the other hand, the honourable attorney general, who represented the 2nd, 3rd and 5th Defendants to the counterclaim filed written submissions dated the 13th September 2024 and in respect of which same has highlighted four [4] salient issues, namely, whether the counter-claimers have proved their respective counterclaims; whether the suit properties were unalienated government land and thus available for alienation; whether the 3rd and 4th Defendants were bona fide purchasers for value without notice of any defect in the titles of the predecessors and whether the counter-claimers are entitles to the various reliefs sought.
363. The court has considered the written submissions filed by and on behalf of the various parties. Furthermore, the court has also reviewed and evaluated the issues highlighted at the foot of the written submissions. Suffice it to point out that even though the parties have highlighted various issues, the dispute herein can be disposed of on the basis of four [4] broad issues. For coherence, the Court will shortly distil the pertinent issue[s], presently.
364. On the other hand, it suffices to underscore that even though the court has neither reproduced nor rehashed the written submissions by the parties, it is imperative to state that the court has considered the crux [substratum] of the submissions and same shall be taken into account in the determination of the dispute beforehand.



365. Finally, it is imperative to acknowledge and appreciate the efforts made by the Advocates for the respective parties. To this end, the court is hugely indebted to the parties for the comprehensive, elaborate and incisive submissions filed.

Issue for Determination:

366. Having reviewed the Plaintiff; the statement of defence and the counterclaim[s] filed by the respective Defendants and upon taking into account the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed, the following issues crystalize [emerge] and are thus worthy of determination;

- i. Whether the suit properties namely L.R No's 209/12965 and 209/12966, respectively constituted unalienated government land and were thus available for allocation or otherwise.
- ii. Whether the suit properties namely L.R No's 209/12965 and 209/12966 were lawfully allocated to and in favour of Hon Sharif Nasir [now deceased] or otherwise.
- iii. Whether the 3rd and 4th Defendants lawfully acquired rights to and in respect of the suit properties; and whether the 3rd and 4th Defendants are bona fide purchasers for value without notice.
- iv. What reliefs/remedies, if any ought to be granted.

Analysis and Determination

Issue Number 1

Whether the suit properties namely L.R No's 209/12965 and 209/12966, respectively constituted unalienated government land and were thus available for allocation or otherwise.

367. The Plaintiff herein has contended that what constitutes the suit properties was hitherto known as L.R No 209/6237 [hereinafter referred to as the original parcel of land]. Furthermore, the Plaintiff has contended that the said original parcel of land was allocated to and in favour of the East African Common Services Authority vide letter of allotment issued on the 26th July 1962.
368. Additionally, the Plaintiff has contended that subsequent to the issuance of the letter of allotment to and in favour of East African Common Services Authority, [hereinafter referred to as the authority], the said authority proceeded to and accepted the letter of allotment and thereafter the chief land registrar proceeded to and generated a grant in favour of the authority. To this end, a copy of the Grant was tendered and produced before the court.
369. To the extent that the land in question had hitherto been allocated in favour of the East African Common Services Authority and thereafter same [Authority] was issued with a Grant, it was contended that the land in question therefore ceased to be unalienated government land. In this regard, it was contended that the land was therefore not available for allocation to Honourable Shariff Nassir vide the letters of allotment which were issued in the year 1996.
370. To be able to appreciate the position taken by the Plaintiff, it suffices to reproduce the evidence of PW3, namely, Pauline Nyagutu Murithia. Same stated in her evidence in chief as hereunder;

“ The letter of allotment is dated the 25th July 1962. The letter of allotment is addressed to the secretary general East Africa Common Services Organization by the department of lands-Nairobi. The letter of allotment refers to L.R No. 209/6237. The letter of allotment relates



to an offer of Grant of unsurveyed plot edged in red. The area of the unsurveyed is 0.933Ha. the term of the letter of allotment is for 99 years w. e. f 1st July 1953”.

371. Furthermore, PW3 ventured forward and stated as hereunder;

“I can see the letter of allotment from the department of lands. The same was addressed to Hon Sharif Nasir. The same is in respect of L.R No. 209/6237 – Residential Plot. The letter of allotment dated the 25th July 1962 to the East Africa Common Services was still in existence. I wish to add that the said letter was issued and accepted by East African Common Services Authority. Thereafter a Grant was processed and issued to East African Common Services Authority. The Grant is at page 51 of the Plaintiff’s bundle of documents. The land in question had been alienated”.

372. From the testimony of PW3, the firm position held by the Plaintiff is that the land in question, namely, L.R No. 209/6237 had already been alienated and thus same ceased to be unalienated government land.

373. The position that the land in question stood alienated was also adverted to by PW4, namely, James Nyaga Kithinji. In his testimony [PW4] testified that same was constituted as an investigator and thereafter assigned this particular case. Furthermore, PW4 testified that same proceeded to and undertook necessary investigation culminating into various findings pertaining to and concerning the alienation of L.R No. 209/6237 [the original parcel of land].

374. It was the further testimony of PW4 that the original parcel of land which was subdivided and culminating into the creation of the suit properties had already been allocated to and in favour of East African Common Services Authority. Furthermore, PW4 also underscored that subsequent to the allocation of the land in question, the chief land registrar proceeded to and registered a Grant in favour of East Africa Common Services Authority.

375. Up to this point in time, there is no contest that indeed L.R No. 209/6237 [original land] had indeed been allocated to and in favour of East African Common Services Authority.

376. Other than the foregoing, there is also no contest that upon the issuance of the letter of allotment dated the 25th July 1962 and the subsequent registration of the Grant in favour of the East African Common Services Authority, the designated parcel of land indeed stood alienated.

377. However, there is no gainsaying that East African Common Services Authority and by extension the East African Community collapsed and the assets of the said Authority were the subject of an Act of parliament, namely, the Treaty of East Africa Community Mediation Agreement Act, which addressed the manner of sharing of the assets/properties of the defunct community.

378. Section 4 of the said Act [supra] stipulates as hereunder;

4. Assets and liabilities of former Community

(1) All the assets which, immediately before the commencement of this Act, were vested in the former Community by the Treaty and which were allocated to Kenya under the Agreement are hereby vested in the Government of Kenya.

(2) The Government shall, in respect of the assets referred to in subsection (1), be subject to the liabilities of the former Community only to the extent provided for in the Agreement.

379. My understanding of the provisions of Section 4 of the Act, [supra] drives me to the conclusion that upon the collapse of the community and following of the enactment of this Act, the assets which were



- within the territorial jurisdiction of Kenya reverted to and vested in the Government. Notably, the original land namely, L.R No. 209/6237, also reverted to and vested in the Government of Kenya.
380. Upon vesting in the Government of Kenya, the original parcel of land “L.R No. 209/6237” fell within the purview of the Government *Land Act*, Chapter 280 Laws of Kenya [now repealed].
381. Before venturing forward to interrogate whether L.R No. 209/6237 which reverted to the Government of Kenya became unalienated Government Land. It is imperative to revert to the evidence tendered by both PW3 and PW4, respectively.
382. To start with, PW3 whilst under cross examination by learned counsel for the 3rd Defendant, namely, George Oraro [SC] stated as hereunder;
- “I have not seen the statute of treaty for corporation of the East African Act. However, Section 4 of the said Act defines the assets of the previous East African Common Services Authority. I now do confirm that all the assets of East African Common Services Authority were to vest in the government. I have seen Section 4 of the Act and the same confirms that the assets were thereafter vested in the Government of Kenya. I do confirm that the property herein ultimately vested in the Government of Kenya. The property became the property of the Government of Kenya. The properties ceased to be the property of East African Community”.
383. Flowing from the excerpts which have been reproduced in the preceding paragraph, it is evident that the original parcel of land which birthed the two [2] properties beforehand reverted to and vested in the Government of Kenya.
384. Whilst under further cross examination by learned counsel for the 3rd Defendant PW3 is on record as hereunder;
- “The body known as East African Common Services Authority ceased to exist. The land in question reverted to the Government. The Government can alienate land that it owns”.
385. On his part, PW4 [who was the investigating officer in respect of this matter] also spoke to the import and tenor of Section 4 of the Mediation Agreement. Whilst under cross examination by learned counsel Mr. George Oraro [Senior Counsel] PW4 stated this;
- “I am aware that the land remained the property of East African Community. Referred to Section 4 of the Treaty of East African Community Agreement Act, the witness now said that the land was vested in the Government. The land vested in the Government by dint of the vesting order”.
386. What is discernible from the testimony under reference is that the land which had hitherto been allocated in favour of East African Common Services Authority indeed reverted back to the Government of Kenya. To this extent the original land, fell with the purview of the Government *Land Act*, Chapter 280, Laws of Kenya [now repealed].
387. Having reverted back to the Government and the public purpose, namely, allocation to East African Commons Services Authority, having ceased, the question that does arise and which merits discussion is whether the original parcel of land [which birthed the suit properties] stood alienated or otherwise.
388. I beg to address the question of whether or not the original parcel of land [L.R No. 209/6237] was alienated Government land or otherwise in a two- pronged manner. Firstly, there is no gainsaying that



- a land in respect of which a letter of allotment and/or a Grant has been issued and remains in existence constitutes alienated land. Such kind of land, cannot thereafter be the subject of second or secondary alienation by the Commissioner of Lands [now defunct].
389. To this extent, it suffices to take cognizance of the ratio decidendi in the case of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed, Mohammed Fidaali Hebatullah, Huseesinbahal Ahemdali Hebatullah, Attorney General & Commissioner For Lands (Civil Appeal 79 of 2007)* [2015] KECA 457 (KLR) (Civ) (31 July 2015) (Judgment), where the court stated and held thus;
25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. 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 allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.
390. Likewise, the legal position that a secondary letter of allotment cannot issue and/or be granted during the lifetime of a previous letter of allotment whose terms have been complied with or during the lifetime of a Grant was also highlighted in the case of *Philemon L. Wambia v Gaitano Lusitsa Mukofu, Attorney General & Settlement Fund Trustees (Civil Appeal 115 of 2017)* [2019] KECA 157 (KLR) (28 November 2019) (Judgment), where the court of Appeal held as hereunder;
36. 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.
37. . 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 Muthurania 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.
391. Suffice it to point out that in respect of the instant matter, the letter of allotment dated the 25th July 1962 and which was issued in favour of the East African Common Services Authority and thereafter the Grant arising therefrom, ceased to exist and stood extinguished by operation of the law.
392. It is instructive to recall that the letter of allotment and the Grant had been issued to the East African Community Services Authority during its lifetime. However, upon its collapse [death] its assets, including the parcel of land reverted to the Government in accordance with Section 4 of the *East African Community Mediation Agreement Act*.
393. Consequently, and in this regard, it cannot be said that the original parcel of land that birthed the suit properties stood alienated on [sic] the basis of the letter of allotment dated the 25th July 1962, in favour of the East African Common services Authority.
394. By parity of reasoning, it also cannot be said that the original parcel of land which birthed the suit properties stood alienated on the basis of the certificate of title namely, Grant No. I.R 19103 [L.R No. 209/6237].



395. To my mind, the legal import and tenor of Section 4 of [*East African Community Mediation Agreement Act*](#), nullified the Grant which had hitherto been issued in favour of East African Common Services Authority. No wonder the original certificate of title was returned and surrendered to the Chief Land Registrar.
396. A debate may arise as to whether or not a surrender may occur and/or accrue without a formal surrender instrument being executed and thereafter registered in accordance with the provisions of Section 44 of the Registration of Titles Act [now repealed]. However, I beg to underscore that surrender may arise and accrue by operation of law or otherwise by the formal handing over [submission] of the certificate of title to the Chief Land Registrar.
397. To this end, I am fortified by the decision of the Court of Appeal in the case of Nathan Tirop Koech, Zacharia Kimutai Kosgei, Ezekiel Kiptoo & Ernest Kibet v Chief Lands Registrar, Registrar of Titles, Ministry of Lands, Director of Surveys, Attorney General & National Land Commission (Civil Application 7 of 2019) [2019] KECA 279 (KLR) (31 October 2019) (Ruling), where the court stated and held as hereunder;
86. The provisions of Section 41(1) of the RTA has received judicial pronouncement by this Court in [*Mwinyi Hamisi Appeal vs. Attorney General, Civil Appeal No. 125 of 1997*](#) (Tunoi, Shah & Bosire JJA). The relevant facts are as follows:

“Captain Townsend was the registered proprietor of Plot Nos. LR 324/III/MN and LR 334/III/MN. As regards Plot 334, he was a co-owner with three other persons. Captain Townsend sought to sell the Plots to Mr. Hamisi Ali. Before he could sell, the then Colonial authorities wrote a letter dated 7th November 1955 to the four asking them to surrender the titles in exchange for allocation of residential beach plots. By letter dated 26th January 1956, Captain Townsend surrendered his title document in respect of Plot 324 to the Government. The letter shows that the Certificate of title in respect of Plot No. 324 was sent to the Commissioner.

The issue of formalization of surrender of the two plots dragged on for years.

The learned judges held that the return to the Government by Captain Townsend of his documents of title in respect of Plot No. 324 could only mean he could no longer sell the property. As regards Section 44 of the RTA, the Judges expressed:

The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But Section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered Plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi any title to the suit land.....The Commissioner had de facto control of Plot No. 334 and if he proceeded, as he did, to allot the land to other persons....., their titles cannot be impugned except as provided for in Section 24 of the Act.....It is on these observations that, in our view, Mr. Hamisi Ali’s claim to the title to the suit land fails.” [emphasis supplied]



86. Guided by the dicta in *Mwinyi Hamisi Appeal vs. Attorney General, Civil Appeal No. 125 of 1997*, it is our considered view that the entry in the Register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government ipso jure extinguished all rights and interest of the then registered proprietors over the suit property. We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed.

The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.

398. In my humble view, the informal return of the certificate of title in respect of L.R No. 209/6237 to the Chief Land Registrar in pursuance to the provisions of Section 4 of the *East African Community Mediation Agreement Act*, denotes informal surrender.
399. The second perspective that merits discussion relates to whether the original parcel of land which birthed the suit property was reserved for public purpose or use. Instructively, if the land is reserved for any designated purpose, then yet again same would not be available for alienation.
400. To be able to discern whether the land was reserved for public purpose or use, it is imperative to revert back and take into account that the only public purpose for which the land was designated was in favour of East African Common Authority Services Authority. However, the authority collapsed and died a natural death.
401. Following the collapse of the East African Common Services Authority and the extinction of its right to the land, the land reverted to the Government. The land became Government and the Government was therefore at liberty to deal with the land as it pleases subject to the provisions of the Government *land Act*.
402. It was contended that there was a government house sitting on L.R No. 209/6237 and that because of the existence of the said House the land was deemed to be reserved. I am afraid, this contention is erroneous because there is no evidence of any such reservation. In any event, it is worth recalling that the house in question was part of the Land when same [Land] reverted back to the Government by dint of the provisions of section 4 of the Mediation Treaty Agreement [Supra].
403. On the contrary, the Ministry of Housing which is chargeable with housing estates on behalf of the Government of Kenya and who would be privy to whether the house was part of reservation, generated a letter contained at page 75 of the Plaintiff's bundle of documents and wherein the Chief Building Surveyor clearly confirms that the suit land on which the house in question stand[s] was lawfully allocated to Hon Sharif Nasir.
404. Even though PW4 contended that he does not agree with the contents of the said letter, there is no gainsaying that PW4 himself conceded that he did not procure any letter from the Ministry of Housing to discount or recant the contents of the said letter.
405. Worse still, the letter authored by the chief building surveyor was brought to court by the Plaintiff and when the contents thereon did not support the Plaintiff's case, the Plaintiff started to play hide and seek with the express contents of the Letter under reference.



406. To be able to understand the position taken by PW4 as pertain to the letter at page 75 of the Plaintiff bundle of documents, it is instructive to reproduce the evidence of PW4 whilst under cross examination by learned counsel for the 3rd Defendant.

407. PW4 stated as hereunder;

“Referred to the letter at page 75 of the Plaintiff’s bundle of document and the witness confirmed that the letter states that the land in question was allocated to Hon Sharif Nasir. I was able to examine the letter before the court. I don’t have any letter from the ministry of housing recanting/discounting the content of the letter at page 75 of the Plaintiff’s bundle of documents”.

408. On the other hand, and whilst under re-examination by Learned Counsel for the Plaintiff, PW4 is on record as starting thus;

“I have seen the letter by the chief building surveyor and i wish to state that the contents thereof are not legitimate”.

409. It is not lost on this court that it is the Plaintiff who brought the letter under reference and hence if the contents thereof were neither accurate nor authentic, then it behoved the Plaintiff to address the contents with the designated ministry, namely, the Ministry of Housing.

410. In my humble view, whereas public land that has been reserved for a designated purpose becomes alienated. However, before one can speak to reservation, it is incumbent upon the Claimant, in this case, the Plaintiff to place before the court evidence to demonstrate such reservation.

411. Unfortunately, in respect of the instant matter, the evidence that has been thrown on the court suggest[s] that the Plaintiff’s case is that the land was already alienated because it was it was allocated to East African Common Services Authority. Beyond that statement, there is no endeavour to demonstrate what other reservation attached to the original parcel of land. Quite clearly, the Plaintiff herein didn’t demonstrate and/ prove that the original parcel of Land stood alienated.

412. It is worth stating that even though the Plaintiff is a Constitutional and independent commission, chargeable with public duties, that alone does not lessen the burden/obligation on the Plaintiff to bring forth and tender plausible evidence before the court. For good measure, Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya applies to all and sundry, the Plaintiff not excepted.

413. Having discussed the issue as to whether or not the original parcel of land namely L.R 209/6237 which birthed the suit properties was alienated or unalienated government land, it is now apposite to discern what then constitutes unalienated government land.

414. To start with, unalienated government land was defined by Section 2 of the Government *Land Act*, Chapter 280 Laws of Kenya,[now repealed], in the following terms;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

415. The meaning and tenor of unalienated government land has also received judicial interpretation and elaboration in a plethora of cases. In Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others (Civil Appeal E038 of 2021) [2024] KECA 714 (KLR) (21 June 2024) (Judgment), the court of Appeal reviewed a number of decisions and thereafter held as hereunder;



31. The Supreme Court of Kenya in *Kiluwa Limited & Another vs. Business Liaison Company Limited & 3 Others, (Petition 14 of 2017)* [2021] KESC 37 (KLR) explained as follows as regards unalienated government land:

“(55) A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of *the Constitution* and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands”.

32. In this respect, section 2 of the repealed Government Lands Act defined “unalienated Government land” to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Section 3 of the then Physical Planning Act defines un-alienated Government land in similar terms. A similar definition is now given to public land under Article 62 of *the Constitution*, which includes

- a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease...

33. The Supreme Court of Kenya noted these definitions in *Torino Enterprises Ltd vs. The Attorney General, SC Petition No. 5 (E006) of 2022; [2023] KESC 79 (KLR)*, and also cited with approval the decision of this Court in *Benja Properties Limited vs. Syedna Mohammed Burbannudin Sahed & 4 Others, Civil Appeal No. 79 of 2007; [2015] eKLR* that the legal effect of registration of land is to convert property from un-alienated government land to alienated land, with the consequence that the property became private property and moved out of the ambit and confines of the Government *Land Act*.

34. In this regard, KACC brought evidence in the trial Court to demonstrate that the suit property was already surveyed, planned, and reserved for use as a customs house at the time of its allocation to Mr. Kenny Mohammed Sheikh Ali. One of the issues raised in *Dina Management Limited vs. County Government of Mombasa & 5 others (supra)* was whether land that had been reserved for a road could be allocated. The Supreme Court found the then applicable law and its effect to be as follows:

“(51) From the record and submissions, we note that the land was first allocated to HE Daniel T Arap Moi in 1989. The applicable law at the time was the Land Planning Act, cap 303, which was repealed by the Physical Planning Act cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No 13 of 2019. The Land Planning Act made provision for open spaces. regulation 11(3) of the Development and Use of Land (Planning) regulations, 1961 made under the Land Planning Act



defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

(52) The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation...”

416. Flowing from the discussion in the preceding paragraphs, my answer to issue number one [1] is fourfold. Firstly, the interests in respect of L.R No. 209/6237 [the original parcel of land] which vested in the East African Common Services Authority lapsed and stood extinguish following the collapse of the said authority.
417. Secondly, the assets and properties including L.R No. 209/6237 which were hitherto vested in the authority reverted to the Government of Kenya by dint of Section 4 of the East African Mediation Agreement Act.
418. Thirdly, the land in question namely, L.R No. 209/6237 [which birthed the suit properties] upon reversion to the Government of Kenya became an unalienated Government land and thus same was amenable to alienation/allocation subject to compliance with the provisions of the Government [Land Act](#) [now repealed].
419. Fourthly, the Plaintiff herein did not tender and/ or produce before the Court any evidence to demonstrate that the Land in question was alienated Government Land. For good measure, the public purpose which was underpinned by the issuance of the Letter of allotment and the subsequent Grant in favour of East African Common services Authority ceased to exist upon the collapse of the said Authority.

Issue Number 2

Whether the suit properties namely L.R No’s 209/12965 and 209/12966 were lawfully allocated to and in favour of Hon Sharif Nasir [now deceased] or otherwise.

420. Both PW3 and PW4 testified before the court that the 1st and 2nd Defendants generated and issued a letter of allotment in favour of one Hon Sharif Nasir. In this regard, it was contended that the letter of allotment was in respect of L.R No. 209/6237. However, it was stated that before the letter of allotment could be progressed Hon Sharif Nasir [now deceased] wrote a letter seeking for subdivision and issuance of two titles.
421. Suffice it to point out that the request by Hon Sharif Nasir was granted and the Directorate of physical planning proceeded to prepare the requisite PDP relative to the subdivision of L.R No. 209/6237.
422. Following the subdivision of L.R No. 209/6237, evidence abound that the commissioner of land issued two [2] sets of Letters of allotment dated the 28th February 1996 and the 8th March 1996, respectively. For good measure, the letter of allotment dated the 28th February 1996 was in respect of L.R No. 209/12966.
423. It is also instructive to recall that prior to and before the issuance of the two letters of allotment, the directorate of physical planning prepared and generated PDP attendant to and underpinning the



issuance of the letters of allotment. In this respect, it suffices to take cognizance of the evidence of DWC 2 [defence to the Counterclaim witness number 1] namely, Mr. Arthur Kanyanchwa Mbatia.

424. The witness herein testified and confirmed that the director of Physical Planning prepared Part Development Plan [PDP] in respect of L.R No's 209/12965 and 12966 and thereafter forwarded the Part Development Plan[s] to the commissioner of lands.

425. The relevant evidence of Mr Arthur Kanyancwa Mbatia which speaks to the preparation of the Part Development Plans [PDP] is discernible from cross examination by learned counsel for the 3rd Defendant.

426. Instructively, Kanyanchwa Mbatia stated as hereunder;

“I do confirm that the director of physical planning enclosed two copies of the PDP. I do confirm that the PDP's have also been certified. I do confirm that the documents are genuine. I wish to add that the PDP's before the court are genuine”.

427. Whilst still under cross examination, the witness stated that the directorate of physical planning forwarded the PDP's vide a letter to the commissioner of land, and the witness added as hereunder;

“I do confirm that the letter references the two PDP's and the numbers thereof. The PDP's herein refer to L.R No. 209/12965 and 12966. The plan that I have availed was approved on the 20th February 1996. The approval was by the commissioner of lands. I do confirm that there are signatures of the PDP and it is true there is a signature of the commissioner”.

428. Furthermore, whilst under re-examination by learned counsel for the Honourable attorney general DWC2 [Arthur Kanyanchwa Mbatia] stated as hereunder;

“I do confirm that there was a PDP which was duly signed by the director of physical planning. The director of physical planning duly approved the PDP”.

429. DWC2 whilst still under re-examination also stated thus;

“I wish to reiterate that the titles by the claimants are valid. I wish to say that the issues as to whether the titles are valid shall be determined by the court”.

430. It is worth recalling that Arthur Kanyancwa Mbatia is the Assistant director of physical planning. Indeed, same testified for and on behalf of the chief land registrar and the attorney general. Furthermore, it is not lost on the court that this is the witness who has expert knowledge pertaining to the checking and approval of the PDP's.

431. To my mind, the evidence of this witness demonstrates beyond peradventure that the alienation of L.R No's 209/12965 and 209/12966, respectively, were preceded by the preparation of the requisite Part Development Plans [PDP] in accordance with the Physical Planning Act, Chapter 286, [now repealed].

432. Pertinently, there is no gainsaying that the preparation of the Part Development Plan [PDP] is integral to the allocation or alienation of a designated parcel of land because the PDP does authenticate and verify the availability or otherwise of the land in question.

433. As pertain to the 1st procedural aspect, relating to the allocation of the suit property, I return a finding that the alienation and allocation in question was procedural and lawful, taking into account that



the requisite Part Development Plan[s] were duly prepared and thereafter approved by the designated officer[s].

434. To this end, I beg to take cognizance of the decision of the Supreme Court in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated and observed as hereunder;

104. 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 allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

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

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, “the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land.”



435. The second aspect that is also relevant and material in discerning whether the allocation was lawful touches on the mandate and or powers of the commissioner of land who executed the letter of allotment.
436. DW1 [Zablon Mabea] testified that same issued the letters of allotment in respect of the suit properties to Hon Sharif Nasir [now deceased] albeit on the instructions of the president. Indeed, it was the testimony of DW1 that the allocation of the two properties was a direct allocation by the president of the Republic of Kenya in exercise of his powers pursuant to the provisions of Section 3 of the Government *land Act*, Chapter 280, Laws of Kenya, [now repealed].
437. To this end, it suffices to take cognizance of the evidence of DW1 whilst under cross examination by learned counsel for the 3rd Defendant.
438. Same stated as hereunder;
- “The Grant was issued in favour of Hon Sharif Nasir. The grantor was the president of Kenya. The document at page 81 has the authority shown thereof. The authority was a direct approval from the president. I do wish to state that D/A means direct authority. Direct authority was from the president”.
439. Whilst under cross examination for the Plaintiff, DW1 stated as hereunder;
- “I wish to add that the proviso to Section 4 of the Government Lands Act prohibits the commissioner of land from exercising certain powers. The allocation of the land in question were done pursuant to the direction of the president. It is the president who authorize the allocation.
- I repeat that the allocation was authorized by the president who was the one chargeable of the provisions of the Government *Land Act* chapter 280 Laws of Kenya’.
440. Whilst still under cross examination by learned counsel for the Plaintiff, DW1 stated thus;
- “I wish to state that the letter of allotment of was issued under the direct authority of the president. The authority of the president is contained at the foot of the application. I have cited and quoted the authority from the president. The authority under reference is ordinarily abbreviated as D/A”.
441. From the testimony tendered by DW1, what becomes apparent is that the letter[s] of allotment relating to the suit properties were issued pursuant to the direct authority [DA] of the president of the republic of Kenya who by dint of the provisions of Section 3 and 7 had the mandate to alienate an unalienated government.
442. On the other hand, the question of existence of the direct authority[DA] and direct allocation of the land was also adverted to by PW4 [James Nyaga Kithinji].
443. It was the evidence of the witness that the impugned letters of allotment contained an authority at the foot thereof. Furthermore, it was contended that the authority was said to have emanated from the president. However, it was the evidence of the witness that he did not investigate the veracity or otherwise of the authority because the authority file was not given to him [witness].



444. To contextualize the evidence of PW4 in this respect, it suffices to take cognizance of the cross examination of PW4 by learned counsel for the 3rd Defendant who undertook extensive cross examination in respect of the instant matter.

445. PW4 stated as hereunder;

“Referred to the document at page 83 of the Plaintiff’s bundle of documents and the witness states that the document thereunder is a letter of allotment. I do confirm that the same is a letter of allotment in favour of Hon Sharif Nasir. I can see an authority at the foot of the letter of allotment. It is the presidential authority”.

446. Whilst still under cross examination PW4 stated as hereunder;

“I do confirm that the president could allocate and alienate land. I know the meaning of what constitute an unalienated land. I have not come across of any challenge of the powers of the president to issue the grant at page 88 of the Plaintiff’s bundle. I have also not come across any letter to challenge the exercise of the power by the president in terms of the grant”.

447. Other than the foregoing, the question of the presidential authority and approval was also adverted to by PW4 during the re-examination. In this regard, PW4 is on record as stating thus;

“I did not investigate the authority. I didn’t ask for the authority because the authority file was not one of the documents shown to me”.

448. To my mind, there is no gainsaying that the alienation of L.R No’s 209/12965 and 209/12966, respectively, were made pursuant to a presidential authority. In any event, the presidential authority that underpinned the impugned allocation of the suit properties has not been impeached or at all.

449. It is worth recalling that PW4 who was the investigator tasked by the Plaintiff to unravel the validity or otherwise of the allocation of the suit properties failed to interrogate a critical segment of the letters of allotment and by extension, the Grant which was issued in favour of Honourable Shariff Nassir [now deceased].

450. In the absence of evidence to dispute and/or discredit the presidential authority, this court is left with no alternative but to return a finding that the impugned allotment were pursuant to presidential authority. For coherence, Section 3 and 7 of the Government Lands Act Chapter 280 Laws of Kenya [now repealed] underpinned the powers/authority of the president.

451. In addition, it is also imperative to reiterate the ratio decidendi of the case of Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others (Civil Appeal E038 of 2021) [2024] KECA 714 (KLR) (21 June 2024) (Judgment), where the court stated and held thus;

23. It was accordingly urged that the suit property was not available for alienation as there were two custom houses thereon, which was evidence that the land was planned, reserved, set aside and in actual use by the Department of Customs and Excise; that once the land was set aside for public purpose, it remained alienated and not available for alienation no matter the state of the developments on the same; and that the fact that buildings became derelict and in need of repair or reconstruction was not a ground to find that the public purpose for which it was reserved no longer exists. In addition, counsel submitted that, under section 3 of the Government *Land Act*, the power to alienate the un-alienated government land was vested in the President, and that such power was delegated to the Commissioner of Lands in limited



circumstances namely: for educational, charitable, sports and other purposes as set out in the Act. It was counsel's submission that none of the exceptions set out there in empowered the 7th Respondent to alienate the suit property and that, in the instant case, the land was allocated as a gift in recognition of the allottee's support of a political party, KANU. Therefore, that having demonstrated that land was set aside or reserved for a public purpose, the onus was on the party alleging the contrary.

452. The third perspective as pertains to the regularity or otherwise of the allocation of the suit properties also entails revisiting the evidence of Arthur Kanyanchwa Mbatia [Assistant director of physical planning]. The witness herein testified during re-examination by Mr. Allan Kamau [principal litigation counsel] and stated as hereunder;

“I wish to reiterate that the titles by the Claimant's are valid”.

453. It is not lost on the court that this piece of evidence is falling from the lips of a senior government officer. In this regard, one wonders why there is a disconnect between the Plaintiff, the directorate of survey and the Honourable attorney general.

454. The final perspective that speaks to the legality or otherwise of the allotment of the suit properties is discernible from the statement of defence which was filed by the Hon Attorney General on behalf of the 2nd, 3rd and 5th Defendants to the Counter-claim.

455. Instructively, the attorney general filed a statement of defence dated the 29th July 2019 and wherein the Hon Attorney General has stated as hereunder;

7. The 2nd, 3rd and 5th defendants confirms the contents of paragraphs 18 of the counterclaim and further states:-

xxv. The allocation of the suit property was done pursuant to a direct approval from the President and the said approval is quoted as authority number 102749/31 DA/VIII/66/ S.L.O (N) 290.

xxvi. The title grant IR.69883 LR.209/12966 was duly processed and executed by then Commissioner of Lands on 8th July, 1996 and registered as IR.69883/1 on 11th July, 1996 for a term of 99 years with effect from 1st October, 1995.

xxvii. The grant IR.69883/1 was endorsed on 1st November, 2004 and special enhanced to Kshs.320,000 and the endorsement was registered as IR.69883/3.

xxviii. The government through the Commissioner of Lands granted consent to transfer the suit property and the respective transfers were duly effected.

xxix. The buildings plans were submitted and in compliance with the special conditions in the grant, vide letter ref No.179622/34 dated 1st March, 2001 from the Commissioner of Lands to the Director of City Planning, the Commissioner of Lands duly approved the buildings plans.

xxx. It would appear that upon obtaining the relevant building approvals, the suit property was subsequently developed.

xxxi. The lessee sought necessary consents from the government which consents were granted and charge documents registered.



- xxxii. From the available records, the lessees have been seeking consent from government to lease portions of the buildings erected on the suit land which consents have been granted over the years.
456. The position adverted to and highlighted by the honourable attorney general at the foot of the statement of defence [details in terms of the preceding paragraph] confirm that the alienation of the suit properties, namely, L.R No. 209/12965 and 12966, respectively was lawful and legal.
457. At any rate, it is not lost on this court that the honourable attorney general is the principal legal advisor to the government and by extension the governmental organizations. In this regard, the explicit position by the honourable attorney general which underpins the legality of the alienation of the suit properties, cannot therefore be wished away lightly. [See the provisions of Article 156 of *the Constitution*, 2010]
458. Other than the foregoing, it is also worth recalling that both DWC 1 and 2 respectively who were called on behalf of the Honourable Attorney General vindicated the legality of the alienation of the suit properties in favour of Honourable Shariff Nassir, [now deceased].
459. In my humble view, there is no gainsaying that the suit properties were lawfully and legally alienated. In fact, DWC2 [Wilfred Muchai Kabue] who is the deputy director of survey also confirm the legality of the deed plans and the processes that were undertaken by the directorate of survey.
460. Before departing from this particular issue, it is imperative to underscore that it is the Plaintiff who had sought to impugn the alienation of the suit properties to Honourable Shariff Nassir, now deceased on the basis of fraud and illegality.
461. To this end, it was therefore incumbent upon the Plaintiff to discharge the burden of proof towards establishing the fraud and/or illegality adverted to. Sadly, the burden cast upon the Plaintiff has not been discharged. At any rate, the burden of proof cannot be deemed to have been discharged by mere averment[s] devoid of substantiation.
462. In the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, the court of Appeal addressed the incidence of burden of proof and stated as hereunder:

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

See D. T. Dobie & Company (K) Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR.



463. The necessity to discharge the requisite burden of proof and on whom same lies was also elaborated upon in the case of *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the Supreme Court of Kenya stated and held thus;
49. Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “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.”
50. This Court in *Raila Odinga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”
51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
464. Flowing from the foregoing analysis, my answer to issue number two [2] is fourfold. Firstly, the allocation and alienation of the suit properties to Honourable Sheriff Nassir [now deceased] was pursuant to a presidential approval [direct allocation] which allocation has neither been impugned nor impeached.
465. Secondly, the alienation of the suit properties in favour of Honourable Shariff Nassir [now deceased] was preceded by the preparation, checking and approval of the Part Development Plan [PDP]. Consequently and in this regard, the allocation was well grounded.
466. Thirdly, the Hon Attorney General vide paragraph 7 of the statement of defence filed has articulated the legal process[es] that were undertaken and complied with prior to and before the alienation of the suit properties to Hon Sharif Nasir [now deceased]. Suffice it to posit that the well articulation by the attorney general has not been challenged by the Plaintiff.
467. Lastly, there is no gainsaying that it is the Plaintiff who walked the claim before the court. Consequently, it was the obligation of the Plaintiff to place before the court cogent and plausible evidence to demonstrate the fraud and illegality that was adverted to. However, the Plaintiff herein has failed the litmus test.

Issue Number 3

Whether the 3rd and 4th Defendants lawfully acquired rights to and in respect of the suit properties; and whether the 3rd and 4th Defendants are bona fide purchasers for value without notice.

468. Having discussed issues number one and two elsewhere herein before and having come to the conclusion that the suit properties were an unalienated government land and thus capable of alienation and that same were lawfully alienated in favour of Hon Sharif Nasir [now deceased], the question that now does arise is whether Hon Sharif Nasir [now deceased] acquired lawful rights to and in respect of the suit properties.



469. It is imperative to state and underscore that upon being issued with the letters of allotment dated the 28th February 1996 and the 8th March 1996 respectively, Honourable Shariff Nassir proceeded to and complied with the terms of the letter of allotment culminating into Grants being issued in his name.
470. Suffice it to point out that a question did arise as to whether or not Honourable Shariff Nassir paid the statutory levies that were highlighted at the foot of the letters of allotment. However, it turned out that the payments were indeed made and the acknowledgement to that effect is duly reflected at the foot of the Grant contained at page 51 of the Plaintiff's bundle of documents. Suffice it to point out that the bundles were duly admitted as exhibits.
471. Additionally, the Honourable Attorney General tendered and produced before the Court various documents including the payment receipts that were issued to and in favour of the allottee. Notably, the receipt[s] in question confirmed that the payments were made and received by the Commissioner of Lands within the prescribed timelines alluded to at the foot of the Letters of allotment[s].
472. On the other hand, it is not lost on this court that the acquisition of lawful rights to and in respect of the suit properties was also vindicated by the two witnesses called by the 2nd, 3rd and 5th Defendants to the counterclaim. Instructively, these are the witnesses who testified on behalf of the Honourable attorney general.
473. Without belabouring the point, it is my finding and holding that Hon Sharif Nasir [now deceased] lawfully acquired rights over and in respect of the suit properties. [See also paragraph 7 of the statement of defence filed by and on behalf of the honourable attorney general].
474. Further and at any rate, it suffices to posit that acquisition of title to property accrues the moment a letter of allotment is issued, the terms thereof are complied with and a certificate of title is issued under the relevant statute. In this regard, there is no gainsaying that Grants were duly prepared, perfected and registered in favour of Hon Sharif Nasir.
475. To underscore the foregoing legal position, I beg to adopt and reiterate the ratio decidendi in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR

It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

476. Having acquired the suit properties herein, Hon Sharif Nassir subsequently sought to sell and transfer the two [2] properties on various dates to the 3rd and 4th Defendants. In this regard, DW2 tendered evidence that the 3rd Defendant was introduced to Hon Sharif Nasir by an Estate agent and thereafter the 3rd Defendant through two [2] of her directors met a negotiated on the purchase price.
477. Furthermore, DW2 also testified that prior to entering into the sale transaction, the 3rd Defendant undertook due diligence including obtaining a certificate of official search and also writing to the commissioner of lands.
478. It was the further evidence of DW2 and DW5 respectively that the commissioner of lands responded to the enquiries as to whether the transfer of the suit properties was acceptable. Suffice it to point out that DW2 confirmed that the 3rd Defendant received a correspondence from the commissioner of lands to the effect that the land lawfully belonged to Hon Sharif Nasir and the transfer was acceptable.
479. It is instructive to note that the question pertaining to the due diligence that was undertaken by and on behalf of the 3rd and 4th Defendant substantially arose in the proceedings before hand.



480. In particular, PW4 [James Nyaga Kithinji] spoke to the fact whilst under cross examination by learned counsel for the 3rd Defendant. The relevant aspect of PW4's testimony is reproduced as hereunder;

“The document at page 3 is a letter by the 3rd Defendant and the letter is addressed to a government officer. The letter is explicit and the same was duly responded to by the commissioner of lands. I wish to add that the commissioner of lands could act through her officers. I do confirm that the letter by the commissioner of lands gave a clean bill of health as pertains to the suit property. the letter shows that there was no objection to the intended transfer.

481. Whilst still under cross examination by learned counsel for the 3rd Defendant, PW4 stated thus;

“I now wish to confirm that the commissioner advised and approved the sale of the suit property. the commissioner of lands has not questioned the letter herein. I am not aware of any government department which has question the transaction involving the sale to the 3rd Defendant herein”.

482. From the testimony of PW4, what becomes apparent is that the 3rd Defendant did not only carry out the search at the land registry but same ventured forward to ascertain and authenticate the root/validity of the certificate of title at the foot of the suit property.

483. Other than PW4, it is also instructive to revert to the evidence of PW3 [Pauline Nyagutu Murithia]. Notably, PW3 was the acting chief land registrar and same recorded a witness statement which was duly adopted before the court.

484. Whilst speaking to the question of the search and the propriety of the allotment of the suit properties, PW3 is on record stating as hereunder whilst under cross examination by learned counsel for the 3rd Defendant;

“Referred to page 75 of the Plaintiff's bundle of documents and the witness states that the letter originates from the ministry of lands. The letter is addressed to the Plaintiff in this case. The letter contains the details of the property in question. The L.R No. is 209/12966 is the land that was subdivided. The letter herein confirms that the suit property was alienated to Hon Sharif Nasir. The contents of the letter are explicit. I don't have any letter that has rescinded/countermanded the contents of the letter from the ministry of lands”.

485. The totality of the evidence placed on record, demonstrate[s] concerted efforts that were put in place not only by the 3rd Defendant but also the 4th Defendant to authenticate the validity of the titles prior to purchase.

486. Furthermore, the various government departments including the ministry of lands, the chief building surveyor and the commissioner of land [now defunct] all confirmed the propriety of the title.

487. To my mind, the 3rd and 4th Defendants undertook the requisite due diligence and were thus entitled to act on the information that was availed by the concerned/designated government department. In any event, the scope of the due diligence that was done by the 3rd and 4th Defendants is also underscored by the honourable attorney general.

488. Having undertaken the requisite due diligence and having acted upon the validity of the information supplied, I beg to underscore that the 3rd and 4th Defendants therefore derived a legitimate expectation on the basis on the documentation. In this regard, it suffices to cite and reference the decision of the



supreme court in the case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (17 June 2022) (Judgment), where the court discussed the import, tenor and scope of the principle of legitimate expectation.

489. For coherence, the Supreme Court [the Apex Court] stated thus;

50. In the 4th Edition, Vol 1 (1) At page 151, paragraph 81 of the Halsbury’s Laws of England, legitimate expectation is described as follows: “A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice”.

51. Further according to De Smith Woolf & Jowell, “Judicial Review of Administrative Action” 6th Edn Sweet & Maxwell page 609; “A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage.”

52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

53. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate.

54. This is the position taken by this court in the CCK Case where it was held that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. For an expectation to be legitimate therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation. We then went on to find the emerging principles on legitimate expectation to be that;

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.”

490. Having reviewed the totality of the evidence on record as pertains to the evidence and scope of the due diligence that was undertaken by the 3rd and 4th Defendants; and having taken cognizance of paragraph 7 of the statement of defence filed by the honourable attorney general, it is my finding and holding that the 3rd and 4th Defendants are entitled to invoke, rely upon and espouse the doctrine of bona fide purchaser for value without notice.

491. Instructively, the various endeavours that were confirmed and acknowledged by PW3 and PW4 on one hand and DW2 and DW5 on the other hand, demonstrates due diligence and thus the 3rd and 4th Defendants fit within the parameters that were espoused in the case of Dina Management Limited



v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), where the court held as hereunder;

90. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

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

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

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

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

492. In a nutshell, my answer to issue number three [3] is threefold. Firstly, Honourable Sharif Nasir acquired lawful and legitimate title to and in respect of the suit properties and thus same had the requisite capacity to sell and/or dispose of the suit properties. In any event, the Hon Attorney General has vindicated the legality of the interests that were acquired by the designated allottee.

493. Secondly, the 3rd and 4th Defendants undertook extensive and apposite due diligence and same cannot therefore be said to have been complicit in any fraud and or illegality. In any event, it suffices to reiterate that there was no scintilla of evidence that was placed before the court to underpin the omnibus allegations that were thrown onto the 3rd and 4th Defendants.

494. Lastly, the 3rd and 4th Defendants, are indeed bona fide purchasers for value of the suit properties without notice of any defect in the title of the predecessor. Nevertheless, it is worth recalling that the court has found and held that what comprises the suit properties had not been reserved for any public purpose, save for the allocation to East African Common Services Authority, now defunct.



Issue Number 4

What reliefs/remedies, if any ought to be granted.

495. The parties herein have filed cross-cutting claims at the foot of their respective pleadings. To start with, the Plaintiff has sought for a plethora of reliefs at the foot of the Plaint dated the 20th February 2019. Owing to the diverse nature of claims sought, it is instructive that the claims be addressed singularly with a view to ascertaining their propriety or otherwise.
496. To start with, the Plaintiff herein has sought a declaration that the letter of allotment dated the 27th September 1995 issued by the 1st Defendant and allotting Sharif Nasir L.R No. 209/6237 is null and void.
497. Nevertheless, it is worth pointing out that the 1st Defendant as a person did not issue and/or execute the letter of allotment under reference. In any event, it is not lost on the court that the said letter of allotment was underpinned by a direct approval by the president.
498. Other than the foregoing, there is also the aspect that touches on the estate of Hon Sharif Nasir. What I hear the Plaintiff to be seeking is a declaration that is destined and intended to impact upon the estate of Sharif Nasir. However, there is no gainsaying that the estate has not been joined. In this regard, it suffices to underscore that the orders sought at the foot of the declaration under reference are bound to impact upon the estate of Sharif Nasir who has not been joined.
499. I am afraid that this Court is not at liberty to proceed and issue declaration[s], which will impact on the rights and interests of person[s], who have not been joined in the matter. Certainly, such an endeavour would be contrary to and in contravention of the provisions of Article 50[1] of *the Constitution*, 2010. [See also the holding in the case of Onyango versus Attorney General [1987] eklr]. [See also the decision of the Court of Appeal in the Speaker, County Assembly of Kisumu and Others versus The Clerk, Kisumu County Assembly Service Board and Others [2015]eklr].
500. The other claim being sought by and on behalf of the Plaintiff touches on and concern declaration that the Grant No. I.R 69883 [L.R No. 209/12966] and Grant No. I.R 68738 [L.R No. 209/12965], are null and void. However, it is worth recalling that the two Grants which are sought to be impugned arose from the letters of allotment dated the 28th February 1996 and 8th March 1996 which letters of allotments have not been invalidated.
501. Furthermore, it is important to recall that the two [2] letters of allotments dated 28th February 1996 and 8th March 1996 are the letters of allotments which contains the presidential approval and which presidential approval PW4 did not interrogate. To my mind, the declaration sought herein is without foundation.
502. Notwithstanding the foregoing, there is no gainsaying that the declaration sought are informed by the contention that what constitutes the suit properties had hitherto been alienated to the East African Commons Services Authority [now defunct] and hence the suit properties were not available for alienation or allocation at all.
503. However, I beg to reiterate that the issue as to whether the suit properties [which hitherto comprised of L.R No. 209/6237] were alienated government land was discussed at the foot of issue number one [1] elsewhere herein before.
504. Additionally, the Plaintiff has also sought to invalidate the creation and registration of the various charges over and in respect of the suit properties. In this regard, the Plaintiff has contended that the



registration of the said charges did not convey to and/or in favour of the 5th Defendant any lawful interests.

505. Yet again, the foundation of that contention stems and/or flows from the position that what comprises the suit properties, were not available for alienation in the first place. However, it bears repeating that the finding in respect of issue number one [1] stands and in this regard, the declaration sought is not legally tenable.
506. Other than the foregoing, the Plaintiff has also sought for an order of eviction as against the 3rd and 4th Defendants. To my mind, the 3rd and 4th Defendants have placed before the court plausible and cogent evidence to underpin the legality of their titles to the suit properties.
507. In this respect, I beg to adopt and reiterate the position espoused in the case of Moya Drift Farm Ltd. v. Theuri (1973) EA 114, where the court of appeal for eastern Africa underscored the scope of the rights of the registered owner of the landed property.
508. Finally, the Plaintiff has sought an order of permanent injunction. However, having found and held that the 3rd and 4th Defendants have espoused valid rights and lawful interests over the suit properties, it suffices to state that an order of permanent injunction cannot issue against the registered proprietor. To this end, I am afraid that the prayer for permanent injunction is not merited.
509. At any rate, I am reminded of the dictum in the case of Nguruman Ltd v Jan Bonde Nielsen & Others [2014]eKLR, where the court of appeal stated and held thus;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

510. Other than the claims raised by the Plaintiff, the 5th Defendant/1st Counter-claimer has also sought for a plethora of reliefs at the foot of the counterclaim dated the 20th May 2019. Consequently, it suffices to review the reliefs sought and discern whether same are legally tenable or otherwise.
511. To start with, the 5th Defendant/1st Counter-claimer has sought for a declaration that the chargor is the absolute owner of L.R No. 209/12966. In this regard, it bears repeating that the court has since rendered itself on the question of ownership rights of the chargor [who is the 3rd Defendant in the main suit]. Simply put, it is my finding that the 3rd Defendant [chargor] is the lawful owner of L.R 209/12966.
512. The second prayer that has been sought for relates to a declaration that the 5th Defendant/1st Counter-claimer has an indefeasible chargee's interests over and in respect of the property, namely, L.R 209/12966. The answer to the prayer herein is in the affirmative.
513. Other than the foregoing, the 5th Defendant/1st Counter-claimer has also sought for an order of permanent injunction to restrain the Defendants to the Counterclaim from interfering with the charges interest over and in respect of the suit property. Insofar as the 5th Defendant still holds the charge over the suit property and subject only to the equity of redemption, it is my finding that the orders of permanent injunction are merited.
514. On her part, the Third Defendant/ 2nd Counter-claimer has sought various reliefs at the foot of the counterclaim dated the 2nd February 2023. Instructively, one of the reliefs sought by the 3rd Defendant/2nd Counter-claimer is to the effect that the effect herein has no powers under *the constitution*, the Ethics & Anti-Corruption Act or the Anti-Corruption & Economic Act to initiate the action for recovery of public land except in accordance with the law.



515. What I hear the 3rd Defendant/2nd Counter-claimer to be saying is that the filing of the suit beforehand and the endeavour by the Plaintiff to recover the suit properties, is unconstitutional and thus invalid. However, it is worth noting that the said prayer seeks to invite the court to interrogate some unnamed constitutional provisions and thereafter to render a declaration of unconstitutionality.
516. I beg to underscore, that where a party, the 3rd Defendant/2nd Counter-claimer not excepted, is intent on challenging the constitutionality of an action, it behoves the concerned party to file a constitutional petition and to highlight [sic] the constitutional provisions that are spoken to, so as to enable the court to deal with such questions.
517. Furthermore, the 3rd Defendant/2nd Counter-claimer cannot make an omnibus allegations pertaining to the Plaintiff's lack of powers under *the constitution* without highlighting the constitutional provisions being alluded to and thereafter seeking to partake of a declaration of invalidity. To my mind, courts of law must weary of such blanket invitation[s], like the one being espoused by the Third Defendant herein.
518. Without belabouring the point, I beg to cite and reference the Supreme Court decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment), where the supreme court considered a near similar situation touching on and concerning omnibus invitations impacting on *the constitution*.
519. For coherence, the supreme court stated thus;
64. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against *the Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional.
- The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case.
520. Even though the supreme court was not dealing with the powers of the Plaintiff herein, the ratio decidendi espoused [supra] is to the effect that any endeavour seeking to attract a finding of unconstitutionality of any act or action, requires to be addressed in a constitutional petition and same must be fully argued, before a court of law can make an informed determination.
521. Suffice it to point out that the prayer sought by the 3rd Defendant/2nd counter-claimer, if granted may cause grave consequences. In this regard, it is an issue that can only be spoken to in the right forum taking into account the provisions of Article 165[3] of *the Constitution* 2010.
522. In respect of the prayer for declaration that the 3rd Defendant/2nd Counter-claimer is the lawful and absolute owner of L.R No. 209/12966 [I.R No. 69883], I do return a positive finding. In any event, the point herein was amplified whilst discussing issue number three [3] elsewhere herein before.
523. Finally, the 3rd Defendant/Counter-claimer has sought for an order of permanent injunction to restrain the Plaintiff/1st Defendant to the counterclaim from interfering with her [3rd Defendant's] rights to the suit property. Similarly, I am minded to decree that the prayer for permanent injunction is well grounded. [See *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] eKLR].
524. On behalf of the 4th Defendant/3rd Counter-claimer several prayers have been sought at the foot of the counterclaim but which essentially mirror the relief[s] being sought by the 3rd Defendant/2nd



- Counter-claimant. Suffice it to point out, that the 4th Defendant/3rd Counter-claimant has laid a claim pertaining to ownership of L.R No. 209/12965 [I.R No. 68738].
525. Whilst discussing issue number three[3] elsewhere herein before, this court found and held that the 3rd and 4th Defendants are indeed bona fide purchasers for value. Furthermore, the court also found and held that having acquired lawful rights to and in respect of the suit properties, both the 3rd and 4th Defendants are entitled to the requisite protection under the law.
526. Arising from the foregoing, I find no difficulty in holding that the 4th Defendant/3rd Counter-claimant is indeed the absolute and indefeasible owner of L.R No. 209/12965 [I.R No. 68738].
527. Similarly, the 4th Defendant/3rd Counter-claimant has also sought for an order of permanent injunction to restrain the Plaintiff/1st Defendant to the counterclaim from interfering with her [4th Defendant's] right to and interests over the suit property. Instructively, one of the rights that vests in the registered owner of a landed property is the right of exclusive possession, occupation and use. [See Sections 24 and 25 of the *Land Registration Act*, 2012].
528. Taking into account the foregoing observation[s] and coupled with the dictum in the case of *Nguruman Limited v Jan Bonde Nielsen* [2014]eKLR [supra], I find and hold that the 4th Defendant/3rd Counter-claimant is entitled to the orders of permanent injunction.
529. In short, an order of permanent injunction is hereby issued.

Conclusion:

530. The dispute at the foot of the instant matter touched on and concerned the legality of the allotment of what now comprises the suit properties. To prove her case, the Plaintiff herein summoned and called various witnesses including one Zakayo Mwendwa Mwega who was hitherto a senior deputy director of survey. However, same had retired by the time of giving his testimony before the court on the 1st February 2021.
531. Whilst tendering his evidence, the said witness stated that the process leading to the sub-division of L.R No. 209/6237 was not undertaken in accordance with the law.
532. On the other hand, the 2nd, 3rd and 5th Defendants to the counterclaim [the Honourable Attorney General], called various Witnesses including Mr. Wilfred Muchai Kabue who testified as DWC2. On his part, the said witness posited that the survey and the resultant sub-division L.R No. 209/6237 [original parcel] was lawful. Furthermore, the witness also posited that all the requisite approvals and authorizations were issued. Instructively, the net effect of the testimony of the said witness is that the survey and the resultant preparation of the deed plans were lawful.
533. Suffice it to state that the two [2] witnesses who are both senior officers at the directorate of survey gave contradicting and conflicting testimonies. In this regard, the court was left in a quandary/ conundrum as to which of the two [2] sets of the evidence is credit worthy or better still believable.
534. Secondly, there is also the interesting aspect brought to the fore by the 2nd, 3rd and 5th Defendants to the counterclaim. Suffice it to state that the said Defendant/Counter-claimants are represented by the Honourable Attorney General. At the foot of paragraph 7 of the statement of defence filed on their behalf, the Honourable Attorney General has stated and reaffirmed that the alienation and registration of the suit properties were lawful and in accordance with the law.
535. However, without perfecting any amendment to the statement of defence dated the 29th July 2019, the same attorney general has turned round and at paragraph 28 of the written submissions has now taken a contrary position. Suffice it to posit that the contents of paragraph 28 of the written submissions is not



only contrary to the pleadings on record, but also the evidence of the witness called by the Honourable Attorney General.

536. To my mind, the juxtaposition of the statement of defence filed by the honourable attorney general as against the evidence tendered on hand and against the submissions filed on the other hand, bring to the fore a clear situation of approbating and reprobating at the same time.
537. However, there is no gainsaying that one, least of all the Honourable Attorney General cannot be oscillating between diverse legal position[s] in the same matter. Quite clearly, such endeavour[s] are inimical to the doctrine of departure. [See Order 2 Rule 6 of the Civil Procedure Rules, 2010]. [See also the decision in the case of Dakianga Distributors Ltd versus Kenya Seed Company [K] Limited [2015]eklr].
538. Finally, there is also the perspective of the Plaintiff and the Honourable Attorney General taking conflicting position[s] in respect of the matter. It is worth recalling that PW4 whilst being cross examined took a position that the contents of the statement of defence by the Honourable Attorney General is incorrect. Interestingly, what played itself out before the court connotes some [sic]cold war, which does not bode well with the Kenyan Constitutional architecture.

Final Disposition:

539. Flowing from the analysis [details enumerated in the body of the Judgment herein], it must have become crystal clear that the Plaintiff herein has failed to establish and/or demonstrate the allegations that coloured the plaint dated the 20th February 2019.
540. On the other hand, it is instructive to point out that the 3rd, 4th and 5th Defendants, respectively, have been able to demonstrate on a balance of probability that the suit properties were lawfully acquired and thereafter lawfully charged to and in favour of the 5th Defendant,
541. Consequently and in the premises, the final orders that commend themselves to the court are as hereunder;
- a. The Plaintiff's suit vide Plaint dated the 20th February 2019 be and is hereby dismissed.
 - b. Cost of the suit be and are hereby awarded to the Plaintiffs are hereby awarded to the Defendants.
 - c. The 3rd Defendant's counterclaim dated the of 2nd February 2023 be and is hereby allowed on the following terms;
 - i. A declaration be and is hereby issued to the effect that the 3rd Defendant/2nd Counter claimer is the lawful and indefeasible owner of L.R No. 209/12966 [I.R No. 69883].
 - ii. A permanent injunction be and is hereby issued to restrain the Plaintiff/1st Defendant to the counterclaim from in anyway interfering with the 3rd Defendants right or interests in the property namely, L.R No. 209/12966 [I.R No. 69883].
 - iii. Costs of the counterclaim be and are hereby awarded to the 3rd Defendant.
 - iv. Any other relief at the foot of the counterclaim dated the 2nd February 2023 which is not expressly granted is declined.
 - d. The 4th Defendant/3rd Counter-claimer dated the 3rd July 2023 be and is hereby allowed in the following terms;



- i. A declaration be and is hereby issued to the effect that the actions of the First Defendant in the Counterclaim with the complicity of the Second, Third and Fourth Defendant in the Counterclaim purporting to effectively deprive the Plaintiff in the Counterclaim [4th Defendant] of its title to the property comprised in LR 209/12965 IR 68738 by the cancellation thereof are illegal and unconstitutional.
 - ii. A declaration be and is hereby issued that the Plaintiff in the Counterclaim [4th Defendant] is the absolute and indefeasible owner of the property comprised in LR 209/12965 IR 68738.
 - iii. An order of permanent injunction be and is hereby issued restraining the Plaintiff/1st Defendant in the counterclaim from interfering in any manner whatsoever with the Plaintiff in the counterclaim's rights and interest in the property comprised in LR No 209/12965 [IR 68738] and its quiet possession and enjoyment thereof.
 - iv. Costs of the counterclaim be and are hereby granted to the 4th Defendant and same to be borne by the Plaintiff/1st Defendant to the counterclaim.
 - v. Any other reliefs contained at the foot of the 4th Defendant's counterclaim, which is not expressly granted is hereby declined.
- e. The 5th Defendant's counterclaim dated the 20th may 2019 be and is hereby allowed on the following terms;
- i. A declaration be and is hereby issued that the Chargor is the absolute owner of that whole parcel of land known as L.R No. 209/12966.
 - ii. A declaration be and is hereby issued that the Plaintiff to the counterclaim [5th Defendant] has indefeasible Chargee's rights over the suit property known as L.R No. 209/12966.
 - iii. An order of permanent injunction be and is hereby issued restraining the Defendants to the counterclaim and more particularly the 1st Defendant to the counterclaim, their agents, servants and/or employees from interfering with the Chargor's absolute ownership of the property known as L.R 209/12966.
 - iv. A declaration be and is hereby issued that the Charges created by the Plaintiff/5th Defendant counter-claimer over the property known as L.R. No. 209/12966 are validly registered as encumbrances over the property.
 - v. An order of permanent injunction be and is hereby issued restraining the Defendants to the counterclaim and more particularly the 1st Defendant to the counterclaim, their agents, servants and/or employees from interfering with the Plaintiff's interest over the property known as L.R 209/12966 as a Chargee.
 - vi. Costs of the counterclaim be and are hereby awarded to the 5th Defendant/Counter-claimant [Plaintiff in the Counterclaim].
 - vii. Any other reliefs contained at the foot of the counterclaim dated the 20th May 2019 which has not been expressly granted is hereby declined.

542. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2024



OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Ms. Faith Ng’ethe and Mr. Kisaka for the Plaintiff/1st Defendant to the counterclaim.

Mr. Mwachofi for the 1st Defendant.

Mr. Kiprotich for the 2nd Defendant.

Mr. George Oraro SC and Mr. Paul Kamara for the 3rd Defendant/2nd Counter claimer.

Ms. Jan Mohamed SC for the 4th Defendant/3rd Counter claimer..

Mr. Allen W Gichuhi SC for the 5th Defendant/1st Counter-claimer

Mr. Allan Kamau [Principal Litigation Counsel] for the 2nd, 3rd and 5th Defendants to the Counterclaim.

