



**Mwandiku & another v Mubia Holdings Limited & 2 others
 (Environment & Land Case 251 of 2013 & 57 of 2016 (Consolidated))
 [2023] KEELC 16998 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16998 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
 ENVIRONMENT & LAND CASE 251 OF 2013 & 57 OF 2016 (CONSOLIDATED)
 LL NAIKUNI, J
 FEBRUARY 27, 2023**

BETWEEN

CAROLINE MWELU MWANDIKU 1ST PLAINTIFF

MONIKA HERTA ELFRIEDE BEHRMANN 2ND PLAINTIFF

AND

MUBIA HOLDINGS LIMITED 1ST DEFENDANT

MUBIA HOLDINGS LIMITED (REGD IN 1975) 2ND DEFENDANT

**AS CONSOLIDATED WITH
 ENVIRONMENT & LAND CASE 57 OF 2016**

BETWEEN

CAROLINE MWELU MWANDIKU PLAINTIFF

AND

MUBIA HOLDINGS LIMITED 1ST DEFENDANT

MUBIA HOLDINGS LIMITED (REGD IN 1975) 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment herein relates to two consolidated but rather convoluted suits pertaining to one subject matter. The said suit property is known as the Land Reference No. Plot No. 533 Section III Mainland North CR No. 14272 situated at Kikambala area at Kilifi (hereinafter referred as “The Suit Property”).



In order to fully appreciate the dispute in the consolidated suit, its significant that the Court provides some brief background of the matter as set out herein.

2. Arising from the nature of the matter, there will be need for the Honourable Court to expend a little more time on the background of this matter. For ease of reference, it is significant to point out that there are some common denominators and features that keep on running through this case and which tend and may cause perpetual confusion. These are a). There exist two supposedly registered companies by limited guarantee under the Companies Act and bearing identical names – Mubia Holdings Limited b). Both of these companies claim to be the registered owners of the suit properties. These issues will be deliberated on in depth as part of the Judgment. and c). Two separate suits filed over the same subject matter.
3. As regards the two separate suits. Initially, the first one was the Civil Case ELC No. 251 of 2013 at the beginning instituted by both the 1st and 2nd Plaintiffs - Caroline Mwelu Mwandiku (Hereinafter referred to as M/s. Mwandiku”) and Monika Herta Elfriede Behrmann (Hereinafter referred to as Mrs. Behrmann”) against the 1st, 2nd and 3rd Defendants named herein. It was commenced in form of the originating summons on 9th November, 2013 and dated 11th October, 2013 (Hereinafter referred to as “The ELC No. 251 of 2013”). The summons to enter appearance were served and all the Defendants complied with the provisions of Orders 6 and 7 of the Civil Procedure Rules, 2010 by filing their Defences accordingly. The second suit was the civil case No. 57 of 2016 (OS) subsequently instituted by “M/s. Behrmann”) filed her suit in form of a Complaint against the 1st, 2nd and 3rd Defendants as named herein. (Hereinafter referred to as “The ELC No. 57 of 2016”). At a later stage, the Honourable court shall explain the circumstances that led to this second suit and the directions given by court thereof. From the records, despite of the Summons to enter appearance having been served and Defences filed, the ELC No. 57 of 2016, proceeded on undefended and on 11th April, 2017 Judgment was entered in favour of the Plaintiff to wit:-
 - a. The Land Registrar to cancel the registration of Muiba Holding Limited as the owner of Plot No. 633 Section III Mainland North, CR. No 14272.
 - b. The Land Registrar to register the Plaintiff, Monika Herta Elfriede Behrmann as the owner of Plot No. 533 Section III Mainland North C.R. Number 14272.
 - c. The Land Registrar to issue a Certificate of title to the Plaintiff Monika Herta Elfriede Behrmann over Plot No. 533 Section III Mainland North, CR Number 14272.
 - d. The Plaintiff shall have costs of the suit.
4. On 7th July, 2017 – the Plaintiff/Applicant – M/s. Mwandiku in the Civil suit ELC No. 251 of 2013 moved this court through an application dated 4th July, 2017, brought under the provision of Order 1 Rules 10 (2) and 11 of Civil Procedure Rules, 2013 seeking to have the aforesaid Judgment, the Decree and all other consequential orders by this Court to be set aside on grounds that there already existed the Civil suit ELC (O.S.) No. 251 of 2015 over the same subject matter being the suit property and parties and yet this information had not been disclosed. The Plaintiff/Applicant indicated that although she had been living on the Suit Property but she had neither been at all involved, participated nor was aware of the said suit – ELC No. 57 of 2016. She was apprehensive that after the delivery of the Judgment and an eviction order made, she risked being declared a destitute before being heard. Further, she also alleged that, the Plaintiff in that case, M/s. Behrmann may have acquired the Certificate of title deed through fraudulent means to her detriment as she also claimed to be having proprietary interest and rights over the same suit property.



5. Upon being heard, on 10th April, 2018 this Honorable Court delivered its ruling by granting the following orders:-
 - a. That the Judgment and decree dated 11th April, 2017 and all other sequential orders are set aside.
 - b. That Caroline Mwelu Mwandiku be and is hereby enjoined in this suit as a Defendant.
 - c. That this suit be and is hereby consolidated with ELC Case No. 251 of 2013 (OS) for hearing and determination.
 - d. That the suit ELC No. 251 of 2013 (OS) to be the lead file.

6. Subsequently, the Plaintiff herein, in ELC No. 251 of 2013 (OS) - M/s. Mwandiku, served the 1st Defendant – Mubia Holding Limited with summons to enter appearance dated 6th April, 2016. On 18th July, 2016, the said 1st Defendant entered appearance and filed a Defence and Counter Claim dated 25th April, 2018.

In the meantime, it is instructive to note that M/s. Mwandiku – instituted a Constitution Petition No. 8 of 2016 at ELC Malindi against the National Land Commission (“Hereafter referred to as the NLC”) over the same suit property and on 2nd May, 2017 the said Court granted her the Conservatory orders she had sought over it.

On 16th July, 2018, by then as the Interested Party – trading in the names of “Mubia Holdings Limited” (Registered in 1975)” vide their Advocate the law firm of M/s. N. Kiagayu & Co. Advocates filed their Notice of appointment. They moved Court vide a notice of motion application dated 13th July, 2018 seeking for the following orders:-

- a. To be joined in the proceedings and liberty to defend their case.
 - b. To be granted temporary Injunction orders prohibiting Mr. Joseph Likoot Lenangetai, the registered owner to the suit land from any further dealings.
 - c. To have the Registrar of Title at Mombasa delete Entry No. 8 from the register of the suit land.
 - d. To have the Provisional Certificate of title issued to Monika Herta Elfriede Behrmann on 20th April 2017 in respect of suit land be nullified.
 - e. To have the Registrar of titles Mombasa reinstate the name of Mubia Holdings Ltd. (Registered in 1975) as the legal owner to the suit land.
 - f. To have the Registrar of Title Mombasa delete the registration of the transfer of the suit land by Monika Herta Elfriede Behrmann to one Joseph Likoot Lenangote on the 7th December, 2017.
 - g. That Joseph Likoot Lenangote to be served with pleadings by way of substituted means.
7. In a nut shell, the then Intended Interested Party based their application on the grounds that the suit land had been designed by way of concealment of material facts as M/s. Behrmann and the Interested Party had known each other from 23rd January, 1994. The intended Interested Party had received some cash 20,000 German Deutsche Mark from her vide a memorandum of agreement. They averred that the afore mentioned Judgment delivered in the Civil suit - ELC No. 57 of 2016 was not only against them but also entertained an imposter company – trading as Mubia Holdings Limited registered in the year 2014. To them, their company was known by the names “Mubia Holdings Limited registered in the year 1975.



8. On 15th January 2019 upon hearing the application, the same was allowed accordingly. The Honorable Court directed as follows:-
- a. In the civil case of ELC No. 57/2016 - Monika Herta Behrmann be the Plaintiff; Mubia Holdings Limited – 1st Defendant Caroline Mwelu as 2nd Defendant and Mubia Holdings Limited (registered in 1975) as the 3rd Defendant while (ii) in the Civil case ELC. No. 251/2013 Caroline Mwelu Mwandiku remained as the Plaintiff, Mubia Holding Limited as 2nd Defendant and Mubia Holdings (Registered in 1975) as the 3rd Defendant). However, the two suits be consolidated with ELC. No. 251 taking the lead.
 - b. On 12th March 2019, the Mubia Holdings Limited (registered in 1975) filed their Defence and Counter Claim. On 27th July 2019 the full trial of the matter commenced which proceeded on until 13th June, 2022 when both the Plaintiff and the 1st, 2nd and 3rd Defendants closed their case. Further, for information sake, on 14th June, 2022 with the concurrence of all the parties, the Honorable Court in the presence of all parties, conducted a Site Visit “Locus in Quo” . Pursuant to that, a comprehensive site visit report was prepared. It is attached as part of this Judgment hereof.
9. While this was going on, its on record that through a Certificate of Urgency, M/s. Mwandiku and Behrmann, ideally as the 1st and 2nd Plaintiffs then, on 29th July, 2018 moved this Court in the Civil case ELC. No. 251 of 2013 (OS) seeking for temporary injunction orders against the 2nd Defendant. On 30th January, 2018, out of rage, the 2nd Plaintiff, M/s. Behrmann filed an application before Court seeking to have her name be struck out from the proceedings on grounds that she had neither given M/s. Mwandiku any instructions nor authority to plead and appear on her behalf in that matter. According to her, there was serious misrepresentation of facts and forgery of her signatures as by that time she had been abroad in Germany as shown from her passport which extract she attached in her affidavit. Her contention was that, in so doing, M/s Mwandiku acted in bad faith all intended to swindle her of the suit property. Clearly, there was bad blood between these two ladies. On 20th April, 2018 this court granted the orders by striking out the names of M/s. Behrmann as the 2nd Plaintiff from the ELC No. 251 of 2013 – (OS). Hence, ideally, she became the 2nd Defendant therein.

II. The 1st Plaintiff’s Case in ELC No. 251 of 2013 (OS) – M/s. Mwandiku

10. From the filed pleadings, on 8th November, 2013 the 1st Plaintiff, M/s. Mwandiku filed an Originating Summons dated 11th October, 2013. Later on, the Originating Summons was converted to a Plaint pursuant to the directions taken under Order 37 Rule 11 of the Civil Procedure Rules, 2010. According to the 1st Plaintiff, she had lived on the suit land continuously and uninterruptedly from the 23rd January, 1994, the time of the execution of the agreement. Hence, to her that was a justification for making a claim of a title and ownership to the suit land by virtue of Land Adverse Possession pursuant to the provisions of Sections 7, 13, 37, and 38 of the Limitation of Action Cap 22. She averred that the 2nd and 3rd Defendants herein (M/s. Behrmann and Mrs. Wairagu had always known of her occupation and use of the suit property. She claimed having caused development and invested heavily on the suit land with the knowledge of the Defendants herein. The 1st Plaintiff held that the 3rd Defendant herein had never used nor stepped on the suit land all this period the Plaintiff was in occupation. She averred that it was not in dispute that Mubia Holdings Limited (incorporated in the year 2014) was the registered proprietor to the suit land. She held that initially M/s. Behrmann and herself had filed this suit but later on M/s. Behrmann withdrew from the civil suit ELC No. 251/2013. M/s. Behrmann remained as Plaintiff in the civil suit no. ELC No. 57 of 2016 where her claim was based on an alleged contract between her and the 1st Defendant – Mubia Holdings Limited.



11. From her Supporting Affidavit, M/s. Mwandiku deponed having been invited by M/s. Behrmann to join hands and buy the suit land in the year 1994. She produced an agreement duly executed on 23rd January, 1994 between M/s. Behrmann and one Anne Wairagu. The said agreement stated verbatim:-

“I have today received 20,000/= DM from Monika Herta Elfriede as part payment of Kikambala plotthe two holes are”

It was marked as “Plaintiff Exhibit - “CM -1”. According to her, this was the agreement which conferred them possession and/or ownership to the suit land. However, it was her contention that the 3rd Defendant refuted the contents and substance of this agreement. PW – 1 held that the 3rd Defendant claimed to only have accorded M/s. Behrmann permission to construct a house on a particular portion of the suit property but instead she built on a different parcel. According to the Plaintiff, the agreement she executed with M/s. Behrmann was different from the one exhibited in the Supporting Affidavit. She produced a different agreement which bespoke of a different parcel of land. The Plaintiff averred that the 3rd Defendant had no legal capacity to sell the land to M/s. Behrmann or her as it belonged to Mubia Holdings Limited and not Anne Wairagu.

12. The Plaintiff held that, this was a clear case of land adverse possession. She based her argument on the facts on three (3) reasons. Firstly, that the 3rd Defendant denied this being the correct agreement. The Plaintiff was emphatic having assisted in the drawing of the agreement as she was instrumental in translating it to M/s. Behrmann who neither understood the English nor Kiswahili languages. Secondly, that M/s. Behrmann and M/s. Mwandiku entered and occupied the suit land without the permission or authority of the registered owner. To her, M/s. Behrmann constructed a house on the suit land and which still stood on it. Thirdly, she claimed having been in continuous, open and exclusive uninterrupted occupation and possession of the land.
13. On the 23rd July, 2019, the hearing of the case for the Plaintiff commenced. Whereby she summoned – witnesses. It proceeded on in earnest as follows:-

Examination - in - Chief of PW - 1 by Mr. B. M Musyoki Advocate

14. PW – 1 is called Caroline Mwelu Mwandiku. She was sworn and testified in English language. She stated being a business lady in Mombasa having arrived there in 1993. She was the Plaintiff in the ELC case No. 251 of 2013 in which she filed a supporting Affidavit in support of the originating summons dated 11th October, 2013, which she adopted and relied on as her evidence in this case.
15. She stated having met M/s. Behrmann on her arrival at Mombasa. They became friends for a long duration before they bought the suit property Plot No. 533 Section III MN. In the year 1994, M/s. Behrmann, introduced PW – 1 to a man who later became the father of her child. On 23rd January, 1994 both of them bought the suit property from Mrs. Wairagu. According to her, the Vendor never told them of the exact number of the Plot they bought though it was at the spot wh Berhmann ere they constructed the house. It measured three (3) acres. The photographs, taken in the year 1994, showed the house on the plot. She was the one currently living in the house. The house had six bedrooms. She lived with her three (3) children and 3 workers.
16. To PW – 1 M/s. Behrmann was not living in that house by then. In the year 2013, she moved out as she wanted to go back to Germany. She went to live with a friend in Mtwapa. PW – 1 stated that M/s. Behrmann a refund of some of the purchase price taking that she was now going aboard. PW – 1 was still in the process of refunding her. Later when they conducted an official search, assisted by a Land Surveyor, they found out that the plot was registered in name of Mubia Holdings Limited



whom coincidentally, they came to learn were their immediate neighbors. The search was marked as Plaintiff Exhibit no. 4. They never bought the suit Plot from the company. She informed Court that Mubia Holdings Limited never made an attempt to evict them from the property. They had never sued them in any Court. She refuted having incorporated a company known as Mubia Holdings Limited in the year 2014 nor having any relationship with the said company registered. She did not know nor having met the directors listed in the Memorandum and Articles of Association of Mubia Holdings Limited. She was aware that M/s. Behrmann withdrew from the civil case ELC case No. 251 of 2013 (originating summons). In conclusion, she urged the Court to issue her with the title deed to the suit land. Also, it was her appeal to be awarded the costs of the suit and the suit against her through the Counter Claim to be dismissed with costs.

Cross examination of PW – 1 by Mrs. Njeri Kiagayu Advocate

17. They started this case jointly with M/s. Behrmann. By then, she was 43 years old. She was born in April 1976. By 23rd January, 1994, she was 16 – 17 years. She had dropped out of school in the year 1993 while in Form 3, due to lack of school fees and out of poverty. Having just arrived at Mombasa, she met M/s. Behrmann in the year 1993 M/s. Behrmann was around 41 years old. Pw - 1 never had money nor any income. She was not working. From the Memorandum (agreement) dated 23rd January, 1994 shown to her, she affirmed she was not a party to the memorandum of agreement. However, although she had no money, but contributed DM 10,000 garnered through her boyfriend. PW – 1 admitted that the said contribution was not indicated in the Memorandum agreement nor did she have any prove of it. Additionally, her presence during the execution was not captured anywhere. To her, this was purely out of trust held between them.
18. By then there was no house built on the land. Both M/s. Behrmann and Mrs. Wairagu agreed on the exact spot of the suit land where the house was going to be built. The construction of the house took two (2) years to complete. The house occupied approximately 1/8 acres of the suit land. According to her, M/s. Wairagu showed M/s. Behrmann the whole suit property being the one for sale. There was no doubt in the memorandum of which land was being bought. They knew the direction and physical location on the ground of what they were transacting on. The agreement says payment of part of Kikambala Plot 533. It appeared there were two agreements. One was signed five (5) times and another four (4) times. She could not tell the area from where the house occupied. The house was on Plot No. 533. It was not a modern one. It had one huge bedroom and a small workers house. It was secured by a barbed wire fence and big nature trees. It was permissible as an enclosure. It had a metal gate. The fence and the trees marked the boundary of where she lived and where Mrs. Wairagu's house was. A few meters from her gate there was a gate to Mrs. Wairagu's house. From her confined area, she would not know what happened in the neighboring home or area.
19. Based on the fence, they were like two parcels of land. She was not aware that both parcels of land consisted of the same parcel number 533. By the fact that she started living on the suit land, it meant she owned the place. She was penniless but she had a boyfriend of the German origin who paid for her. He was called Wolfgang. He never lived in Kenya for long. He left soon thereafter. Both of them had a son of mixed race while she had two other children who all lived with her there. M/s. Behrmann taught them German language. After construction was complete, she moved in with M/s. Behrmann's mother and husband. They lived in the house until the year 2013. PW – 1 later got married. Later on M/s. Behrmann got divorced and the husband left to Germany. M/s. Behrmann got a boyfriend by the name Mr. Joseph Likoot Lenangetai but after a fight he also left. She got another boyfriend called Bob or Tom whom they also separated and he went his way. In the year 2014, they came back together with Mr. Lenangetai.



20. The two families used live in the same house on the suit land. They never used to fight with M/s. Behrmann. She was an angel. There was a gentleman who lived in the neighboring plot. On Mrs. Wairagu's Compound there were 4 unit houses. She knew Mrs. Wairagu was a neighbour and lived in her own house. She only saw them occasionally. She knew the employee. One day he had an accident and PW – 1 took him to hospital. She did not know if Mrs. Wairagu was a director of Mubia Holdings Limited. They took up the main house whenever they came over.
21. She informed court that, in the year 2013, M/s. Behrmann and PW – 1 had an arrangement, for PW – 1 to buy the land as per the enclosed three (3) agreements to wit dated 23rd August, 2013, 4th December, 2013 and 26th June, 2014 respectively. In the agreement dated 21st August, 2013, while M/s. Behrmann was referred as the original occupant, PW -1 was referred to as the financier. She stated to be the financier because she was not in the original document. Her contribution was not included in the Memorandum Agreement. M/s. Behrmann never showed her any other document apart from the memorandum produced signed with by Mrs. Wairagu..
22. PW – 1 stated that the agreement dated 21st January, 2013 was for her to pay to M/s. Behrmann a sum of Kenya Shillings Twenty-Three Million (Kshs. 23, 000, 000/=) so that she could become the sole owner to the suit property. The land was never valued. Clause 3 of the agreement was to give her exclusive possession taking that previously, they had been joint owners. She informed Court that out of this sum, she paid a deposit of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=). She denied having been a financier and a buyer at the same time. A further agreement was dated 4th December 2013. It referred to her as a financier. It was after having filed Civil Case ELC No. 251 of 2013. It showed that from 23rd August 2013, she had paid a further sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) making a total sum paid of Kenya Shillings Two Million Kshs. 2, 000, 000.00). The agreement also confirmed that she had filed suit against the registered owner being ELC No. 251 of 2013. After this, they agreed that M/s. Behrmann would be collecting from her a monthly sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00/=). They had a further agreement dated 26th June, 2014. She had no evidence of all these payments made whatsoever. She never completed paying the agreed purchase price. She was in court on the strength and as a follow up of these three (3) agreements. Without these agreements, the case would not be there. She was claiming the whole parcel of land measuring 3 acres by claim of land adverse possession. She reiterated having moved on to the land in the year 1994. She was the one who lived on the land.
23. They started the case together with M/s. Behrmann but eventually she pulled out. She was fighting for her property. It was M/s. Behrmann's wish to leave her the suit property. She wanted to leave her alone. It was m/s. Behrmann who was approached by one Mrs. Wairagu.

Cross Examination of PW – 1 by Mr. Magiya Advocate.

24. PW – 1 met the father of her first child in the year 1993. Before she had no baby. She got the baby on 16th April, 1995 in Mombasa. She had a Certificate of birth but not in Court. In the year 1993 she was able to speak German. M/s. Behrmann was not fluent in the English language. PW – 1 met the father of her child through M/s. Behrmann. She never took advantage of M/s. Behrmann because of the language. PW – 1 was born in the year 1976. They constructed the house in two (2) years though she had no evidence to support this.
25. PW – 1 lived with M/s. Behrmann, her mother and husband in the same house. They had one garden boy whom she could not remember his name. PW – 1's name was not captured in the memorandum agreement of the year 1994 because she trusted M/s. Behrmann. PW – 1's boyfriend contributed half of the money for the purchase of land. She had no acknowledgment of that payment. The writing was



between M/s. Behrmann and the seller. PW – 1 had nothing in writing. From the year 1994 upto 2013, there was no disturbance from anybody. Neither was there any threat of eviction from the suit land.

26. PW – 1 was not aware of the agreement referring to Plot No. 531. Initially, they had wanted to engage the law firm of Sichangi & Company Advocate as their lawyer. PW – 1 had a company called WOCA Investment Limited. They changed their mind and instead appointed the law firm of Messers. B.M Musyoki Advocate in the year 2013. She was shown a company by the name Mubia Holdings Limited incorporated in year 2014. She was not aware of it and had no relationship with it. PW – 1 informed Court that in the year 2013, M/s. Behrmann and her filed the Civil case ELC No. 251 of 2013 together. M/s. Behrmann signed the authority to plead on her behalf dated 11th October, 2013. She was aware that M/s. Behrmann disputed the authority. They used to live and share a lot of things together. PW – 1 was aware of her being present in the country on 11th October 2013. She saw her documents in the affidavit of M/s. Behrmann dated 29th January, 2018. It showed that she had booked to travel abroad. It confirmed that she had travelled but she had to show the air ticket. The document showed she booked to travel from Frankfurt to Nairobi.
27. PW -1 indicated that there was an adjacent house in the neighbouring plot where M/s. Anne Wairagu lived. It was her who was the neighbor and not Mubia Holdings Limited. PW – 1 admitted that in one of the agreement she signed with M/s. Behrmann she was referred to as a financier. She admitted as being both a financier and purchaser at the same time. She was not aware if M/s. Behrmann had disowned the agreement. She confirmed having attended the NLC proceedings at Malindi. She appeared and tendered her evidence. She was aware the National Land Commission granted a verdict and there was aware that there was an advertisement published. Her advocate informed the NLC that there was a suit pending before Court over the suit property. She refuted having known M/s. Behrmann in the year 2013 and that they never lived together.

Re – Examination of PW –1 by Mr. BM. Musyoki Advocate

28. The two houses for the PW – 1 and Mubia Holdings were separated by a barbed wire and natural hedge fence. The whole suit land measured three (3) acres 1/8 of an acre. It was the compound occupied by the house. She was claiming the whole suit land and not the house only. The actual Plot number for the suit land was 533.
29. From the agreement dated 13th August, 2013, stated that the original owner was living in the land and had invited her since then. PW – 1 was pursuing her own rights. She was not aware of the agreement drawn by Sichangi Advocate as she never signed it. She signed an affidavit sworn on 17th December, 2017 and filed in Court on 19th December, 2017 in the civil case ELC No. 57 of 2016. She was aware that the ruling of the NLC was stopped by court. *The Constitution* Petition in Malindi was completed. An Air ticket never proved that somebody had travelled. She had not seen a boarding pass to that effect.

III. The 2nd Defendant (in ELC No. 251 of 2013 & (Plaintiff in ELC No. 57 of 2016) case.

30. She filed a Plaint on 6th April, 2016 dated even date. From the filed pleadings, she averred that on 23rd January, 1994 she purchased the suit property from a company known as Mubia Holdings Limited for a sum of Deutche Mark Twenty Thousand (DM, 20,000.00) (by then equivalent to Kenya Shillings Two Million 2,000,000.00/=). She averred having signed an agreement for sale and a transfer for the suit property both in triplicates but the Agreement and the transfer were in the possession, custody and control of Mubia Holdings Limited and who had refused to give copies to the Plaintiff.
31. She held that on 20th November, 1996 she conducted an official search and the Certificate of postal search which showed that the suit land was registered in the name of Mubia Holdings Limited. She



stated that on 23rd January, 2014 one M/s. Mwandiku through proxies namely Tonny Kamande and Patrick Kuria Mwangi incorporated a new company with the same name as Mubia Holdings Limited. Thereafter, they fraudulently obtained a provisional title over the suit land in the name of the new company. She provided all the particulars of fraud under Paragraph No. 7 (a) to (d) of the Plaint. According to the Plaintiff, the Defendant knew of the fraud all along and obtained a Provisional Certificate of title and incorporating a new company called Mubia Holdings Limited in year 2014. On realizing this, the Plaintiff lodged a complaint with the NLC which led the titles to be issued to the Plaintiff but the Land Registrar declined insisting on first of all obtaining a Court order. The Plaintiff sought for the following reliefs. These were for:-

- (a) The cancellation of the registration of Mubia Holdings Limited as the owner of the suit land.
- (b) The registration of the Plaintiff's – Monika Herta (M/s. Berhamann) as the owner of the suit land.
- (c) The issuance of the Certificate of Title to the Plaintiff Monika Herta over the suit land.

32. On 20th February, 2020, the 2nd Defendant in ELC No. 2013 and Plaintiff in ELC No. 57 of 2016 testified. For this proceedings, she is reffered ti as Plaintiff Witness – 2. PW – 2 testified as follows:-

Examination – In – Chief of PW – 2 by Mr. Magiya Advocate

33. PW – 2 was called Monika Herta Elfriede Behrmann. She was sworn and testified in English. She lived in Mtwapa. She was a retiree. She filed a suit claiming her Plot – the suit property. She had lived in Kenya for more than twenty (20) years. She signed a statement which she wished to rely on and have it adopted as her evidence. She also filed a list of documents and wished to produce them as exhibits. These were an Memorandum agreement/ acknowledgement dated 23rd January, 1994; a postal search dated 20th November, 1996; a companies search dated 27th May, 2015 for Mubia Holdings Limited; a Letter dated 22nd December, 2015 by the NLC; the determination by NLC dated 10th March, 2016 respectively. PW - 2 produced and had them marked as 2nd Defendant's Exhibits Numbers 1 to 7.
34. The testimony for PW - 2 was that she acquired the suit property from Mrs. Wairagu on 23rd January, 1994. She paid 20,000 Denteche marks as the purchase price. She took possession of the land and started to build a residential house. She was not given the title by Anne Wairagu. Instead, Mrs. Wairagu promised to give her title later. She tried contacting Mrs. Wairagu but who kept on telling her the title was on the way. When she conducted an official search, she found out that the suit land belonged to Mubia Holdings Limited. Mrs. Wairagu had never told her about this information that the plot belonged to Mubia Holdings Limited. She did not know if another company was formed in the year 2014. She met M/s. Mwandiku in the year 2013. She refuted having bought the land jointly with M/s. Mwandiku. She was alone when she purchased the land.
35. In the year 2013, PW - 2 sold the land to M/s. Mwandiku for a sum of Kenya Shillings Twenty-Three Million (Kshs. 23, 000, 000.00). M/s. Mwandiku paid her a sum of Kenya Shillings two Million (Kshs. 2, 000, 000.00). She never completed paying the balance. After she sold the land to her, she promised she would get the title. PW - 2 left her looking for the title and went to Germany. However, when she came back in October 2013, she found out that M/s. Mwandiku had filed a suit and sought to acquire the land by adverse possession. She never instructed M/s. Mwandiku to file suit in her name. The purported authority to plead in the Civil case ELC No. 251 of 2013 was a forgery as she never gave her the authority. She never signed it as she had been abroad during that period. She applied to have her name struck out and was allowed.



36. After M/s. Wairagu refused to give PW - 2 the title and M/s. Mwandiku failed to clear the outstanding balance of the purchase price lodge a complaint on the ownership of the suit land with the NLC. M/s. Mwandiku appeared before the NLC in Malindi. Eventually, the NLC decided in her favour to the effect that the land belonged to PW - 2. Pursuant to that, she decided to institute the civil case ELC No. 57 of 2016 and got the decision of the NLC adopted as an order of the Court. Thereafter, the NLC gazetted the land in her favour. The gazette notice was published in the Kenya Gazette dated 17th July, 2017 conferring her the land. There was no objection raised over the published gazette notice within the stipulated period. She was issued with a provisional title deed.
37. PW - 2 had lived on the land for over twenty (20) years. Nobody had ever interrupted her. M/s. Wairagu never objected to her taking possession for the said twenty-three (23) years she had lived on it. There were many neighbours around the plot. She did not know about the property No. 531. She bought Plot No. 533. She followed the right procedure to acquire the property. After getting the provisional title, she sold the property to the Interested Party, one Mr. Joseph Likoot Lenangetai. There was nothing stopping her from selling it. She trusted both M/s. Wairagu and M/s. Mwandiku but they failed her. M/s. Wairagu never gave her the title while M/s. Mwandiku failed to clear the outstanding balance of the purchase price. She urged Court to give her the suit property.

Cross - examination of PW - 2 by Mrs. Njeri Kiagayu Advocate

38. PW - 2 lived in Mtwapa. She had lived at Mutwapa for five (5) years. She moved there in the year 2013. The suit land was in Kikambala. There was a distance of about 10 kilometres between Kikambala and Mtwapa. She was of German Nationality. She had a residence permit issued to her in the year 1998. It bore No. 240740. Its expiring date was year 2020. She had her passport with her. PW - 2 first came to Kenya in December 1991 for one week. Then she came back after three months for another one week. She would frequently come and go back to Germany. She was a periodical visitor in Kenya. In April 1993, she came for three (3) months. From the years 2000 to 2013 she used to go for 6 to 7 months as she was working. She could spend six (6) months in Kenya and (6) months in Germany. She had four (4) children back in Germany.
39. She was shown the Memorandum agreement executed between her and Mrs. Wairagu. She confirmed that both of them signed it. It's purpose was for acquiring the suit land. She got a copy of it from M/s. Wairagu. It was dated 23rd January, 1994. She had not known where the original copy went to. She could now see the original, but it was for Plot No. 531. The copy she produced was for Plot No. 533. She could not remember why a question mark was put against Plot No. 531. She could see the original agreement bore her signature but the property referred to was Plot No. 531. (the Original copy of the memorandum was produced and marked as "DMFI -1").
40. She constructed her house in the year 1994. She moved in after three (3) months with her boyfriend whom she married after seven (7) years. She never bought the property together with M/s. Mwandiku. She refuted the assertion that M/s. Mwandiku contributed Germany Ten Thousand Deuche marks (DM 10, 000) for the purchase of the suit land. They neither built the house nor lived in it together. She reiterated never having bought the land from Mrs. Wairagu together with M/s. Mwandiku. She stressed having bought it alone.
41. She first saw her in the year 2013. She would be visiting the place with some people. She had no relationship with her. When M/s. Mwandiku came to the land, her intention was, to buy the property i.e Plot No. 533, including the house. PW - 2 wanted to sell the property Somebody offered to buy it for her. She was selling both the land and the house on Plot No. 533.



42. The Plot for M/s. Wairagu was next to the one for PW - 2. That Plot was not the subject of the memorandum of 23rd January, 1994. There was a metal gate on the plot for PW - 2. M/s. Wairagu's plot also had a metal gate, but it was about 50 meters apart. PW - 2's home was distinct with that of M/s. Wairagu's. Her house was on one end of the plot neighbouring another neighbour. It was true M/s. Wairagu was her neighbour but PW - 2 moved out of the place. She occupied the rest of the land up to date. There is a barbed wire and natural hedged fence separating the two plots. To access Mrs. Wairagu's home, one had first to get out of the PW - 2's gate and enter through her gate. She did not know if M/s. Wairagu's house was within the same land. Mrs. Wairagu had one main house and other small houses. PW - 2's house was on another portion.
43. PW - 2 remembered there was a Court case filed by a neighbour of the Asian Origin against her and Mrs. Wairagu alleging PW - 2 had built a house which encroached on to his plot. However, PW - 2 stated that the matter was amicably resolved. PW - 2 gave him some money. She did not know if he wanted her to demolish part of her house. Also she did not know what was happening on the suit land now having been away from the place for six (6) years. She could read the memorandum dated 23rd January, 1994. At that time Angeline translated it for her. She told her everything was okay.
44. Although they got a surveyor and she paid him but no survey exercise on the land was done. There was no valuation of the suit property done. Likewise, her house was clearly marked by an edge. She could not tell the size of the area her house occupied. They had a portion that defined it. It was clear. She bought the whole of Plot No. 533. She only used the portion where her house occupied. She never interfered with where Mrs. Wairagu stayed.
45. The transfer was not done but Mrs. Wairagu assured her everything was okay and that she would get her the title deed. She kept on asking for the title deed but nothing happened. The land measured 3 acres. PW - 2 was the first person to occupy the land. It was an agricultural parcel of land. There was no application for the letter of consent from the Land Control Board. Apart from the memorandum, they never signed any other document with Mrs. Wairagu pertaining to the transfer.
46. PW - 2 was selling M/s. Mwandiku the whole of Plot No. 533 and the house. She engaged a surveyor in the year 2011 to survey the whole of Plot No. 533. She got the survey report. PW - 2 wanted to know the size of the land and the planted beacons. She did it for herself. She knew Mr. Kassim who was a caretaker in Mrs. Wairagu's plot. She would use him to reach Mrs. Wairagu. She also tried to reach Mrs. Wairagu many times but all in vain. She gave up. She did not know the size of her land. She only wanted Plot No. 533. She wanted to sell the whole of Plot No. 533.
47. The sale agreement between M/s. Mwandiku, and her, described herself as the original occupant. To her, she was the only occupant of Plot 533. In the sale agreement dated 21st August, 2013, she was the seller of the Plot No. 533 while M/s. Mwandiku was the buyer. She met her in mid - August 2013. She came to the PW - 2 having been told that the land was being sold. They agreed on terms of sell. The purchase price demanded was at the market value then. She did not know the then current value. She was selling the entire parcel No. 533. It was not true that M/s. Mwandiku stayed with her since the year 1994. She paid a total sum of Kenya Shillings Two Million (Kshs. 2, 000,000.00). PW - 2 never gave her the authority to file the civil suit in their joint names. On 4th December, they signed another agreement.
48. Additionally, on 24th June, 2014 they signed yet another sale agreement. It was then that she paid the above stated amount. PW - 2 never received any more money from her. They only had business relationship. She did not know anything on the civil case ELC No. 251 of 2013 and the reliefs sought. She withdrew from the said case out of rage. By this time, she was already into the property. PW - 2 moved out to live with a friend.



49. PW - 2 obtained a Court order that the suit land be transferred to her. It was transferred. She immediately sold it to Mr. Lenangetai. That was the person who was now registered as the current owner of the suit land. She could not remember the year she transferred the land to him but must have been in December 2017.
50. PW - 2 was aware that at that time there was a pending application filed by M/s. Mwandiku to reverse the Ruling delivered and the issued by this Court. She was the one who filed the civil case ELC No. 57 of 2016 seeking to be given the land. Eventually, she got an order that enabled her to transfer it to herself. M/s. Mwandiku challenged the ruling and order through an application dated 4th July, 2017. PW - 2 never waited for that application to be heard as she left the Country. But later on she heard there was an order that reversed the Court order that had directed the transfer of the land to her favour. She was aware that the land was now in name of Mr. Lenangetai. She could not remember how much she sold the land for to him. It was at very difficult financial times for her. She did not know if the land was valued before being sold to him. She did not know if Mr. Lenangetai had moved to the land. As stated earlier, she lived at Mtwapa which was about 10 kilometers away from the suit land. After selling the land, she had never gone back there again.
51. PW - 2 informed Court that M/s. Mwandiku had incorporated a company called Mubia Holdings Limited. She came to know this at a later stage. She used proxies to incorporate the company. She used similar name to that M/s. Wairagu. M/s. Mwandiku would be advertising to sell the plot. Later on, she learnt that somebody else had a provisional certificate in the name of Mubia Holdings.
52. That company was the one M/s. Mwandiku was using to sell the land. PW - 2 was aware of *the Constitution* Petition instituted by M/s. Mwandiku in Malindi. She was protecting the Mubia Holdings. Although PW - 2 heard about the Petition but she never applied to be joined in it.

Cross – Examination of PW - 2 by Mr. B.M Musyoki Advocate.

53. PW - 2 was the one who filed civil case ELC No. 57 of 2016 where she sued Mubia Holdings Limited. She later on amended it to Join M/s. Mwandiku. She never authorized the filing of case ELC No. 251 of 2013. She did not get a bill of costs in Misc. No. 12 A of 2015 from the Law firm of Messrs. B.M. Musyoka & co. Advocates. She had an advocate called Waithera. She did not know if the Deputy Registrar ruled that she had instructed the advocate. She could not remember.
54. She was aware of the decision of the NLC which was made in Malindi to have her be registered and issued with the title to the land. That was the decision she wanted implemented by this Court. She was aware the Lands office refused to implement the said decision. She was aware that the NLC decision was set aside in Malindi ELC Petition No. 8 of 2016 on 23rd January, 2020. She did not know if her advocate participated in *the Constitution* Petition in Malindi. When they appeared before the NLC, her lawyer produced 13 documents, including pleadings in this case.
55. M/s. Mwandiku was living on that land, but she did not know for how long. She started living on it after PW - 2 it sold to her. She signed several sale agreements with her. She made a deposit of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=). Thereafter, she would be receiving a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) every month for 15 months making a total sum paid to be Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=). She was not yet refunded it to her. She could not remember telling the court that she never signed any agreement with M/s. Mwandiku. They signed several of them. In the year 1994, she bought the land from Mrs. Wairagu. She knew nothing about Mubia Holdings Limited. She had no claim against Mubia Holdings Limited as she never gave them anything. She was aware that M/s. Wairagu never had land there. The land



measured three (3) acres. She bought the whole of it. When she transferred the land to Mr. Joseph Lenangetai in 2017, she never paid the KRA liability. The transfer was done by other people.

56. She was not a Kenyan and did not know what was the right way to acquire land. She was still a German citizen through marriage. She married one Samson Kalema who had been and still was in Germany since the year 2000 but they separated. She had been in Kenya from the years 1994 to 2000. In the year 2000, she went back to Germany. She could see the affidavit sworn by herself on 8th March 2019. In her filed Complaint, she was claiming the land which she had sold twice. In paragraph 3(ii) of her affidavit, she deposed being a stranger to Mubia Holdings Ltd. She could see the Gazette Notice No. 6862 of 17th July, 2017. She could not remember what it was all about. Other people helped her to transfer the land to herself using the sale agreement. The sale agreement with M/s. Mwandiku was prepared by the Law firm of Messers. B M Musyoki Co. Advocates. PW - 2 signed an agreement with Joseph. It was with her advocate. She received some little money from Joseph for helping her. She sold the land to him for small money.
57. Her worker used to live in the house. She planted trees between the fence of Mrs. Wairagu's and her house. Mrs. Wairagu's house was on another plot. She was her neighbour. She saw her only two times.

Re examination of PW - 2 by Mr. Magiya Advocate.

58. She first came to Kenya in the year 1991 for one week. She married a Kenyan in the year 1998. They went to Germany in the year 2000. By virtue of their marriage, she could own property in Kenya. She bought the suit property from M/s. Wairagu. In January, 1994, she went to Nairobi with a friend to see M/s. Wairagu and that was when they entered into the agreement of 1994. She had not known about Mubia Holdings Limited. She only knew M/s. Wairagu. It was upon conducting an official search, when she realized of the existence of Mubia Holdings Limited. The agreement she signed was for Plot No. 533. She knew nothing about Plot 531. She started building her house in the year 1994 Plot No. 533. There was no objection from anybody. However, while constructing some Indian's came claiming she had encroached out their land. She went to Germany and borrowed a sum of Deuche mark Ten Thousand (10,000 DM) which the said the Indians wanted. She paid them. They never came back again.
59. In August 2013, they met with M/s. Mwandiku for the first time. She had wanted to buy the property. She was a buyer, not a financier although described as such. They agreed on terms of sell of the whole of Plot No. 533. It was by mutual agreement. She made some payment and undertook to look for the title. She never authorised her to file the suit on her behalf. She did not know whether M/s. Mwandiku fully participated in NLC the case, but she was in Malindi NLC sitting. NLC made a decision in her favour which was not challenged. She was aware of the Kenya Gazette Notice. It has never been set aside. When she got NLC decision, she came to court and obtained a ruling and order to her favour. She obtained a Provisional title deed. She was not aware of any objection.
60. She was aware of the Petition in Malindi. She not aware of any impediment stopping her from transferring the land. She transferred the land before these suits came back again. She got registration of title regularly through the court process. When she registered the Decree, the Land Registrar never informed her of any restriction.

Examination – In – Chief of PW-3 by Mr. Magiya Advocate

61. PW-3 was sworn and testified in English language. His name is Kitema Francis Lulu. He lived in Ganjoni Estate, Mombasa. He was a salesman. He recorded a witness statement on 7th March, 2019. He wished to adopt the said witness statement as his evidence. He knew M/s. Behrmann. His testimony was that he was the one who introduced M/s. Mwandiku to M/s. Behrmann. Around the year 2013,



one of his friends from Mtwapa called and informed him there was a lady selling a motor vehicle. He went to Kikambala and found the PW - 3. He looked at the vehicle and eventually bought it. At the same time, PW-3 informed him she was selling some property. It comprised the main house, a servants quarter, and undeveloped portion. She informed him that the property measured about three and half (3.5) acres or thereabout. By then he had not known the plot number, but later on he learnt it to be LR No. 533/III/MN. After some few days, he got a call from his friend working at the Bank of Africa, Nyerere Road who told him that he had a client who needed a property in Shanzu or anywhere nearby. He informed him there was a property in Kikambala. He told him to go to the Bank as he had a client. On getting to the bank, he found him with M/s. Mwandiku.

62. PW-3 told M/s. Behrmann that since M/s. Mwandiku could speak pure German language, they could discuss and agree. He remained outside with another gentleman called Collins. They discussed and agreed that M/s. Berhamann could give vacant possession. He understood M/s. Mwandiku paid partially. He was not paid his commission as he was made to the property understand never had any title deed. He was the one who introduced M/s. Mwandiku to M/s. Berhamann. Later on he learnt from Mr. Lenangetai the boyfriend to M/s. Berhamann that the deal never went through.

Cross – examination of PW-3 by Mr. BM. Musyoki Advocate

63. That was the first time he knew M/s. Berhamann when he went to see the car, a Nissan Saloon. When he met her, she was alone and she took him around all the rooms. The main house was alright, but the servants quarter was partly in use. There were several rooms. The rooms appeared to have been in use. She never informed him whom she had been living with. The compound had a fence and a gate. He was shown the photographs marked annexure “3” in the originating summons. He could not tell if the photographs looked like the house he went to. The house was made of bricks and makuti roof. He could not remember the colour of the house.
64. He stated being a broker who sold anything. He met M/s. Mwandiku for the first time when he went to the bank. He knew her family though. Her sister was married to his friend. He did not know any of the relatives to M/s. Behrmann. It was after a year thereafter, that he came to know Mr. Joseph Lenangetai. This was when he asked him to appear before the NLC as a witness. He was not there during the transaction. He was not aware that M/s. Mwandiku and M/s. Behrmann signed some agreement at a lawyer’s office in Nyali. He went to Kikambala in the year 2013. He never met them again. Its M/s. Berhamann who was supposed to pay his commission. He never asked for it. She did not do so because the deal did not go through. M/s. Mwandiku took possession of the suit property in the year 2013. He recorded a witness statement for the hearing at the NLC though he never testified. The statement was there in the bundle of documents. Under paragraph 7 of the statement, he requested Mr. Sonko Mike Founka to come and arbitrate the dispute. He knew M/s. Behrmann to have been the owner because he found her in the property.
65. His testimony was that Mr. Lenangetai and M/s. Mwandiku obtained title without the knowledge/ or consent of M/s. Behrmann. M/s. Behrmann took her around the property. There was a home neighbouring the property. He knew one James Mugaya Waititu whom he once sold a vehicle. He knew him before he had met Mr. Lengeitei. None of them introduced him to each other. When he went to buy the vehicle from M/s. Behrmann was the first time he got to the suit land. He never saw James Waititu there nor at the NLC during its hearings.

Cross Examination of PW-3 by Mrs. Njeri Kiagayu Advovate

66. When he visited the property, there was a metal gate. There was first one building, main house then servant’s quarters. The house was well fenced using a barbed wire with many trees planted inside the



compound along the fence. They went to the neighbouring house. The compound and the house which was fenced was about 0.5 acres. They had to get out of the main gate to get to the next house. From the 0.5 acres, one had to go out of the gate to go the other portion of the land which was not fenced. He went to the other compound. There were no houses on the other portion of the land. The two parcels of land were adjacent to each other. There were neighbours on the next plots. He did not know the Land Reference number of the other plots.

67. He did not see any of other houses. He did not know who built the house, though M/s. Behrmann told him she built it. That was the main house, servants quarter and the other buildings there. He knew M/s. Mwandiku's sister who was in Germany. He never knew much about M/s. Mwandiku. The land owner was responsible for paying his commission as he was the one who took the seller to Kikambala. She did not know where the property was. His banker friend told him he had a client who was interested in property within Shanzu or Mtwapa. Since he had seen the suit property, he informed him. Mr. Mike Sonko promised to secure a title for M/s. Behrmann, but it did not materialize. He was told by Mr. Joseph Lenangetai that there was no title for that land and the title for M/s. Mwandiku were revoked by Court. From the date of agreement, M/s. Mwandiku took vacant possession. She had gone there as an intending purchaser.

Re - examination of PW - 3 by Mr. Magiya Advocate

68. PW-3 learnt that there were issues between M/s. Behrmann and M/s. Mwandiku between the years 2013 and 2015. That time, he introduced them to Mr. Sonko to arbitrate the issues between them. He was to secure the title for M/s. Berhamann and thereafter for M/s. Mwandiku to pay the outstanding balance of the purchase price, but none of these happened.
69. He stated that the property was about 3.5 acres. There was a gate, a compound and a fence. The fence (barbed wire) separated the house from the main property. There were no two parcels. There were neighbours but he did not know the title numbers as he was not interested in them. He was not involved in the title and hence did not know how it was secured.

Examination in Chief of PW - 4 by Mr. Magiya Advocate.

70. PW-4 was sworn and testified in Kiswahili language. His name is Mr. Joseph Likoot Lenangetai. By then, he lived in the County of Samburu. He was a businessman. He knew what had brought him to court. It was over the land dispute involving Plot No. 533/III/MN plot in Kikambala. He remembered recording a witness statement on 6th April, 2016. He wished to adopt it as part of his evidence. M/s. Behrmann was his wife. Both got married legally and stayed together from the year 1999 on Plot No. 533. They met in the year 1994. She explained to him how she had acquired it. She began constructing a house which she lived. It was a main house with servant's quarters.
71. He knew M/s. Mwandiku. She came in the year 2013 as a buyer. In the year 2007, they had intention of selling the plot. They sold the plot to M/s. Mwandiku. They agreed on the terms of the sell – the purchase price of a sum of Kenya Shillings Twenty Three Million (Kshs. 23, 000, 000.00) which part of it was paid. She paid the rest by installments. They entered into a sale agreement. The agreement was not signed. The plot had not been transferred from the original owner. Mrs. Wairagu, a director of Mubia Holdings Limited had there been a memorandum of agreement between Mrs. Wairagu and M/s. Behrmann which was signed on 23rd January, 1994. M/s. Wairagu stated she was acting on behalf of Mubia Holdings Limited. It was the agreement that allowed M/s. Behrmann to enter the suit land. She started construction. He found her going on with the construction and they completed it together. In the year 2007, they started looking for a buyer. They never had a title.



72. From the year 1994 upto 2007 was over 12 years. For the entire period, no one had interfered with them. It was until the year 2017 when they were disturbed. M/s. Wairagu had a plot neighbouring the suit plot. The transfer was not done from M/s. Wairagu to M/s. Behrmann. Upon failing to obtain the transfer they went to NLC. They asked to be availed with all the relevant documents. They then came to the ground. He was the one who lodged the complaint with NLC in his capacity as the husband of M/s. Behrmann. There was notice issued by NLC to all interested parties, including Mubia Holdings Limited. The summons were published in the media. They did not attend. Summons were taken to M/s. Mwandiku as she was the one who was available. She kept on saying she would pay. M/s. Mwandiku filed a case for land adverse possession being case ELC. No. 251 of 2013 which he saw an advertisement in the Standard Newspaper. M/s. Behrmann and him were not aware of the case. The case was filed on 8th November, 2013. The Originating summons was dated 11th October, 2013. His wife was then away in Germany. She never gave out any authority to M/s. Mwandiku to file the case. They were not part of that case. It was a forgery. On discovering it, he instructed an advocate and the case was revoked. They were discharged from that case. M/s. Mwandiku was claiming to have bought the plot in the year 1994. That she was entitled to it.
73. According to PW-4 by the year 1994, the two M/s. Behrmann and M/s. Mwandiku had not met. They did not know each other. Thus, the allegations that they negotiated and bought it jointly was false. In the memorandum of the year 1994, M/s. Mwandiku's name was not there. Those claims were false. The authority to act was also a forgery. M/s. Mwandiku, her advocate, M/s. Behrmann, one witness called Waititu and PW – 3 all participated at the proceedings of the NLC. After the NLC heard the case, the land was given to M/s. Behrmann. PW-4 stated that they then went to Court for it to adopt the order. They were not given any stay order. There was nothing stopping them from taking the land and obtaining the title. He did not know M/s. Mwandiku went to Malindi court. They were not parties to that case, though by then he had gotten the title.
74. According to PW-4, the case in Malindi was fraudulent. They were not parties to the Mombasa case either. When the Malindi court granted the NLC order, they had gotten title. They had bought the land from Mubia Holdings Limited of the year 1996. PW-4 stated that he came to learn of Mubia Holdings in year 2014 during the proceedings at the NLC. They conducted an official search in the year 1996 of Mubia Holdings Limited. The latter Mubia Holdings Limited was a forgery. PW – 4 stated that Mrs. Wairagu and M/s. Mwandiku were both fraudsters. As far as he was concerned, had the land belonged to Mrs. Wairagu, she could have directly and immediately transferred it to M/s. Behrmann. PW – 4 and M/s. Behrmann lived together on the plot for over 20 years. The agreement dated 23rd January, 1994 annexed to the affidavit in support of the application dated 13th July, 2018, was in respect to Plot No. 531. In the year 1999, he entered the plot, and saw some of the documents. This was not one of the documents. They referred to a different plot. When the suit plot was sold, there was no order stopping him from any thing. The Court order came after the suit land had already been sold and transferred. M/s. Wairagu had no right to ask the court to cancel their title as she had already sold the plot. They were given title after they had lived on it for long without any interference.

Cross – Examination of PW - 4 by Mr. BM. Musyoki Advocate;

75. PW-4 stated he picked Summons from NLC and took them to Mubia Holdings Limited through advertisement. This was because they did not know where to find them. He knew Ms. Wairagu as a neighbour of the suit plot. She never stayed there, but there was a house. He indicated all this information on page 76 of application dated 4th July 2017 of the summons appearing as an advertisement dated 14th July 2016. This was the summons issued by NLC.



76. PW-4 confirmed that at page 77 were the plot numbers. There was M/s. Berhamann and M/s. Mwandiku, but there was no Mubia Holdings. PW-4 indicated that there was no court order when they obtained title. They were not aware of the existence of a case pending in court. The 7th document in M/s. Berhamann's list of documents dated 6th April, 2016, was a letter dated 10th March 2016. He could see the proceedings at the NLC. It included documents submitted by the parties. It included pleadings in case ELC. No. 251 of 2013. PW-4 indicated that Item Number 5 was a court order in name of Ms. Behrmann and Ms. Mwandiku. Up to item number 13 was in reference to case No. 251 of 2013. NLC was aware of the case, but PW-4 and Ms. Behrmann withdrew themselves from the case.
77. He indicated that revocation authority came first before they went to NLC. Ms. Mwandiku had never been a registered owner of the suit property. PW-4 together with others went to the lands offices pursuant to obtaining the order from NLC. While there, they were told by the Land Registrar that the NLC had no authority to issue title. He confirmed he had seen the Judgment in the Petition at Malindi but indicated he never understood it. He stated never having seen the Misc. Application No. 12A of 2015. He had not been aware of it. From the application dated 4th July 2017 at page 17 was a memorandum of agreement. He confirmed never having seen the Plot number. As far as he was concerned the one quoted as Plot No. 533 was the true and/or correct copy.
78. PW-4 stated that he was not aware that the Judgment in the civil case ELC No. 57 had been set aside. He informed Court that Ms. Behrmann met Ms. Mwandiku for the first time in August, 2013. She was introduced to her by one Frank, PW-2 who had already testified. PW-4 was away when they came for the first time, but was present on the second time. He confirmed being aware of an agreement entered between Ms. Behrmann and Ms. Mwandiku in the bundle dated 4th July, 2017 at pages 29, 30 and 31 which were not signed by Ms. Behrmann. There would be no possibility of her having signed it yet the PW - 4 failing to know about it. He knew that Ms. Behrmann was paid a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=).
79. PW-4 stated there was nowhere to show that they acknowledged having received a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=). He was not aware that he quarreled with M/s. Behrmann resulting into a police case. He had had a problem with Ms. Mwandiku and Mr. Sonko. He refuted having gone to the house to threaten and evict Mwandiku. He stated there had been no court order. He went to the police to report and DCIC and decided to evict Ms. Mwandiku from the house on 12th January, 2018. He never used an Auctioneer. Instead, he used the police. He stated that in the year 2018, the land had already been transferred to himself.
80. PW - 4 Ms. Mwandiku had put some goons inside the house. He stated that M/s. Berhamann sold the plot. She was paid the purchase price and they had no interest in it. They genuinely sold the land to Lenengatai. Lenengatai had not sued them. PW-4 stated that he was forcefully evicted in September 2013 by the police. PW - 4 averred that there was a prominent person associated with Ms. Mwandiku who used the police. M/s. Behrmann also left the house fearing for her life. PW - 4 informed Court that he was born 5th August 1979. He married M/s. Behrmann in the year 1999. PW - 4 stated that from 1994 they never sued Mubia Holdings Limited to transfer the land to them. This case was filed in the year 2016. In the year 2017, after they had obtained title, they reported to the police in Mtwapa Police Station that Ms. Mwandiku had invaded their land assisted by a prominent person. He stated he knew James Waititu who is his friend. Waititu was not present when M/s. Behrmann and Ms. Mwandiku agreed. He stated he never received any money from Lenengatai. The money was paid to Monika.
81. PW-4 indicated that the land came from Mubia Holdings Limited to M/s. Behrmann, then to Mr. Lenengatai. He confirmed he knew Patrick Kuria Mwangi and Tony Kamange. He saw them in Mubia Holdings Limited. He did not see anything showing their connection with Ms. Mwandiku.



Cross Examination of PW - 4 by Mrs. Njeri Kiagayu Advocate

82. DW - 3 stated having gotten married to M/s. Behmann when he was 20 years old and it was normal under the Samburu customary law. He stated that M/s. Behrmann stated building the house in the year 1994. By the time he got married to Ms. Behrmann, the house was incomplete but had moved in and they completed together. He noted on the Agreement dated 23rd January, 1994 there was a question mark on the plot number. He stated he did not know what the question mark meant. It could be a forgery. They were sure of the land on the ground. He stated he did not know about the area to be between the two holes. Ms. Behrmann was to be responsible for survey work. PW-4 did not know if Ms. Behrmann brought a surveyor or a valuer.
83. PW-4 noted that both agreements were dated 23rd January, 1994. He noted that one had corrections on the date. The words “as payment of” were in different lines and one was done on ruled paper. He stated knowing that Ms. Behrmann had a dispute with a neighbour when the neighbour claimed Ms. Behrmann had trespassed on her plot. It was his testimony that he found the dispute still on but did not know the outcome of the said case. He stated Ms. Behrmann could not have built on a neighbour’s plot. She had built where she had purchased.
84. PW-4 noted the existence of civil suit HCCC. No. 500 of 1994 – “Kikambala Villas Ltd – Versus - Mubia Holdings Ltd & Ms. Behrmann. Filed by the neighbor of the Asian Origin. He stated the house they constructed was still standing on the same portion. He was not staying in the neighbour’s land. He stated that his wife had paid almost a sum of Kshs. Five Million (Kshs. 5, 000, 000.00/=) to the neighbour for the portion the house was standing. He stressed that Ms. Behrmann paid that sum because she was conned. He stated the house alone occupied $\frac{3}{4}$ of the area without the fence. The fence was around 3.5 acres. The fence had barbed wire and trees. He stated that Ms. Behrmann and himself put up the fence around Plot No. 533. According to him, the house was entirely on Plot No. 533. He stated they were neighbours with Mrs Wairagu.
85. PW - 4 stated Mrs. Wairagu’s house was far from theirs. He did not know if Mrs. Wairagu had two plots there. He refuted that the house of Mrs. Wairagu was on Plot No. 533. PW-4 was not aware there was never any transfer. He stated that there was no other document or agreement between Ms. Behrmann and Mubia Holdings Limited. PW-4 stated that Ms. Behrmann was living in Kenya as a resident and she had an Alien Certificate which was renewed annually.
86. He knew Ms. Behrmann was working as a hotelier in Germany where she worked for 6 months and was in Kenya for the other 6 months. Mtwapa and Kikambala was about 7 kilometers away. He stated they moved to Mtwapa in the year 2014 because Ms. Mwandiku moved to the house with goons and took over. He stated that from the year 1999, they had not lived with Ms. Mwandiku in the house and only met her on 23rd January, 2013. He did not know her before then. PW - 4 stated that Ms. Mwandiku paid a total sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=) to Ms. Behrmann and she had never paid any other money. He stated Ms. Mwandiku came as a buyer and they discussed and agreed. After paying the said sum, she took possession. She ejected them from the land.
87. PW - 4 stated the neighbour (Wairagu) had a Maisonnete whereby her workers lived. He stated he knew she was a neighbor and knew the plot where her house was standing on. PW-4 stated their house was a stone throw away. He stated they had never transferred the land to Ms. Mwandiku. He stated they received the above sum from her while she knew they had no title documents. She moved to court without their consent. PW - 4 stated Ms. Mwandiku had never lived in the house with her children. She could only visit and stay over. She was now living in the house with goons.



Re – Examination of PW-4 by Mr. Magiya Advocate.

88. PW-4 stated there was no order stopping the NLC Tribunal from proceedings. They were not involved in case No. 8 in Malindi. He had not known when the judgment in that case was delivered but could see it was delivered on 23rd January 2020. He stated that they got title in April, 2017 and the Judgment was delivered about 3 years later. It had already been overtaken by events.
89. He stated that when they went to the Land Registrar with the decision of NLC, they were advised to go to court which they did. Thus to him they obtained title legally. Therefore, it was not true they fraudulently obtained title. He indicated they have stayed on that plot for over 24 years and they had a right to come to court and pray to be registered as owners. He believed the signatures in the agreements were forgeries. He stated M/s. Behrmann was not even around. They sold the land and the buyer wanted vacant possession yet they had not been paid the full purchase price. He stated he did not know Mubia Holdings Limited. He stated the company was incorporated in the year 2014. He believed it was all intended to obtain the title fraudulently. He could remember the memorandum Agreements dated 23rd January 1994. The Plot numbers were different; one was Plot No. 531 while the other was for Plot No 533. He confirmed he knew of Plot No. 533, but did not know of Plot No. 531. They did a search for Plot No. 533 in the year 1996 and found out it belonged to Mubia Holdings Limited. PW-4's evidence was that nobody objected on the the construction going on. He affirmed that even though they bought Plot No. 533, the transfer had not been done, and that was why they went to court.

Examination in Chief of PW - 5 by Mr. Magiya Advocate

90. PW - 5 is called James Mungai Waititu. He was sworn and testified in English language. He was a Clinical Officer and lived in Mtwapa. He knew M/s. Berhamann and Mr. Lenangetai since the year 2003 and was aware why he was before court. He was in Court over Plot No. 533 in Kikamabla which according to him belonged to M/s. Berhamann. He stated he recorded witness statement on 8th March 2019 which he wished to adopt as his evidence.
91. He met Ms. Mwandiku at the NLC. He stated that he was taken to meet M/s. Behrmann and Ms. Mwandiku by one Lulu. Ms. Mwandiku wanted to buy the plot. She paid a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=) million to her. By then, M/s Berhamann and Mr. Lenangetai had constructed a house and the plot was fenced.

Cross Examination PW - 5 by Mr. BM. Musyoki Advocate.

PW-5 stated he was a Clinical Officer and not a Land Surveyor. He did not know the Land Reference number of the place. He could not tell the boundary of Plot No. 533. He knew what adverse possession was. He was aware Mwandiku sold the Plot to somebody else. He was saying what he knew not told.

Cross – Examination of PW-5 by Mrs. Njeri Kiangayu Advocate.

92. PW - 5 stated that he used to be a regular visitor to M/s. Behrmann's house. He described the place. It was when one entered, there were two buildings. There was a metal gate and the compound. It was secured by a fence with live plants and hedge. He stated that one could not walk across the fence and had to go through the gate to get to the neighbor. He confirmed he did not know the neighbours. He never witnessed payment of the money. He was told about it. The land was about three (3) acres it was for sale. It was sold to Ms. Mwandiku. He stated the buildings occupied about one acre. He stated that Mike Sonko Mbuvi is the former Governor of Nairobi. He used to claim they were cousins with Ms. Mwandiku.



93. PW - 5 confirmed that he was not present during a fracas at the suit property. He only heard about it. He stated that Mike Sonko's group were ejecting Mr. Lenangetai from that land. He stated that Sonko being a cousin of Ms. Mwandiku, he vowed to make sure Ms. Mwandiku got the land. He used his resources to defend Ms. Mwandiku, by ejecting Mr. Lenangetai's security from the land. The matter was reported to the police. PW - 5 did not know Mubia Holdings Limited. He stated the he heard about the fight was confined to the 3 acres as he was not there, but he was told. He stated that M/s. Berhamann's house was after the gate. It was one acre. It had a hedged fence.

Re Examination of PW-5 by Mr. Magiya Advocate.

94. PW - 5 indicated he was not there during the fight. He only got involved when Sonko said he was to settle the payment of Ms. Mwandiku for 3 acres. He never paid.

IV. The 3rd Defendant's case in ELC No. 251 of 2013

95. The 3rd Defendant Mubia Holdings Limited (Registered 1975) filed its Defence on 12th March, 2019 – a company by Limited guarantee. They held they never knew the 1st Defendant which was incorporated by the 2nd Defendant through proxies for purposes of obtaining suit land nor the 2nd Defendant – M/s. Mwandiku. The 3rd Defendant held the suit land was subject of three suits – ELC No. 251/2013 – filed pursuant to an agreement dated 21st August, 2013 between the Plaintiff and the 2nd Defendant. The 2nd Defendant Ms. Mwandiku claimed to have lived on land from 23rd January, 1994. Ms. Mwandiku proceeded to file a suit on her joint names with Ms. Behrmann and attaching an authority to act on Ms. Behrmann's behalf, which was disclaimed to be forgery, by Ms. Behrmann annexing a copy of her passport to prove that she had been in Germany when the subject letter was alleged to have been signed by her. Ms. Behrmann managed to struck out her names from the suit ELC No. 251/2013.
96. Both the Plaintiff and 2nd Defendant had Provisional Certificate of title deed for the same land. The 3rd Defendant averred that the claims of the suit land by both the Plaintiff and 2nd Defendant had no basis as it is based on fraud and abuse of court process the same having been found on an agreement dated 23rd January, 1994 between her and a Director of the 3rd Defendant by the name Mrs. Wairagu which never was for sale and never concerned the entire land but a portion of it. The claim by the Plaintiff to had bought the suit land from Mrs. Wairagu and not from the 3rd Defendant for DM 20,000 was not supported by any documents. The claim by Ms. Mwandiku to have been a friend of Ms. Behrmann by 23rd January, 1994 was denied as she was then aged 17 years and had never lived on the suit land nor caused any development on it.
97. There was a row between the Plaintiff and the 2nd Defendant over the alleged sale of the suit land from conceived three (3) sale agreements including one dated 12th August 2013 and 4th December 2013 which the 3rd Defendant was not a party. There was a lot of forgery and misrepresentation of facts by Ms. Mwandiku over the transaction of the suit land as stated out under Paragraph 9 (a) to (9) of the filed Defence by the 3rd Defendant from the alleged sale agreement dated 21st August 2013, for the sale of land between the Plaintiff and Ms. Mwandiku for a consideration of a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000.00/=) but which only Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00/-) plus a further sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000.00) totaling to a sum of Kenya Shillings Two Million (Kshs. 2,000,000.) was paid leaving out a balance of a sum of Kenya Shillings twenty One Million (Kshs. 21,000,000.00/=) the alleged transaction fell out. Besides the Plaintiff had no good title to sell the suit property. The Plaintiff was the vendor and Ms. Mwandiku a purchaser and thus not claimants of land adverse possession as alleged.



98. The 3rd Defendant held that neither the Plaintiff nor 2nd Defendant were in occupation of the land. They never lived nor developed the said suit land as claimed. Their claim on land adverse possession was baseless, unfounded and mischievous and ambiguous. Ms. Mwandiku fraudulently registered a Company Mubia Holdings Limited in June 2014 and conspired with the staff at the Company Registry to cause the original Company Mubia Holdings Ltd. (1975) to disappear from the shelves of the Company Registry and she obtained a Provisional Certificate of Title Deed without a Court order. She started to sell the land. Yet the 3rd Defendant was the rightful owner a total confusion cause by Ms. Mwandiku. The Plaintiff lived in Mtwapa and not Kikambala.
99. The 3rd Defendant denied all the allegations contained in Paragraphs 8 (a) (b) (d) and (e) of the Counter Claim by the 2nd Defendant. The 3rd Defendant emphasized that the Provisional title deed held by the 2nd Defendant and obtained on 9th January, 2015 was forged. The claim for Land Adverse Possession was meant to sanitize the forged title deed.
100. The 2nd Defendant had never bought the land from the 3rd Defendant. The 3rd Defendant denied the contents of Paragraphs 21, 22, 23, 24, 25 and 27 of the Counter Claim and reiterated that the 3rd Defendant had never sold any portion of Land to the Plaintiff not 2nd Defendant and that Mrs. Wairagu had never had any authority to sell the company land or a portion of it at any one time or on 23rd January, 1994. The 3rd Defendant held all the contents of Paragraphs 26, 28, 29, 30 and 31 of the Counter Claim were all strange to them and they were criminal in nature as they were about conspiracy by the Plaintiff and the 2nd Defendant.
101. The Contents of the alleged sale agreement dated 21st August, 2013 between the Plaintiff and the 2nd Defendant were castigated for being a product of deceit, false and forgery as set out in the particulars of Paragraphs 25 (a0 to (i) of the Defence to the Counter Claim by the 3rd Defendant. In the long run the 3rd Defendant prayed for the following reliefs:-
- a. A declaration that the Provisional Certificate of title issued to Caroline Mwelu Mwandiku or any other person in respect of Land Registration No. 533 Section III MN CR 14272 in the name of Mubai Holdings Ltd. registered in 2014 was null and void.
 - b. The Registrar of Titles at Mombasa Land Registry do delete from the Register of Land Parcel No. 533 Section III MN CR 14272 the Provisional Certificate of title issued to Caroline Mwelu Mwandiku or any other person in the name of Mubia Holdings Ltd. registered in 2014.
 - c. A declaration that the Provisional Certificate of title issued to Joseph Likoot Lenangetai in respect of Land Parcel No. 533 Section III MN CR 14272 in Kikambala in Kilifi County is null and void.
 - d. The Registrar of Titles at Mombasa Land Registry do delete from the land register of parcel No. 533 Section III MN CR. 14272 the name of Joseph Likoot Lenangetai.
 - e. The Registrar of Titles at Mombasa Land Registry do maintain any registrations, injunctions and cautions registered in Land Parcel No. 533 Section III CR. 14272 situated at Kikambala in Kilifi County until directed otherwise by court.
 - f. A permanent injunction be issued directing the Plaintiff and 2nd Defendant and their servants, workers agents from trespassing on the suit land.
 - g. The Plaintiff and the 2nd Defendant herein do pay costs of the suit to the 3rd Defendant.
102. On 28th March, 2022 M/s. Wairagu testified as a witness for the 3rd Defendant as follows:-



Examination in Chief of DW - 5 by Mrs. Njeri Kiagayu Advocate.

103. DW - 5 is called Anne Wanjiru Wairagu. She was sworn and testified in English language. She was a retired registered nurse and lived in Lavington, Nairobi. She had a rural house in Nyeri and another in Kiakambala, the County of Kilifi. DW-5 was a holder of the National Identity Card bearing No. 3065524 issued on 12th October, 2018. Her date of birth was 18th June, 1943. She was a Co - Director of John Warafu and had authority to testify having been given consent by a resolution from minutes of a meeting held on 5th June, 2018 at Nairobi and she wishes to proceed. Also, she had Letters of administration for the estate of her late husband. She was a surviving Director of MUBIA Holdings Limited. This the one that was incorporated in the year 1975. Mubia was her late husband's middle name. Both her husband and her were its Directors. She stated that she filed applications for injunctions in both cases. After the death of her husband, she was left with a daughter. She confirmed the certificate of postal search filed by M/s. Behrmann. She stated that as early as the year 1996, the company owned the suit properties. They had the Original of the Certificate of Title Grant for 99 years from 1st November, 1991 measuring 1.291 HA (approximatelyacres). The transfer to MUBIA holdings Ltd was on 1st March, 1984 on Entry No. 5 from Entry No. 2 from Alexander Tredway House. The title had been the custody of DW -5's husband who died in the year 2005. The entry No. 7 is provisional title deed issued when the title was transferred to them.
104. DW-5 indicated that on 6th October, 2015 there were two people with two provisional titles. She did not know who applied for the Provisional title deed. There was a court order as Entry No. 8 of 11th April, 2017 ELC No. 57/2017 Mombasa causing it to cancel the title deed in the names of Ms. Behrmann and Issue it to the Plaintiff. On Entry No. 9 it directed for the order to be effected. Hence, Ms. Behrmann would apply for the title. Entry No. 10 was a restriction to the land. Entry No. 11 was a removal of restriction placed by the Court order by the Land Registry while Entry No. 12 was the transfer of title to Mr. Joseph Likoot Lenangetai for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) on 7th December, 2017. DW - 5 stated that they had been serving him severally but had never appeared in Court.
105. DW - 5 confirmed she had never lost or misplaced the title. She further stated she had never applied for the provisional title deed and does not know who applied for the Provisional title. On the Provisional title entry No. 9 was that of the 1st date of issue on 9th January, 2015 as per order No. 5 giving the land to Ms. Behrmann She only came to learn about the said provisional title while in Court. She also learned that the land was transferred to multiple people and one of them was for M/s. Behrmann. DW - 5 learned the provisional title had been applied and issued with the title deed to Mubia Holdings Ltd., but with different directors from them. She stated that she wrote a letter to the Registrar of Companies but she could not get her Mubia Holding Limited that was incorporated in the year 1975 but the other was in in the year 2013 or 2014. She never got to know the Directors in this new Company. DW - 5 stated she sent her daughter to the Land's offices. She found out that her Company was out and was replaced by another new company. It had a parallel title deed. She wrote a letter to the Commissioner of Lands and got assistance. She later learned there was filed a civil suit in High Court Malindi and where they sought to be joined in the proceedings.
106. Further to this, and as an indication of being the owners to the suit properties, they owed the income Tax Department (KRA) a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=). She stated that amount was registered and was still registered against the suit property and the suit property could not be transferred before clearing the amount. She had the Certificate of Incorporation of Mubia Holdings Co. Limited registered on 21st March 1975. She filed the Certificate of incorporation on 13th, July 2018.



107. DW - 4 testified that lately she could not access the company at the companies Registry as some people somehow registered another company with the same name. The other registered Company was Mubia Holdings Limited. She conducted an official search of the new company in May 2015. It was bearing numbers No. 0132903 and was registered on 15th January, 2014. It was exactly like their company. The directors of the new company were Patrick Kamau with 100 shares and Patrick Kuria Mangi with 90 shares. DW - stated she did not know these people. She had never sold the company to anybody. She came to know that there were two provisional titles in the names of Lengarus and Ms. Mwandiku Mwelu. She stated that they filed an application on 16th July 2018. She confirmed that apart from in documentation, the new Mubia Holdings Limited had not interfered with their property, except that they interfered with the KRA and Registrar of companies. The Registrar of companies had since deregistered the new Mubia Holdings Limited and reinstated the original company. DW – 4 stated that it was as a result of this that she came to Court.
108. DW-5 said her company had never been involved and all those dealings were being done behind her back and she wished to produce the original copy of the grant. Although Mr. Magiya Advocate had objected to the production of the original certificate of title and indicated he was seeing it for the first time but upon it being explained by Court to the effect that being under an RTA – Cap. 281 land tenure, and eventually the Registrar of Title Mombasa having to be summoned to produce all the Land records – particularly Entry numbers 6 to 12, Mr. magiya Advocate fully understood.
109. DW - 5 stated she was sued by Ms. Behrmann and Mubia Holdings Limited for trespassing on her neighbor’s land which allegations she denied. DW-5 stated it was Ms. Behrmann who encroached on the land when she requested her to be assisted to build a small shekter on the parcel of land. Ms. Behrmann being a foreigner, she was not entitled to agricultural land so DW - 5 stated that she wrote her a letter and allowed her to take a small portion – on 531 and 532. But later on DW - 5 came to learn that M/s. Behrmann proceeded to construct the small house on Plot No. 533. Ms. Behrmann had given Mrs. Wairagu 20,000/= Deutsche Mark when she allowed her to build on the two holes, but Ms. Behrmann build at the corner of the suit land, which was a little bit on the DW - 5’s land and the other on the Asian (Indian) land. Hence, the cause of the suit filed by the Asian. The house was dilapidated. DW - 5’s beacons went into her house. Ms. Behrmann was never fined but she was made to pay the Asian for the encroachment into his land. They never came back to DW-5. DW-5 produced the summons for the said case being “High Court No. 500 of 1994 Kikambala Villas –versus- Mubia Holdings Ltd. and a Complaint dated 10th August, 1994.
110. She stated that when the new company was registered, it removed everything to do with the original company. The documents at the lands office also were not being found. She confirmed she had the original title and she had never lost her title, reported it lost nor had she obtained a police abstract for that matter. She never reported it lost. DW - 5 stated she first saw a provisional title in Malindi but she had the original title. She did not know who had reported a loss. She saw the provisional certificate. She never sold the suit land.
111. She said M/s. Behrmann came to her house crying and telling her that her husband had left her and had been thrown out of a rented house at Mtwapa. She allowed her to build a house to stay in temporarily and on 23rd January, 1994, they signed a note in the affidavit which she filed on 18th July 2018. She confirmed she was the one who signed. She indicated she was not sure of the registration number of the parcel of land as she had another parcel number, other than Plot No. 531. The correct number was Plot No. 533. DW - 5 never saw M/s. Behrmann again until she saw her in court. She stated that she never corrected the note/letter. She stated she used to come to Mombasa but she never saw M/s. Behrmann. M/s. Behrmann never fulfilled the conditions in the letter. The documents produced by M/s. Behrmann were not written by DW - 5, even though the writing looked like hers. DW - 5 stated she



had the original letter which was written in a foolscap paper. According to DW - 5 in the original letter, she changed the date, signed and put a question mark on Plot No. 531 and signed above her name.

112. On 28th August 1994, DW - 5 wrote to M/s. Behrmann telling her that she was on her own since she failed to fulfil the conditions they had agreed on. They had a case with Mr. Gikandi advocate. A demand letter was written to her but she still failed to comply. She paid DW - 5 some money in Deutsche Mark. According to DW - 5 in the arrangement, she was to build between two holes on her land. Instead, she built along the boundary, partly on the land of DW – 5 and that of a neighbour’s land. According to DW - 5 they were both sued for trespass and DW - 5 responded to the case. DW - 5 never permitted M/s. Behrmann to build on the neighbors’ land. The house was still there, but not in good shape.
113. DW - 5 opined that if she was to straighten up her fence in her land it would cut through M/s. Behrmann’s house as the portion was at the corner. She stated that she had put up a barbed wire and casuarina plant. She further stated that each one of them had her own gate and compound. Hers was about 1/8th of an acre. One had to go through a gate to reach the others house. DW - 5 stated that hers was a metal gate. She had a main house, guest house and servant’s quarters. It was quite some distances between these two houses. DW – 5 was within Plot No. 533, while that of m/s. Behrmann was on Plot No. 533 and the neighbours.
114. DW - 5 opined that if they wanted 3 acres, then that would include the whole land including her house. She further stated that she only planted coconut trees. She had never left her property without a caretaker. While this case was going on, she put up two water tanks in the year 2019 and 2020. The earlier ones were underground. She indicated that even when she was developing her land in the year 2018, she never knew there was someone claiming her land. She stated she never met M/s. Mwandiku until they encountered each other in court.
115. She further stated that Ms. Mwandiku never paid her any money. She was surprised that Ms. Mwandiku was claiming she was on the land from years 1994 up to 2013. DW-5 was categorical that she never sold Ms. Mwandiku any land. She stated that the agreement of 21st August, 2013 was between M/s. Behrmann and Ms. Mwandiku. It confirmed she had never met Ms. Mwandiku and never sold her any land. Also that she had never sold the whole land to M/s. Behrmann. It further confirmed that Ms. Mwandiku was a newcomer and the financier. From the said agreement, they were selling the whole land. DW - 5 denied Ms. Mwandiku’s claims for adverse possession and stated that Ms. Mwandiku was not there in trying to claim the land.
116. DW - 5 denied Ms. Mwandiku’s claimed that she paid a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2, 500, 000.00/=). She stated that Ms. Mwandiku never occupied the land and she never met her. According to DW-5, Monika lived there for only six (6) months. The other six (6) months she lived in Germany. Currently, nobody lived there as she stated that she lived in Mtwapa. DW - 5 had never seen anybody living there.

Cross Examination of DW – 5 by Mr. B.M. Musyoki Advocate.

117. DW - 5 confirmed what she had told court the last time. She was referred to her Defence. There was a written paper between her and Ms. Behrmann dated 23rd January, 1994 to build. Ms. Behrmann had asked whether she could build a small house, and gave DW - 5 twenty thousand Deuche marks (DM 20,000/=). DW - 5 confirmed signed the document dated 23rd January, 1994. and it was her signature and her witnesses.
118. DW - 5 stated that her land was Plot No. 533. M/s. Behrmann built on Plot No. 533. She built outside of the Plot No. 531 and a little bit of the house was on Plot No. 533. She had encroached onto the Asian’s portion of land. The Asian took her to Court. She agreed to demolish part of the structure



which had encroached. She stated she was not on the ground, the construction was in the year 1995 and had never taken Ms. Behrmann to court or evicted her. DW - 5's problem was for Ms. Behrmann to occupy the whole land. She allowed Ms. Behrmann to only occupy on 1/8 of an acre on Plot No. 531 but she was claiming the whole land while she gave DW - 5 20,000 Deutsche Mark. DW - 5 testified that although Ms. Behrmann went ahead to build, but it was beyond what they had agreed. She built a permanent structure and on wrong site. DW - 5 confirmed she was a Director of Mubia Holdings Limited but she never had any documents. She also never made any returns as the file went missing. However, she confirmed that she had now resumed filing returns. DW - 5 stated that her title deed had upto Entries No 5. She further confirmed that Entry No. 6 was by the Kenya Revenue Authority for the non - payment of arrears of a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=) by the company. She further stated that the caveat had not been removed. Her title never showed the Income Tax entry as she had never transacted with it but used another title. She confirmed she now had a PIN and everything had been reinstated for the Company.

119. She remembered there were people who had been using the name Mubia Holdings Limited wrongfully. For instance, they had opened a bank Account. She was a Director of Mubia Limited. She was the surviving Directors to deal. She had the seal for the Company. She could not sell nor transfer the the land to M/s. Behrmann for lack of nor authority from the company to that effect. She pointed out that the Directors of Mubia Holdings Limited did know Ms. Behrmann.
120. DW - 5 indicated that although her husband was a land Surveyor, she did not know the beacons and boundaries of the land. Her husband/surveyor showed Ms. Behrmann the boundaries and where to build on. It was a portion which was less than eighth (1/8) acres. Ms. Behrmann encroached into the other person's land. Ms. Mwandiku had a title to the land. She took over as Director of another Mubia Holdings Limited. DW - 5 stated she did not know whether M/s. Mandiku had held anything on the the Mubia Holdings Limited (1975). From the records and in particular Entries No. 1 to 12 Ms. Mwandiku neve featured at all.
121. DW - 5 testified that she believed she had a title deed to the land. She claimed land measuring three (3) acres. She further stated that when she went to conduct official searches, the register had the names of Kamande, an Indian and Patrick Kamau Kuria as the Directors of Mubia Holdings Limited. Ms. Mwandiku herself stated she got three (3) acres from Ms. Behrmann who claimed to have bought the land from DW - 5. She never reported any of these fraudulent activities to the police as the matter was already pending in court. DW - 5 informed Court giving Ms. Behrmann freedom to choose where to build between the two holes hence she was not taking advantage of Ms. Behrmann being a foreigner. She never made any effort to evict Ms. Behrmann and she had been seeing the house from the year 2005 and had no problem as it only occupied a small place.
122. DW - 5 stated she had never been to the house of Ms. Behrmann as the gates were even different. She never knew whom she was living with. She neither filed a Defence in the civil Suit - HCCC. No. 500/1994 nor prayed for eviction as she was not malicious. She never knew they wanted the whole plot. DW - 5 opined that when she requested for prayer (b) to have the title to be cancelled she was not referring to any of the 1 to 12 entries but she was referring to different document which they had not produced.

Re - Examination in Chief of DW - 5 by M/S. Njeri Kiangayu Advocate.

123. DW - 5 informed Court never having lost her documents on the suit land. She had produced the original Certificate of Title deed which had only five (5) Entries. The last entry was Entry No. 5 which was a transfer of land to Mubia Holdings Limited dated 1st March 1984. Entry No. 7 was a Provisional Certificate of title dated 9th January, 2005. Entry No. 8 was a court order of 11th April, 2007 in ELC No.



57 of 2016 Mombasa ordering the Registrar to cancel registration and registered it to Ms. Behrmann. With regard to Entry No. 8, DW - 5 was never a party to those proceedings nor the matter. She knew M/s. Behrmann. She produced the title marked as Plaintiff Exhibit No. 1 and referred to the Map for the III Mainland North issued by Survey of Kenya on 5th April 2022, the suit land MN/III/533. The portion occupied by Ms. Behrmann was shown and marked in ink. It was rectangular in shape. In comparison between a copy of 23rd January 1994 PW - 5 stated the one shown to her was a forgery, from the copy there is a cancellation on the Date of Birth, an addition of the word "or". The handwriting looked like hers but she acknowledged it was not her handwriting but the signature was hers.

124. She had never reported the forgery anywhere when she realized that her land was transferred to them as the matter was already in court. DW - 5 stated that ground was clear when the agreement was signed.

Examination in the Chief of the Land Registrar of Titles – Mrs. Njeri Kiagayu.

125. The Land Registrar stated her name as Ms. Sheila Soita, Registrar of Title Mombasa. She was a holder of Personal numbers No. 20202006739. She was posted at Mombasa in the year 2020. She previously in Nairobi. She stated that received summons to attend court.
126. She presented the provisional Title for CR. No. 14272 Land Reference No. 256 III MAINLAND/SECTION 311 NORTH. On entry No. 7 the Provisional title, it indicated it was issued on 9th January 2018. She confirmed having perused the file and there was a report by NLC dated 10th March 2016 that was issued to Ms. Mwandiku Mwelu. In summary there was a dispute over the land between M/s. Behrmann and Ms. Mwandiku. The conclusion was that at first, it was held that Ms. Behrmann was the proper owner of the land. But later on, the Provisional title was revoked when it was found to have been acquired wrongly. Ms. Mwandiku was trading as Mubia Holiday Limited. The Land Registrar produced the NLC report dated 10th March, 2016 as Plaintiff Exhibit No. 4
127. The Registrar explained the procedure upon which a Provisional title was issued. First, an Applicant makes an application on the grounds that the title was lost. Then the Land Registrar issues a notice published in the Kenya Gazette and after the lapse of 60 days, the new title is issued. Among the documents for the Applicants are produce were: - (a) Police Abstract (b) a Copy of the lost title (c) an affidavit from an Advocate (Commissioner for Oaths) (d) the receipt for the amount paid (e) an identity Card. From the Registry records, these documents were not there. With regard to the instant case, the Registrar informed Court none of these documents were found. Besides, even after she managed to peruse the dispatch records/file and there were no documents.
128. Based on the documents in the parcel file, the Registrar was not able to tell to whom the provisional title was issued to. From the title in their possession, she showed Entry No. 13 which was signed on 18th January 2021 revoking Entry No. 7 under the provision of Section 79 (1) and (2) of the [Land Registration Act](#), No. 3 of 2012 by the Land Registrar. From the said Entry, it did not state the exact parties who consented to it. From the record there was only a restriction registered by John Magiya Advocates and later on the removal of the restriction.
129. Entry No. 9 was the provision on the Provisional title pursuant to a Court Order. Under, Entry No. 8 dated 11th April 2017, from the Civil case ELC. No. 57 of 2016. The Registrar had never been served with an order setting aside of Judgment. Had the Court order been served, the Registrar of Title would have immediately cancelled the title. According to Entry No. 12, the title had been transferred to Joseph Lokiit Lengenetai. He was the one who had the provisional title having been transferred to him on 27th November 2017 for a consideration of a sum of Kenya Shillings ten Million (Kshs. 10,000,000.00/=).



130. In conclusion, she produced NLC Report dated 10th March 2011, marked as Plaintiff Exhibit No. 4, the Title deed with Entries Numbers 1 to 13 marked as Defendant Exhibit No. 5, a letter dated 7th November 2017 by John Magiya Advocate revoking the restriction marked as Defence Exhibit No. 6; a letter dated 16th October 2017 by M/s. Berhamann placing the restriction.

Cross Examination of the Registrar of Titles by Mr. B.M. Musyoki Advocate.

131. The Registrar confirmed the Entries No. 1 to 7 of the title deed were photocopies. She opined there was a likelihood that the original was misplaced and hence the land Registrar re-constructed the title deed. She did not know how it was reconstructed as there was no evidence of asking Mubai Holdings to furnish the Registrar of title with the title. However, according to her, Entry No. 8 to 13 was original.
132. According to the Registrar, from the Registry records there was no evidence of M/s. Mwandiku. The Provisional titles for 9th January 2015 and 20th April 2017 were not accompanied by the prerequisite documents. The second Provisional title was pursuant to a court order. The Registrar confirmed that the position for the removal of restriction was under Section 76 of the *Land Registration Act*, No. 3 of 2012 and was normally undertaken following a hearing of the parties. She did not have the proceedings to that effect. The removal of the restriction was done on 7th December 2017 and the transferred was done on the same date. The Land Valuer placed the value of the property at a sum of Kenya Shillings Ten Million (Kshs. 10, 000,000.00/=) on 21st January, 2017 before the transfer had been submitted. The stamp duty for a sum of Kenya Shillings Two hundred and Fouty Thousand (Kshs. 240,000.00/=) was paid on 29th November 2017 to the National Bank of Kenya and a official receipt No. 089426 issued.
133. It was the Registrar's evidence that when the consent was referred to under Section 79 (1) and (2) of the *land Registration Act*, No. 3 of 2012 for the rectification of the title deed, there was no consent by Mubia Holdings Limitd and M/s. Mwandiku on record. The removal of Entry No. 7 was based on the recommendation in the report by the NLC report dated 13th March 2016 which stood to be null and void. From the Registry records there was no proof that Entry No. 6 was valid. The entry No. 6 onwards was by court order. She could not comment on the Entries No. 6 to 13 of the title and their legalities. She left it for the Court to decide.
134. She opined on a possibility of some injustices caused by the land Registry offices. For instance, the removal of the restrictions without following the dur process of law – issuance of notices, conducting a hearing and retaining a record on the decision; the transfer conducted within such a short time and without the involvement of all the parties and so forth. All these were irregularities meted by the office.

Examination in Chief of DW - 6 by Mrs. Njeri Kiangayu Advocate

135. DW - 6 is Mr. Muye Mwangunza Kakunde, he was swron and testified in Kiswahili language. He identified himself as a holder of the national identity Card bearing No. 1003160785 and that he was born in 1961. He lived in Kikambala. He was a caretaker and employee for the land and house belonging to Mrs. Wairagu. There were three (3) houses - one with a story building and another 3 bedroom masionette on the suit land for Mrs. Wairagu. He occupied the servants quarter and he had been living there for thirty (30) years.
136. He stated knowing the German lady (M/s. Behrmann). She would live in her small portion of the land that had a one -story building. She had fenced the land with wire, bougainvillea and trees and there is a block. But at the moment there had been no one there. At the time there was only a caretaker. According to DW – 6 the German Lady then lived at Mtwapa but before she would come and live there for a short. This was when she was from abroad on seasonal times such as during Christmas time.



137. He indicated he did not know M/s. Mwandiku. He only heard of her and only saw her once while in Court. For a long time, the house for Ms. Behrmann had been unoccupied. He stated that they all use their own gate. He stated the plot for Ms. Behrmann was in the middle of the boundaries of his employer and there was no access to the house of Ms. Behrmann. Ms. Behrmann and Ms. Mwandiku had never used and occupied the land for Mama Wairagu.

Cross Examination of DW - 6 by Mr. B.M. Musyoka Advocate.

138. DW - 6 stated he did not know the number of the land. He had been there for close to 30 years and the fences had been there. He found Ms. Behrmann there and he concluded she was on M/s. Wairagu's land as there was one part which had not been fenced. M/s. Wairagu's land was three (3) acres.
139. He described the house as white colour/paint and roofed with Makuti (Coconut leaves). He was shown the photographs. He stated that from the year 1972, there had been two servants. They only came to clean up the place and then left. He indicated that he was illiterate but was capable of signing documents. He confirmed he had never been into the compound for Ms. Behrmann and he had seen Mr. Joseph Likoot Lenangetai.

V. The Submissions

140. On 13th June, 2022, upon the closure of the consolidated case by the Plaintiff, the 1st, 2nd and 3rd Defendants herein the parties were directed to file their written submissions within given stringent timeframe thereof. Pursuant to that, all the parties fully complied and the Honorable Court reserved 20th February, 2013 as the date for the delivery of Judgment accordingly.

A. The Submissions by the 1st Plaintiff – Caroline Mwelu Mwandiku

141. On 8th November, 2022, the Learned Counsel for the 1st Plaintiff - Caroline Mwelu Mwandiku – in ELC No. 251 of 2013 the Law firm of Messrs Benjamin Mwikya Musyoki & Co. Advocates filed the written submissions dated 26th October, 2022.
142. Mr. B.M. Musyoki Advocate commenced by providing the Court with a detailed background of the two cases ELC. No. 57 of 2016 and ELC. No. 251 of 2013 now consolidated suits in a nut shell as follows:-
- a. It was not disputed that Mubia Holdings Limited was the registered Proprietor of the suit land – the ELC No. 251 of 2013 was initially instituted by two Plaintiffs Caroline Mwelu Mwandiku hereinafter referred to as (“Caroline”) and Monika Herta Elfriede Behrmann hereinafter referred to as (“Monika”) against Mubia Holdings Limited. The two were seeking to be declared as owners of the suit land by way of Land Adverse Possession. Ms. Behrmann later withdrew her suit against the Defendant in the Originating Summons and only Caroline was making a Claim of adverse possession.
 - b. M/s. Mwandiku had claimed the suit land on the basis of Land Adverse Possession based on the trite law as the Plaintiff on her occupation for a period of more than 12 years – which was peaceful, open, continuous and uninterrupted and the occupation must be adverse to the interest of the registered owner, the Plaintiff satisfied these ingredients. Ms. Mwandiku averred that she was invited by Ms. Behrmann to join hands and buy the suit land in the year 1994. She produced an agreement between Ms. Behrmann and one Anne Wanjiru Wairagu – “CM – 1” hence their entry to the land.



- c. However, this agreement was denied by the Defendant that she allowed Ms. Behrmann to build on a different parcel. The land belonged to Mubia Holdings Limited and not Mrs. Waragu. The agreements went on to show that the Plaintiff and Ms. Behrmann entered and occupied the land without the permission or authority of the registered owner. By denying that she sold the land, the director of Mubia Holdings Limited was in support of the Plaintiff's case. If it was assured that Mrs. Wairagu rightly represented the registered owner while entering into the agreement dated 23rd January, 1994 time started counting from the date of the said agreement was executed. It was sufficient claim of adverse possession based on an agreement for sale. The time started running from the time the last instalment was paid and the buyer was put in possession. There was a common factor that 20,000 Deutsche Mark cited in both agreement and orally confirmed by Mrs. Wairagu during her oral testimony, was in full payment of whatever portion Mrs. Wairagu was selling to Ms. Behrmann and Ms. Mwandiku.
143. The Learned Counsel averred that the Plaintiff's house was still stood on the suit land and the court saw it when it conducted a site visit on June, 2022. Mrs. Wairagu testified that the construction of the house started immediately upon payment of the money. On this point the Counsel cited the cases of "James Maina Kinya – Versus- Gerald Kwandaka (2018) eKLR and Wilson Njoroge Kamau –Versus- Nganga Muceru Kamau (2020) eKLR..
144. Where upon the Courts held that for purposes of claim for Land Adverse Possession, time starts running from the date the buyer was put in possession. Ms. Behrmann or consent occupied the land without the permission of the owner. The Defendant never filed any suit since the year 1994. Thus, her right over the land was extinguished on or about year 2006. Even the Counter claim in the current suits would not hold the Defendant's Defence.
145. According to the learned Counsel, the entry and occupation on the suit land was in the year 1994. Ms. Mwandiku held she had been consciously, open and exclusively uninterrupted, occupations and possession of the suit property for a period of over 19 years and as a result of the said occupation, she had acquired proprietary rights over the said portion of the land by consequence of adverse possession. Anne Wairagu admitted Ms. Behrmann entered and established home in the suit land immediately after their transactions. Ms. Mwandiku was emphatic that she assisted in the drawing of the agreement as she was instrumental in transacting the purport of the agreement to Ms. Behrmann who did not then understand English or Kiswahili languages.
146. The Learned Counsel submitted that Ms. Behrmann invited Ms. Mwandiku to live with her in the land even during the construction of the House. However, Ms. Behrmann in bad faith and behind the Plaintiff's back started claiming that she had not instructed any advocate to file the suit neither had she granted authority to Ms. Mwandiku to file and prosecute suit on her behalf. Ms. Behrmann disowned her advocate who went on to file a bill of costs against her. Ms. Behrmann attempted to disown the agreement between her and Ms. Mwandiku but at the same time accepted having received money in exchange of her claim over the property.
147. He contended that there was nothing illegal about the agreements between Ms. Mwandiku and Ms. Behrmann . All the parties signed it and this does not negate the fact that they were both in joint possession of the property for the period since it was bought from Mrs. Wairagu. The agreement showed that Ms. Mwandiku intended to buy Ms. Behrmann 's share interest on the land for the greed consideration and became the sole owner.
148. The contestation of having attained a title by way of the Land Adverse Possession was between Ms. Mwandiku and Mubia Holdings Limited. Ms. Behrmann withdrew from that claim and she even moved out of the house they constructed and but never got to live there. She left Ms. Mwandiku there



and it's a fact the court confirmed during the site visit only to hold it is workers who currently inhabited the house. This is over 12 years from the year 1994. The court noted that there was a high ledge of fence around the house but could not see through the other side. Anne Wanjiru and her worker – Muiya Mwangunze Kakunde never knew who lived there not did she bother to evict them. The Counsel held it was Ms. Mwandiku who was in occupation.

149. The Learned Counsel pointed out that after the site visit the court directed there be a joint surveying exercised conducted. The parties' surveyors never agreed on the date of survey. Hence Ms. Mwandiku commissioned a Surveyor – Gismap Surveyors and Consultancy Limited who conducted an independent survey and prepared a report dated 20th June, 2022 filed in court. According to the report, it confirmed what the teams had seen on the ground during the site visit.
150. The Survey Report by the Defendant claimed, it was only a quarter ($\frac{1}{4}$) acre of the suit land that was in occupation. It was inconclusive and not reliable. This information was never reflected to what the court saw on the ground. Hence the borne of contention was the area of occupation. To the Counsel, the Plaintiff occupied a larger portion of the suit land. Ms. Mwandiku emphasized that when the court visited the land it saw a magnificent house and cultivation of vegetables and which the 3rd Defendant could not fail to have seen for all these years. Therefore, the 3rd Defendant's rights to reclaim the land from the Plaintiff had been extinguished. To butrees on this point, he cited the case of "Abednego Otundo Ayuku –Versus- Laban Masinjira 2021 eKLR. The Learned Counsel held that the Land Adverse Possession and ownership were two conflicting rights operating against each other with the first one extinguishing the second one. The Defendant slept on its rights for 19 years and even when this suit was file it never filed a Counter Claim against the Plaintiff.
151. The Learned Counsel stated that Ms. Behrmann being a foreigner could not own or hold freehold title in Kenya. In any case, upon her withdrawal, Ms. Behrmann relinquished her claims in the Civil case ELC No. 251 of 2013, She lost the opportunity in arguing her case in adverse possession. Furtermore, the Counsel argued that the decision by the NLC of 10th March 2016 was quashed in the ELC Malindi No. 8 of 2016 on 23rd January, 2020. The decision had never been appealed or challenged in any forum. Ms. Mwandiku denied being involved in the formation of the 2nd Mubia Holdings Limited nor knowing the persons indicated as Directors of the Company – Tonny Kamande and Patrick Kuria Mwangi. It's hard to appreciate why the Plaintiff never summoned these directors to testify.
152. In conclusion the Plaintiff Ms. Mwandiku urged court to find the court to find that the only competing variance was the size or area of the suit land which was occupied by Ms. Mwandiku. He urged court to grant her a $\frac{1}{4}$ acre of the land of the suit land and dismiss the the Civil Case of ELC. No. 57/2016 with costs.

B) The Written Submission by the Plaintiff in ELC No. 57 of 2016 (Consolidated with ELC. No. 251 of 2013 (OS) and the ELC. No. 57 of 2016).

153. On 1st February, 2023, the Learned Counsels for the Plaintiff in the ELC. No. 57 of 2016, (consolidated with Civil Case ELC. No. 251 of 2013 (OS) and as the Interested Party and/or 2nd Plaintiff in ELC. No. 251 of 2013), now reffreed to as PW – 2 in this Judgement, the Law Firm of Messrs. Nyameta Mogaka and Magiya Advocates filed their written submisisions dated 31st January, 2023.
154. Mr. Magiya Advocate commenced his submission by providing a brief introduction to the matter by stating that the alleged Plaintiff in ELC. No. 251/2013 (OS) – M/s. Behrmann was of Germany National, married through customary means to a Kenyan but whom they later on separated. She proceeded to acquire a home within Kikambala, County of Kilifi, Mombasa and since then she had been constantly within the Republic.



155. The Learned Counsel stated that the Mubia Holdings Ltd. through Anne Wanjiru Wairagu was the legal entity that sold the disputed parcel of the suit land to Ms. Behrmann in the year 1994. According to the counsel, Ms. Mwandiku masqueraded as a friend and a purchaser of the property sold to Ms. Behrmann she was given possession by Ms. Behrmann . But from that time she endeavored out of betrayal and dishonesty to disentitle Ms. Behrmann and take over the said property through dubious and fraudulent means.
156. The Learned Counsel presented a clearer picture of the three (3) persons who have been claiming ownership to the suit property as follows:-
- a. Mubia Holdings Ltd. (Registered year 1975). This was already registered by the time it got into an agreement with Ms. Behrmann on 23rd January 1994.
 - b. Mubia Holdings Limited – purportedly registered on 23rd January, 2014 – it was a stranger to Ms. Behrmann as she only came to know about it during the hearing of the case conducted by the National Land Commission.
 - c. Joseph Likoot Lenangelai – was the current title holder of the suit land in dispute. He acquired it from Ms. Behrmann who procedurally followed the court process. He was issued with the title through the Decree of this court hence an innocent purchaser for value without notice.
157. The Learned Counsel presented the facts to the effect that Ms. Behrmann who was desirous of obtaining land got one through land agents on 23rd January, 1994 she entered into a memorandum with Anne Wanjiru Wairagu of Mubia Holdings Ltd. which was witnesses by two persons John M. Dermout and Brigid M. Dermout who never testified and are mentioned again in the proceedings. She constructed a house on the land later on out of mutual trust. She invited a friend – Ms. Mwandiku who had a Germany boyfriend and spoke a bit of Germany language. Ms. Behrmann opted to sell the property to her at a sum of Kenya Shillings Twenty Three Million (Kshs. 23, 000,000.00/=) but she was only able to pay Kenya Shillings Two Million (Kshs. 2,000,000.00/=) she travelled to Germany on her return she realized that Ms. Mwandiku had been in the process of acquired the title without her knowledge by stay of Land Adverse Possession. She demanded her land back. She lodged a complaint with NLC. The Complaint was advertised through local newspapers and published in the Kenya Gazette but despite all this Mubia Holdings Ltd. never appeared and NLC declared the land belonged to Ms. Behrmann having satisfactorily explained herself and that she should be issued with title deed.
158. Although Mubia Holdings Limited never challenged the decision by the NLC, Ms. Mwandiku filed a constitution Petition at Malindi ELC – Malindi Case No. 8 of 2016. The Counsel submitted that these two (2) suits ELC. No. 251 of 2013 and Constitution Petition No. 8 of 2016 at Malindi were a nullity as they were brought by strangers and persons from her own testimony she was a minor in the year 1993 when Ms. Behrmann was purchasing the subject property.
159. The Learned Counsel held that the statement and testimony by Ms. Mwandiku was dishonest and full of contradictions to wit:-
- i. That she had authority of Ms. Behrmann to bring about the suit – ELC. No. 251 of 2013 yet by then Ms. Behrmann had been in Germany.
 - ii. That she claimed to be a financier, then purchaser of the land while at the same time making a claim of land by virtue of Land Adverse Possession
 - iii. The evidence by Ms. Behrmann all alleged financing agreements were a fraud and her signatures were forged.



160. The Learned Counsel challenged the assertion by Mubia Holdings Limited to have the title issued to Joseph Lenangetai be cancelled on allegations of having been obtained by fraud on basis they never proved the same. The Learned Counsel challenged Mrs. Wairagu's capacity as a director of Mubia Holdings Limited as the only document she presented were minutes dated 5th June, 2018. He submitted the minutes were not a serious demonstration of directorship. He held:-
- i. There was No. CR – 12 Form produced from the Company Registry.
 - ii. There were no Articles of the Company and Memorandum of Association of the Company showing who the directors of Mubia Holdings Limited were and the returns done at least for the past six (6) years, to show the company has been running or if dormant the three directors must demonstrate by certified copies of letters from the Company. Thus, Mrs. Wairagu was a masquerader and an opportunists taking advantage of the situation.
 - iii. Mrs. Wairagu never denied that Ms. Behrmann bought land and had been in occupation of a section of the suit land and build a house a fact court was able to witness during the site visit thought she claimed to be having an original title on whose its acquisition was questionable as she was not able to demonstrate being a director of Mubia Holdings Limited by failing to produce the original document of registration of the CR-12 Form. Such a Company could not have been dormant for over 30 years.
161. The Learned Counsel questioned where the Memorandum purporting that Ms. Behrmann bought part of land was a forgery. He challenged the pleadings filed by Mubia Holdings Limited for failure to comply with the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010 and relied on the decision of “Leo Investments Limited – Versus - Trident Insurance Co. Limited (214) eKLR and Republic – Versus - Registration General and Others (2005) eKLR East African Portland Cement Limited – Versus - the Capital Markets Authority and 5 others Petition No. 6000 of 2013 Bugerere Coffee Growers Limited – Versus - Seraduka & Another (1970) EA 147 and Kenya Commercial Bank Limited –Versus - Stage Coach Ltd. (2014) eKLR and for failure of filing a Resolution by the Company authorizing her to file suit and appointment of the Advocates.
162. The upshot of the foregoing submissions, the Learned Counsel held that the decision by NLC should not be distributed as both Mrs. Wairagu and Ms. Mwandiku lacked a “Locus Standi” or authority to have instituted the suit. Counsel submitted that the NLC proceedings were public and hearing was a process not an event. The Respondents were invited but choose not to attend.
163. During the site visit, the Learned Counsel stated it was evident that the place was deserted and buildings were dilapidated hardly with any indications that people resided there. The Care taker resurfaced after the issues calmed and was imposed to achieve a specific end as all along there had been no Caretaker. The Learned Counsel reiterated that Ms. Behrmann acquired land over 12 years ago – 20 years and hence entitled to land adverse possession. The findings by NLC that Ms. Behrmann was entitled to be registered as the owner of the suit land should be upheld. He quashed the 3rd Defendant who came to court with identical Memorandum of sale one of Plot No. 531/II/MN and other for Plot No. 533/II/MN as these were forgery to confuse the parties and a fishing expedition. The Ccounsel stressed there was no proof of forgery on Ms. Behrmann 's part and she went to court essentially to validate and/or enforce the findings of the NLC and by the said Decree acquired good title which she passed to Joseph Likoot Lenangetai the current registered owner as an innocent purchaser for value without notice, any knowledge of fraud or mis-representation. To Buttress its point the Counsel relied on the decision of Katende –Versus- Haridar & Co. Limited (2008) 2 E.A. 173.



164. He argued that none of the evidence filed in court displaced the current buyer or proved otherwise. There was no evidence of any confusion. The mere fact of pointing out the short falls in the entries on the title deed never invalidated the transaction or a validity acquired title. There was no evidence that Ms. Behrmann and Mr. Lenangetai never followed the due process for the acquisition of the title that they held. As result therefore, the Learned Counsel submitted Mr. Lenangetai was a bona fide purchaser for value with an indefeasible title, right and interest on land in according to the Provisions of Section 25 of *Land Registration Act*, No. 3 of 2012 and cited the case of “Nbi Civil Appeal No. 411 of 2015 – Moses Parantoi & Peris Wanjiku Mukuru –versus Stephen Njoroge Macharia (2020) eKLR.
165. The Learned Counsel argued that land could never have had two titles. Besides, both parties were under duty to protect and show the roots of their titles as rightfully put by the Court in Munyu Maina (Supra). In conclusion, the Learned Counsel argued that the Applicants had not demonstrated cogent and credible evidence for the court for them to be granted the reliefs sought. He urged the Honourable Court not to disturb the findings of the NLC and the Decree of this court to be affirmed.

C. The Written submissions by the 3rd Defendant

166. On 13th October, 2022, the Learned Counsel for the 3rd Defendant, Mubia Holdings Ltd. (Registered in 1975) the law firm of Messrs. N. Kiagayu & Co. Advocates filed their written submissions of even date.
167. Mrs. Njeri Kiagayu Advocate commenced her submissions by providing a detailed introduction and background of the matter. The Learned Counsel averred that the civil suit No. ELC. No. 251 of 2013 (O.S.) was originally filed jointly by the two ladies – M/s. Behrmann and M/s. Mwandiku. According to her, they came together while executing the 1st sale agreement between themselves on 21st August, 2013 in respect to the alleged transfer of the suit land. It is instructive to note that there had existed three sale agreements between these two ladies over the said suit property – dated 21st August, 2013, 4th December, 2013 and 26th June, 2014 respectively.
168. This was after Ms. Behrmann , misrepresented facts to imply they were to purchase the whole suit land by both of them. Ms. Mwandiku was to pay M/s. Behrmaan a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000/=) as the purchase price for the land. Unfortunately, she only managed to pay a sum of Kenya Shillings (Kshs. 2, 000,000/=).
169. The Learned Counsel stated that on 23rd January, 1994, assumed joint occupation of the suit land. M/s. Mwandiku used this to allege that it confer on her which led them to claim for title jointly on land adverse possession. She later turned against Ms. Behrmann after she obtained registration of a company with a similar name – Mubia Holdings Limited on 23rd January, 2014 claiming to be registered proprietor registered of the suit land. While this was happening, the case was still pending. All this was happening without the involvement, knowledge nor consent of the legal owner - Mubia Holdings Limited (Registered in 1975) nor its surviving Director – Mrs. Wairagu.
170. After they fell apart, in the year 2016 Ms. Behrmann came to learn that Ms. Mwandiku had been advertising to sell the suit land to other third parties and had even acquired a provinsional title deed while she had been abroad. Ms. Behrmann applied to be withdrawn and her names struck out from the joint suit – ELC No. 251/2013. She refuted having given Ms. Mwandiku any authority to represent her in the suit despite the facts contained in the suit and the 1st sale agreement of 4th August, 2013. Instead, Ms. Behrmann decided to file another civil suit ELC. No. 57 of 2016 suing the new company registered by Ms. Mwandiku. The bad blood and furore between the two ladies escalated upto the grounds. This caught the attention of their workers who reported the matter to the legal owner of the land. It was at



this juncture that Mrs. Wairagu became aware of the happenings and on 13th July, 2018, she formally sought to be joined in the Civil suit ELC No. 251 of 2015. She filed her papers in all the two suits.

171. The Learned Counsel averred that Ms. Mwandiku claimed to have lived on the suit land from 23rd January, 1994 as a purchaser when she was only 17 years of age having been born in the year 1976. As at this time, all that Ms. Behrmann had over the land was a Memorandum signed between her and Mrs. Wairagu. The contention of the Counsel was that the only import of the agreement was in only the identification of an area of land within the suit land for which Ms. Behrmann paid a sum of German Deutche Marke Twenty Thousand (DM 20,000/=) (then equivalent to Kenya Shillings Million (Kshs. 2, 000,000/=) against certain conditions which were never fulfilled thereafter todate.
172. According to the Learned Counsel, she submitted that Ms. Behrmann lied to Ms. Mwandiku that she had acquired the whole parcel of the suit land and that she had not been able to trace the legal owner for effecting of the transfer of the bought land to her names. The Counsel held that from the site visit conducted, the Honourable Court was able to witness that M/s. Wairagu was in occupation of the suit land together with her permanent workers on the ground who took care of the whole suit land. Further, the Learned Counsel averred that from the site visit, it was seen the area Ms. Behrmann formerly occupied was just part of the main suit land owned by Mubia Holdings Limited (registered in 1975) Ms. Behrmann had build a house as they had agreed with M/s. Wairagu. It was deserted and the building standing on it was dilapidated with no occupation. However, the the Learned Counsel opined that the house now abandoned was fenced with a barbed wire fence was partly built on the neighbor's farm and a small portion on to Mubia Holdings Ltd. land. None of them have occupied onto where the land of Mubia Holdings Limited. It was largely on a neighbour's land for which Ms. Behrmann was sued in HCCC. No. 500 of 1995 at Mombasa for trespass and encroachment.
173. The the Learned Counsel argued that the peculiar second version of the sale agreement had false statements. It referred to the whole suit land and not the portion, Ms. Behrmann and M/s. Wairagu had agreed in the Memorandum they signed on 23rd January, 2013 to which Ms. Mwandiku was not a party. On the second one, Ms. Mwandiku was trying to bring herself on board so as to justify claiming the land by way of Land Adverse Possession.
174. The Learned Counsel held that Ms. Mwandiku was laying a claim of land adverse possession to a parcel of land she was trying to but in the year 2013 and also trying to sell to others by defrauding Mubia Holdings Ltd. these are contradictions the court never found any of the two ladies occupying the dilapidated house when it paid a site visit. The Counsel further pointed out further contradictions from the sale agreement of 21st August, 2013 where Ms. Mwandiku was described as being a financier cum-buyer cum land adverse possessor. Also under Paragraph 4 Ms. Mwandiku had been welcomed to live with Ms. Behrmann for that period. Clearly Ms. Mwandiku was on the land by permission of Ms. Behrmann , she could not play both role – either a land adverse possessor without physical occupation or buyer of the land at a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000/=) of which she only managed to pay a sum of Kenya Shillings Two Million (Kshs. 2,000,000.00).
175. The Learned Counsel held that there had be a conspiracy to defraud Mubia Holdings Ltd. their land given that at some point Ms. Behrmann even obtained a Provisional Certificate of title for the suit land entered as Entry number 6 on the title.
176. The learned argued that as for Ms. Mwandiku she could not be buying that which she was claiming she was entitled to as had Adverse Possession. All their claims should be dismissed with costs as the suit was based on fraudulent vexatious, scandalous and an abuse of the court process. The small portion the dilapidated building occupied sat on an estimated ¼ of an acre for a larger portion of it is on adjoining parcel of land and not the suit land whose registered owners were not party to this suit. Ms. Mwandiku



was never a party to the agreement of 23rd January, 1994 between M/s. Wairagu and Ms. Behrmann . Ms. Mwandiku was a total stranger to it.

177. The Learned Counsel averred that Ms. Behrmann had testified being a German Citizen and under the Land Act Section 9 (1) (c) foreigners were barred from owning freehold and/or agricultural controlled land. There was this limitation by affliction of law. Besides the Learned Counsel argued that the land was still in the name of Joseph Lokooti Lenengatai having acquired it on 17th December, 2017 when the suit was still going on. He had never filed any papers in the suit. Hence there will be need to expunge his names from the Land Register for having acquired it irregularly. This was contrary to the Doctrine of “Lis Pendens”.
178. In the final analysis, the Counsel stated that the Honourable Court directed that there be a joint surveying exercise in order to establish the area Ms. Behrmann ’s house was occupying. Since this was never possible the Counsel engaged their own surveyor who established that the area occupied was ¼ acres (0.90 HA) of the total parcel of land. Being a non - citizen and having abandoned the area where she had been allowed to build occupying the Learned Counsel urged court to have that portion revert back to the 3rd Defendant.
179. The Learned Counsel argued that there was no sale agreement duly executed between Ms. Behrmann and Mubia Holdings Limited. The Memorandum signed never revealed the purpose for the payment whether it was for sale of lease and for how long. For that reason, Ms. Behrmann build the house without any further documentation between her and Mrs. Wairagu. Besides, she had now abandoned the house. The Learned Counsel argued that her earlier stay on the suit land was only as a licensee which expired upon her abandonment of the house.
180. In conclusion, the Learned Counsel appealed to the Honourable Court to find that the Mubia Holdings Limited which was registered in the year 1975 as the legal registered and rightful owner to the suit land. Pursuant to that, there be orders that the Registrar of Titles at Mombasa do deregister Joseph Likooti Lenangatai from the suit land as he had never defended his registration and the 2nd Defendant, M/s. Behrmaan had never proved to be owners but being wrongful owners.

VI. The Issues for Determination

181. I have had an opportunity to keenly assess the pleadings in these two (2) suits – namely:- “ELC. No. 251 of 2013 – Caroline Mwilu Mwandikhu – Versus- Mubia Holdings Limited and Mubia Holdings Ltd. (Registered 1975) and ELC. No. 57 of 2016 Monika Herta Elfriede Behrmann (Consolidated) the filed Plaintiffs, the Defences and Counter Claims, the evidence adduced by all the witnesses summoned, the written submissions, cited authorities and the relevant provisions of the Constitution of Kenya 2010 and the statutes.
182. For the Honorable Court to arrive at an informed, just, reasonable, equitable and fair decision from these rather convoluted suits it has condensed the subject matter into the following four (4) salient issues for its determination. These are:-
 - a. Whether the two (2) suits ELC No. 251 of 2013 and ELC. No. 57 of 2016 (Consolidated) by the Plaintiffs herein and against the 1st, 2nd and 3rd Defendants have any merit to wit.
 - i) Who was the registered and legal proprietor with indefeasible, rights, interest and title to the suit land as vested in law.
 - (ii) Was there any valid legal and right contract to transfer the suit land from Mubia Holdings Limited. to Monica terms and conditions stipulated thereof?



- (iii) Was there any valid legal and right contract to transfer the suit land or part of it between M/s. Behrmann and M/s, Mwandiku.
 - (iv) Is there any proper claim of the suit land by M/s. Behrmann and M/s. Mwandiku over the suit land through Land adverse possession as provided for by the relevant provision of the law.
- (b). Whether the parties herein should be considered for entitlement of the suit land through the Land Adverse Possession as provided for in law.
 - (c). Whether the parties herein are entitled to the relief sought.
 - (d) Who will bear the costs of the two ELC. No. 251 of 2013 and ELC No. 57 of 2016 (Consolidated) herein.

VII. Analysis and Determination

ISSUE No. (A) Whether the two (2) suits ELC No. 251 of 2013 and ELC. No. 57 of 2016 (Consolidated) by the Plaintiffs herein and against the 1st, 2nd and 3rd Defendants have any merit to wit.

Brief Facts

183. Before the Honourable Court proceeds on with the analysis under this Sub heading, it is imperative that it extrapolates on the brief facts of the case. Based on the filed pleadings and the elaborate evidence adduced herein, the main borne of contention is on the ownership of the suit land. Undisputedly, the suit land situated at Kikambala within the County of Kilifi measures three (3) acres or thereabout. It consists of three apportioned Plots No. 256, 531 and 533. Ideally, and from the site Visit, the three plots are found on two segments being Plot A of parcels No. 256 and 531) approximately measuring two and three quarter ($2\frac{3}{4}$) acres and Plot B of Parcel No. 533 measuring a quarter ($1/4$) physically separated using a barbed wire and natural hedged fence and each with separate metallic gates. On Plot A there already existed some developments – a mansionette, drive way, several plantations, a servant quarters water wells by Mrs. Wairagu. On Plot B, which is rectangular shaped there was constructed a huge bricked story house with coconut roof (makuti) on it by M/s. Behrmann and claimed by M/s Mwanduku.
184. It is a confirmed fact that in the year 1994, M/s. Behrmann a German Nationality and Mrs. Wairagu entered into an agreement terms and condition stipulated thereof, whereby she was allowed to occupy some portion of the land. But later on she proceeded to build on a different spot than they had agreed. The construction took place for two (2) years without any hindarance from Mrs. Wairagu. However, a neighbor of the Asian origin lodged a complain that through the construction and fencing, both of them had trespassd and encroached on his land. Indeed, he filed a civil suit in hgh Court for that matter. However, in the Course of time, it appears there was an amicable solution to the issue. M/s. Behramann conducted an official search and found the suit land was registered in the names of a company trading and in style of Mubia Holding Limited. She waited for the transfer to be effected without success. Out of disperation she lodged a complaint with NLC and who after the due process – decided that she be granted a title. Upon presenting the decision by NLC to the Land Registrar she was advised to obtain a Court order. Eventually, she filed a civil Suit and obtained an order to that effect which she now presented and was issued with a Provisional title deed.
185. In the meantime, M/s. Behrmann got into a plan to sell of the suit land supposedly as she intended to leave the Country. In the process she was approached by M/s. Mwandiku who had intention to



- buy the land. They became acquitted to each other as she spoke the German language. They entered into several sale agreements. A purchase price of Kenya Shillings Twenty Three Million (Kshs. 23, 000, 000.00/=) was agreed upon. Out of this M/s. Mwandiku managed to pay a sum of Kshs. 2,000,000/= and remained with an outstanding balance of Kshs. 21,000,000/=. She took possession and ejected them out of the suit land. She offered to get a title deed. While living on the land, she claimed there had been no interference.
186. M/s. Mwandiku got into top gear to secure a title deed. She claimed being a financier and purchaser. She alleged being entitled to the land both as a buyer but also adverse possession. In the course of time a company – Mubia Holdings Limited was incorporated in the year 2014 and which purported to be selling the land. She filed a suit ELC. No. 251/2013 making a claim of title by way of Land Adverse Possession and ownership as buyer. She joined M/s. Behrmann but later on, on learning all these, M/s. Behrmann withdrew and applied to have her name struck out from the suit. Their relationship became sour which escalated into Mrs. Wairagu knowing of the happenings on the ground through her workers. M/s. Behrmann filed her own case ELC. No. 57 of 2016 – claiming breach of contract with Mrs. Wairagu. M/s. Behrmann also sold the suit land to her lover, one Mr. Joseph Likoot Lenangetai.
187. M/s. Mwandiku also filed a Constitution Petition at Malindi but which was dismissed. She also applied to have the orders issued to M/s. Behrmann be set aside on the ground that there existed another suit over the same subject matter. She was successful. This had some serious repurcation on various aspects. First, in essence it extinguished the Provisional Certificate of title deed held by M/s. Behrmann and caused the consolidation of the two (2) cases.
188. While all these were happening Mrs. Wairagu was not in the picture. But after realizing it and conducting an official search at the Company Registry she found out that an original company called Mubia Holdings Limited (registered in the year 1975) had been replaced by another one the same name. According to her, it was her late husband and her who were the Directors to this Company. She now remained as the surviving Director. She still held the original Certificate of Title Deed bearing five entries only. She found out there was a title deed that had been fraudulently and irregularly issued to M/s. Behrmann. The said title had twelve entries. She applied to be joined in the ELC. No. 251 of 2013 as an Interested Party and which was allowed as a 3rd Defendant. She filed a Counter Claim. From her pleadings, she confirmed having been approached by M/s. Behrmann but only allowed her to occupy some portion but not intending to sell the land. She claimed the land belonged to her company. She sought for a declaration of the ownership of the suit land to the company. That is adequate on facts.
189. Now turning to the framed issues for analysis under this sub-heading. I wish to state from the onset that land in Kenya and in particular the Coastal region is an extremely emotive issue. It is agreed that land is a source of livelihood and one commodity that has been marred with historical injustices and insurgencies at the coast. These include cases of absentee landlords where the registered owners disappear from their registered portion of land for long periods where on some incidences without any caretakers or in others with agents who eventually even assume the ownership rights over the land. As indicated, this may be almost a case of this nature.
190. Based on the facts of this case being so convoluted and the request by parties on 14th June, 2022 the Honorable Court conducted a Site Visit and a report was prepared.

VIII. The Site Visit Report

SITE VISIT REPORT FOR KIKAMBALA AT 3.10 P.M. TO 5.00 P.M. ON 14TH JUNE, 2022

Coram



- I. Court
 - (a) Justice Hon. L.L. Naikuni (ELC. No. 3)
 - (b) Court Clerk Yumnah Hassan
 - (c) Mr. Rowland – Usher
- II. Advocate for the Plaintiff
 - a. Mr. B.M. Musyoki Advocate
 - b. M/s. Ms. Mwandiku – Unwell
 - c. Mr. Mika Mwema Mutua – Nephew to Caroline Mwelu Mwandiku
 - d. Mr. Shaban Kekinzdao – caretaker for Ms. Mwandiku
- III. Advocates for the Interested Party in ELC. NO. 57/2016; Plaintiff and Interested Party (M/S. BEHRMANN)
 - a. Mr. Magiya Advocate.
 - b. M/s. Behrmann (absent as she was abroad).
 - c. Mr. James Muganja Waititu – witness and friend to Ms. Behrmann
- IV. Advaocate for the 3rd Defendant
 - a. M/s. Njeri Kiagayu Advocate (Apologies).
 - b. M/s. Anne Wanjiru Wairagu for Mubia Holdings Ltd.
 - c. Mr. Muyei Mwanguya Kakunde – Caretaker.
 - d. Mr. Samson Mukunda John – Son of Anne Wanjiru Wairagu.
 - e. Mr. Masinde Syril – Land Surveyor – Private.
- V. The Security Operatives.
 - a. Kimtai – Kijipwa Police Station.
 - b. Enock Pop – Kijipwa Police Station.
- VI. The purpose for the site visit.

The site visit was pursuant to a Court order made on 13th June, 2022
- VII. The Procedure

The surveying exercise led by the surveyor. He used:-

 - a. A Map.
 - b. GEO Reference.
 - c. G.P.s. for coordinates.
 - d. The tapes.
 - e. Parties at liberty to take notes



- f. No photography due to the abuse in social media.
- g. Recording using phone allowed.

It was agreed that the land surveyor would take the lead of the suit land. Parties were allowed to be at liberty to take notes and even record the proceedings. However, they were sternly warned from taking any photographs as they tend to be misused in this era of social media excitement/frenzy.

The survey used all their instruments and affirmed the land measurements – beacons to beacon which were easily identifiable.



VIII. Observations

- 1) There were two compounds within the suit land. They were divided by a large natural hedge and barbed wire fence.

On Plot A:- by occupied by Mrs. Wairagu. There were two portion no, 256 and 531. Plot No. 531 had a black gate and several - 5 buildings - a white painted massionette with well-manicured compound with some flowers. From close observation, it was not habited. We were informd it would be occupied occasionally. There was a septic tank system in place and a nice drive way for vehicles and a large servant quarter. It was occupied.

From thrwing in a stone block, it sounded to be 60 metres shallow well not covered. It was empty. Looked dangerous for human and animals. It was unused.

There existed a large position of land with several trees, Mwarubaini trees, Tamarid, vegetation, long unkempt grass – almost a forest with great serenity, possibility of replies such as snakes and birds nests scattered.

Plot B:- Plot No. 533 measures 3.19 Acres (1.292 HA)

The team observed:-

- a. There existed a guard shelter at the entrance with a make shift gate though all dilapidated and clearly not in use for a while.



- b. It was a long rectangular shaped and narrow compound. Surrounded by a 1000 metres long concrete perimeter wall of 200 feet long on one side and a barbed wire and natural hedge. We learnt the wall was constructed by Ms. Behrmann /M/s. Mwandiku.
- c. It goes across the road reserve on the left hand we learnt belonged to a certain Asian/Indian individual of Sikh background and who had been having a boundary dispute with Ms. Behrmann to an extend of filing a suit in High court. His Plot was No. 256. He claimed that the concrete perimeter wall encroached into his land. The wall went to the middle of the house. We could not fully appreciate the issue of encroachment and hence never bothered much.
- d. Ms. Behrmann claimed to be the owner of parcel No. 533 and 256. The hedge wall was visible through to the Plot A
- e. There were two rectangular shaped underground water tank and water well though not in use. They were empty.
- f. There was a huge permanent massonnette house of 7 bedrooms and coconut (Makuti) thatched roof. The roof had several leakages and worn out by the harsh weather (Sunny) conditions. The rooms were spacious and well lit.
- g. The building was dilapidated and neglected with the all old paint peeling off due to scorching sun and hot weather condition associated with Coast region. There was no furniture and not habited at all. However, there was a caretaker who had a few old beddings spread/heaped on the floor of one of the rooms upstairs. There was a 19 metres debris heap where a leisure shed stood.
- h. There was a broken down electric pole on the midst of the compound. There were several leakages as the Coconut leaves (Makuti) were worn out by the harsh weather (Sunny) conditions. She was cultivating some kitchen vegetables for subsistence use. There were several water ramps an indication there were water tanks for rain harvests.
- i. We learnt the house was constructed by both Ms. Behrmann & Ms. Mwandiku.
- j. That Ms. Behrmann had intended to convert the house to a hospitality i.e. a hotel in future.
- k. Mrs. Wairagu informed and showed Court where she had intende Ms. Behrmann to take. It was behind the house. There were two huge holes dug for building her house but she opted to move elsewhere on the land. We learnt the deceased had intended to construct swimming pool there but died before he could execute the plan.
- l. We learnt the deceased had bought the land from one Mr. Hole in the year 1980. The Singh occupied Plot No. 256 while Mrs. Wairagu had Plots No. 531, 532, 533 and 534. However, Plot No. 534 had been sold off to



Continental Bank to offset a loan that had been secured by the deceased. Plot No. 535 was also disposed off. It was a beach plot.

- m. The massionette house was sitting on plot No. 533 and a 2 bedroomed cottage built by the previous owner – Mr. Hole. The cottage was dilapidated. We physically visited all the parcels.

IX. Conclusion

- (a) It was directed that the 3 Advocates engage their own independent Land Surveyors to conduct a joint surveying exercise and eventually file a joint report and shared accordingly within 14 days time.
- (b) Mr. Magiya Advocate was granted leave to recall any witnesses for cross examination under Order 18 Rule 10 of the Civil Procedure Rules, 2010 and Section 147 of the *Evidence Act*, Cap. 80 of the Laws of Kenya.
- (c) The matter was fixed for mention on 27th July, 2022 for further direction.
- (d) The Site visit was concluded at 4.45 P.M. with a word of prayer. The site report to be shared.

The Report Prepared & Shared By The Elc At Mombasa Dated

This.....30thday Of.....june.....2022

.....

Hon. Justice L.I Naikuni, Judge,

Environment & Land Court At Mombasa

191. Its established law that one may acquire land in Kenya in either of the following means as provided for under Section 7(1) of the *Land Act* No. 2012 these are:-

- (a) Allocation;
- (b) Land adjudication process;
- (c) Compulsory acquisition;
- (d) Prescription;
- (e) Settlement programs;
- (f) Transmissions;
- (g) Transfers;
- (h) Long term leases exceeding twenty one years created out of private land; or
- (i) Any other manner prescribed in an Act of Parliament.

192. The suit land is registered under the Registration of Titles Act Cap. 281 (now repealed). In its preamble it stated “An Act of Parliament to provide for the transfer of land by registration of titles. Subject: Land & soil. Before I can address the above issues, I have to deal with the applicable law considering that the Registration of Title Act, Cap. 281 have since been repealed and replaced with the Lands Registration Act, No. 3 of 2012 and the *Land Act*, No. 6 of 2012. This Legal position finds grounding



in the provisions Section 23 (3) (c) of the Interpretation and General Provisions Act, Cap. 2 which provides.

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

This position was upheld in the cases of “Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR” .

193. The provisions of Section 23 (i) and 24 (i), (ii) and (iii) of the Act holds that.

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named herein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, resolutions and conditions contained therein or endorsed thereon and the title or that proprietor shall not be subject to challenge except on the ground of fraud, or misrepresentation to which he is proved to be a party’

- i. except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;
- ii. in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;
- iii. no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee’s statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya.

194. From the filed pleadings and the evidence adduced herein orally and documents, there is no doubt that the suit property was registered in the names of Mubia Holdings Limited – a company by Limited guarantee under the [Companies Act](#) Cap 486. However, before proceedings further to other pertinent surrounding issues and inferences over this matter, it is critical to access the legally and legitimacy depicting this legal entity. The reasoning for taking this dimension is because it appears there appears two (2) sets of the legal entity sharing the same legal names – Mubia Holding Limited and one that is alleged to be the legal proprietor to the suit land. Indeed, there has been serious allegation of one having been incorporated illegally much later with the sole intent to defraud, forge, deprive and dispossess the legal owner of the suit land.



195. From evidence by PW.....an officer of the Company Registry and M/s. Waiguru testified on behalf of the 3rd Defendant in the ELC No. 251/2013 and informed court this Company was incorporated in the year 1975. They stated that by then the directors were one Mr. John Wairagu the husband to Mrs. Wairagu. As fate would have it, he was now deceased. The other and the only surviving Director was Anne Wanjiru Wairagu. The official search to this Company was produced.
196. However, the court came to learn later on that another Mubia Holding Limited was incorporated in January, 2014. Its directors were Tonney Kamande and Patrick Kuria Mwangi. The most challenging part of these proceedings was that this fact remained as a matter of pure conjecture and imagination. At no time were the empirical documentation or information on this Company placed before Court for its own assessment and determination. The Court was informed that the records of the previous company had mysteriously been removed from the shelves. This is an allegation that the 3rd Defendant was not able to adequately demonstrate nor prove as required by the standards of the law under Section 107 of the *Evidence Act* Cap 80 on the existence of this latter company. The Court fully concurs with the Counsel for the Plaintiff in ELC No. 251 of 2013 to the effect that the 3rd Defendant failed and/or neglected a golden opportunity to have summoned these directors to have shed some light on this aspect. I am compelled to rely on the decision of *Salomon C. Limited – Versus - Salomon (1877)* on lighting the veil.
197. While still at that juncture, Ms. Mwandiku, denied neither having any relationship nor knowledge nor anything to do with the formation of the 2nd Mubia Holdings Limited in the year 2014. She stated that she never knew any of the Directors of the said company. The court finds that rather curious as she alleges to have acquired a Provisional Certificate of title to the suit land transferred to her by the director of the said 2nd Mubia Holdings Limited. The impression created here was that this second Company never existed at all. At least, since no evidence of its existence was produced, that would be the safest conclusion to make in the given circumstances.
198. Be that as it may, for the sake of neatly finalizing this issue, from the Certificate of title held by the 3rd Defendant, Mubia Holding Limited (Registered 1975) under Entry No. 4 and 5 – it acquired the suit parcel from one William Robert Mc. Athen Spencer and Paul Kiara Kariuki who had granted rights to the members of the Public on 27th January, 1983 – on 1st March, 1984. Therefore, this is a clear indication in my own view that the 2nd Mubia Holdings Limited of 2014 was all an illegal, irregular and/or un-procedurally constituted company with malicious and ill intended motives. In order to deduce the actual owner of the suit land, it is important to trace the root and historical morphology of the land. I am compelled to cite the case of *Munyū Maina (Supra)* where the Court held:-
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”
199. Therefore, to begin with, it is imperative to note that there have been three sets of Certificates of Titles produced before this Court pertaining to this suit land. The first one is the Certificate of title (original) for grant No. 14272 for 99 years from 1st November, 1971. It measures one decimal two nine two (1.292) Hectares. It was granted unto Mary Hope Field. On 23rd September, 1974. Under Entry No. 2 it shows, land was transferred to Alexander Treadaway Hoare under entry No. 3. On 28th September, 1982, a grant of probate for the estate of Alexander Treadaway Huarge was registered



having William Robert McAllem Spencer and Paul Kihara Kariuki as the beneficiaries. Under the Entry No. 4, on 27th January, 1983, these beneficiaries granted rights and the interest of the suit land to the general public. Under the Entry No. 5, on 1st March, 1984, the land was transferred to Mubia Holdings Limited (Registered in 1975)

200. The second Certificate of title for the suit land was a Provisional Certificate of title held by M/s. Behrmann. It had the following details:-
- i. For grant No. CR. 14272 for 99 years from 1st November, 1971 it measures one decimal two nine two (1.292) Hectares. It was granted unto Mary Hope Fields.
 - ii. Under Entry No. 2 shows the transfer dated 20th September, 1978 to Alexander Treadways Hoarse for a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/=) registered on 23rd September, 1978
 - iii. Under Entry No. 3, It's a probate of Alender Treadways Huorse to William Robert McAllen Spencer and Paul Kihara Kairuki dated 28th September, 1982.
 - iv. Under Entry No. 4 it's a grant of Easement dated 27th January, 1983 to William Robert McAllen Spencer and Paul Kariuki Kihara granting rights to the general public and registered on 27th January, 1983.
 - v. Under Entry No. 5 it's a transfer to Mubia Holdings Limited for a sum of Kenya Shillings Two Hundred and Thirty Thousand (Kshs. 230,000/=) on 1st March, 1984.
 - vi. Under Entry No. 6 – its Income tax arrears dated 19th July, 1990 by commissioner of Income Tax for a sum of Kenya Shillings One Million (Kshs. 1, 000,000/=) registered on 19th September, 1990.
 - vii. Under Entry No. 8, there is a Court Order dated 11th April, 2017 from the Civil case ELC. No. 57/2016 Mombasa cancelling registration of Mubia Holdings Limited and registered it to Monika Herta Elfriende Behrmann as the owner registered on 20th April, 2017.
 - viii. Under Entry No. 9 the Provisional Certificate of title issued as order No. 8.
 - ix. Under Entry No. 10 it's a registration of restriction under Section 76 of [Land Registration Act](#) 2012.
 - x. Under Entry No. 11, it's a removal of restriction dated 16th October, 2017.
 - xi. Under Entry No. 12, it was a transfer of Land dated 27th November, 2017 to Joseph Likoot Lenangetai registered on 7th December, 2017.
201. From these two certificates the great distinctions are from the entries. There is no doubt that in both of the Certificate of Titles, the Entries Nos. 1 to 5 are all common and similar. The main distinctions and variation are founded from the Entries No. 6 to 12. Which are only found to be entered in the Provisional certificate of title deed in favour of M/s. Behrmann. From the records, the said Entries Numbers 6 to 12 were arrived at from the decision by the NLC and the Court Order obtained in the ELC No. 57 of 2016. However, as indicated these processes were all set aside and hence remained null and void. In essence, the said Provisional Certificate of Title held by M/s. Behrhamann and any other consequential status related to it were extinguished. It became null and void ab initio. Thus, in the given circumstances this Court is left with no option but to invoke the provision of Sections 23 and 24 of the Registration of Titles Act, cap 281 and Sections 79 (1) and (2) and 80 (1) (2) of the [land Registration Act](#) of 2012 to cause for the revocation and cancellation of the issuance of the



said Provisional Certificate of Title issued to both M/s. Behrmann and and Joseph Likoot Lenagnetai henceforth. In a nut shell, the suit land is undoubtedly remain to be legally registered in the names of Mubia Holdings Limited (Registered 1975) as per the contents of Entry No. 5 of the original Certificate of the title deed produced as 3rd Defendant subject to the settlement of the Income Tax owing to the Kenya Revenue Authority thereof.

202. As regards the issue of whether there existed any valid and legal sale agreement between the Mubia Holdings Ltd. and Ms. Behrmann dated 23rd January, 1994. Primarily, this Court has had a task to deduce whether or not there was an enforceable agreement by the parties in this matter. From the strict Laws of Contract, a legally enforceable agreement means a legal instrument entered between two or more persons/parties for a particular purpose and there is a consideration. Contract may be both implied or express. Further to this assesses the provisions of Sections 38, 39 and 40 of Land Act, No. 6 of 2012 which provide for the validity of contracts in sale of land as follows:-

Section 38 (1):- “Other than as provided by this Act or by any other written law no suit shall be brought upon a Contract for the disposition of an interest in land:-

- a. The Contract upon which the suit is founded:
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
 - iii. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

Section 39:- “If, under a contract for the sale of land, the Purchaser has entered into possession of the land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the Purchaser by:-

- a. Resuming possession of the land peaceably; or
- b. Obtaining an order for possessions of the land from the court in accordance with the provisions of Section 41.

The provision of Section 40 of the Land Act, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-

40

- (1) “Nothing in Section 39 of the Act prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may be under independently of Contract or effects the amount of damages that the Vendor may claim..”
- (2) Any term express or implied in a contract or other instrument that conflicts with this section shall be inoperative.



203. In direct application of these legal principles to the instant case, I am compelled to reproduce the said agreement verbatim herein:-

“I have today received 20,000DM from Monica Herta Elfriede Behrmann (Meg Heckert Geb Behrmann) passport No. 1814119904 Date of Birth 11.6.1952 as payment of part of Kikambala Plot 5 the two holes area. I will check whether or not two (2) holes are in my plot. In the event of them being outside my plot she will choose an area equivalent and the area she wants she will undertake all other costs of valuation and transfer that may be required (Emphasis is Mine).

Signed: Anee Wairagu Box 54422 Nairobi

Signed: Monika

Signed: John McDernott

Signed: Bugrit McDernott Box 3 University of Nairobi

204. This agreement was produced as evidence by the parties. Critically, as far as I am concerned, there exists a valid and legal sale agreement between Ms. Behrmann and Anne Wairagu acting as the sole Directors of Mubia Holdings whereby its duly executed by all the parties present and in the presence of several witnesses. There is a consideration of 20,000 Deutch Marke (equivalent of Kshs. 20,000,000/=). This fact has been confirmed by M/s. Anne Wanjiru Wairagu in her evidence in chief. From its contents, Mrs. Wairagu allowed M/s. Behrmann to make payment of part of Kikambala Plot 5 the two holes area. The only short coming and from the wordings and terms of the agreement, were the exact land being sold was never specified. It only talks of “Plot No. 5 where the two holes are situated”. Indeed, from keen reading of the agreement, the Vendor does not seem to be sure whether the exact area belongs to her or not. This Court is compelled to assume and based on the information gathered from the site visit and the reports by the two Land Surveyors which were produced in Court as evidence that the purchaser bought a portion of ¼ acre from the suit land. Whether that is the exact place she proceeded to construct her permanent story building is a different issue altogether. Thus, it will be safe to conclude and on admission by Mrs. Wairagu, that she was entitled to that portion of the land. It’s also not clear what exactly was the total purchase price as the agreement refers to part payment. Besides, for M/s. Behrmann to have caused all these development on the site and been on land for almost twenty (20) years, an issue which was never controverted, and without any interference by the Vendor is a clear indication there was an implied contract. The Honorable Court will leave these details to the parties. One issue remains constant here, there was a breach of Contract by the Vendor and the Purchaser from the implied and express stipulated terms and conditions of the agreement between the parties herein. Therefore, from the above legal instrument, the Honorable Court rightfully concludes there existed a valid and legally enforceable agreement between the parties.

205. As to whether, M/s Behrmann is entitled to compensation in form of land or as specific performance arising from the breach of this agreement by Mrs. Wairagu or land is a matter of conjecture. On the assertion whether Ms. Behrmann being a foreigner was entitled to acquire a freehold land under the provision of Section 9 (1) of the *Land Control Act*, Cap. 302 of the laws of Kenya, though an extremely valid legal issue and worth considering, but I find it was being introduced by the both the 1st Plaintiff and the 3rd Defendant rather late in the day – Jonnie come home lately as an afterthought and this Court would rather not get embroiled with that argument to defeat the wheel of justice at this juncture. In any case, there was no evidence placed before this court to support the said allegation.



206. With regard to whether M/s. Behrmann was entitled to an order any specific performance based on the surroding facts herein. In the case of “Reliable Electrical Engineers Limited – Versus – Mantrac Kenya Limited (2006) eKLR wherein Justice Maraga (as he then was) stated that:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles....its jurisdiction is based on the existence of a valid enforceacible contract. It will not be ordered if the contract suffers from defects, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be adequate alternative remedy where the Claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance maystill be refused on the ground of undue influence or where it will cause severe hardship to the Defendant”

In the instant case, I am fully satisfied that the order for spefici performance tenable here. I state so for the following reasons. Firstly, M/s. Behrmann and on the admission of both the 1st Plaintiff and Mrs. Waiguru entered into a valid agreement on 23rd January, 1994. The agreement was r the use or transfer of part of the suit land. Secondly, as result she occupied it for such a long duration and even constructed a permanet house there and caused cultivation on it. Thirdly, there was a consideration of DM 20, 000,00/= was paid up for that purposes. Finally, despite of all these, Mrs. Waiguru as the Vendor failed and/or refused to comply on her part of the obligation by either causing the transfer of the land to M/s. behrmann or even to refund her the monies which todate has continued to keep. In order to balance the sacle of Justice, I hold that she has to either be apportioned the land she bought or a refund of her monies with interest equivalent to the current market rate.

207. Now with regard on whether there existed any valid agreement between Mwandiku and M/s. Behrmann. Certainly, there were four (4) agreements placed before this court dated 23rd January, 1994, which was between Mrs. Wairagu and M/s. Behrmann and 21st August, 2013, 4th December, 2013 and 26th June, 2014 between M/s. Mwandiku and M/s. Behrmann respectively. Although no tangible evidence has been placed before the court but it was alleged Ms. Mwandiku who had been married to a German husband and hence got to mingle easily with the persons from that community, they became good friends with Ms. Behrmann. Ms. Behrmann though she later on refuted, invited her to join hands with her to purchase the property from Mubia Holdings Limited interestingly by this time and from her own evidence having been born in the year 1976, M/s. Mwandiku was a teenager aged 17 years hence could not have had legal contractual capacity to have been part of this transaction. Its further admitted that Ms. Mwandiku who never witnessed the agreement duly eneterd between Ms. Behrmann and M/s. Wairagu. Her only claim then may be that she assisted in the transaction as Ms. Behrmann never understood neither Kiswahili nor English languages. To me this was a very minature and superficial role indeed to warrant her be making any legal claim on ownership to the suit land. It not surprising that the Court was never shown the Provisional certificate of title she alleged to have acquired from Mubia Holdings Lied of the year 2014. I discern that none of such document ever existed.
208. Later on, the Honorable Court was informed that Ms. Behrmann got interested in selling off her share of land of what she had bought from Mubia Holdings Limited (Registered in 1975) to Ms. Mwandiku. Resultantly, both of them entered into an agreement dated 21st August, 2013 for a consideration a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000/=). Out of this amount, Ms. Mwandiku paid a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) as first deposit and later on a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) respectively.



Nonetheless, for unclear reasons, she was unable to complete making the full payments as agreed. It caused the transaction to fall through.

209. From this assertion, there are a few legal issues to ponder. Firstly, this time Ms. Behrmann had no legal and proprietary rights as yet over her shares of the suit land to have been in a position to deal. The land had not yet been available to her to have entered into this transaction as she claimed Mubia Holdings Limited had refused to transfer the land to her as yet. The Provisional title was cancelled by court order as per the terms and condition of the said agreement, Ms. Mwandiku could not complete paying for the reason, the only remedy is for Ms. Behrmann to refund the case with interest for the breach of contract or consider part performance remedy over her ¼ acres share. In an all the 3rd Defendant remains a stranger to this contractual agreement between Ms. Behrmann and Ms. Mwandiku.

ISSUE No. b). Whether the parties are entitled to the title by way of Land Adverse Possession as provided for by law.

210. Under this sub title, the Honorable Court will wish expend adequate time to deliberate on the concept of the Land Adverse possession in depth. The reason for this is that M/s. Behramann and Mwandiku have in addition on having acquired the suit properties by way of purchase but also be entitled to the title and right of Land Adverse possession alleged having been in occupation of it continuously from the year 1994 without any interruption from anyone.
211. The Doctrine of Land Adverse Possession is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22. Section 7 provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 on the other hand provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

212. Finally Section 38 states:-

38.

- (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as



the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under article 40 of the constitutions become extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

213. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.

It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable. Where the land is registered and there is a title, where the land is yet to be registered. It cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.

214. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24. The principles were well set out in the case of “Kahindi Ngala Mwangandi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held:-

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-

- “7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.



- (3) The Court shall direct on whom and in what manner the summons shall be served.”

In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

215. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a Judge under Order 37 Rule 13 and 16 of Civil Procedure Rule, 2010 and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In case of: “Kimani Ruchine – Versus - Swift Rutherford & Co.Ltd (1980) KLR it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”

In Teresa Wachuka Gachira (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

216. Further, R.C.N. Kuloba, J in the case the “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, according to the retired Judge, the elements that a person claiming a right by adverse possession.
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless



there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant.

- b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He/She must have with him his own apparent right which affords him/her some semblance of title under which he/she claims to found his/her occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. The ingredient of unpermitted occupation is usually expressed as “hostile” possession.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The purpose of this element is to afford the owner an opportunity for notice.
 - g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
 - i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or
 - ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
217. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said



to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the OS. The squatters claiming adverse possession must be individually identified, they ought to produce their ID cards when filing suits and not a mere stating Mwanaisha Juma and 300 others.

218. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.
219. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of “Supreme Court Applications No. 16 (E026) of 2021 – Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th may, 2021 while dismissing the application the Court held:

“ that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.

220. From these decisions of Court, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are:-
- a. There has to be a registered proprietor of the land being claimed;
 - b. The Claimant ought to have occupied the suit land without any interruption and continuously.
 - c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
 - d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non permissiveness.

Were adequately deliberated on from the cases of Daniel Ruchire & Others versus swift Ruther Fords & Co. Limited & Another 1977 eKLR, Sarah Nyambura Njoroge Mairu (2005) eKLR Nairobi Court of Appeal Sisto Wambugu –Versus- Kamau Njuguna (1983) eKLR.

It’s evident that Ms. Behrmann got the entry to the land based on the above sale agreement which this court has already demonstrated it was a legal document she had the full permission of the land owner to occupy and use the land. Indeed, Mrs. Waiguru admits that there was a huge fence between her land and where Ms. Behrmann occupied and whereby she constructed a magnificent house. The



only borne of contention was that she took a place, location where they had not agreed on. This was a surveying issue. Despite this, Mrs. Waiguru. The land has had a lot of incidences and interruptions in form of complaints and suits filed before court. For instance, *the Constitution* Petition No. 8 of 2016 at Malindi, ELC 251 of 2013 and ELC No. 57 of 2016, complaint lodged before the NLC and its report, issuance of and cancellation of provisional certificate of titles. All these tantamount to interruptions on the occupation and use of title and land.

Furthermore, I fully concur with the Counsel for Ms. Mwandiku to the effect that the Land Adverse Possession and ownership were two complete and distinct causes of action which would not be raised from the same civil suit. M/s. Mwandiku claimed to be a financier and purchaser at the same time. This is rather curious. Be that as it may, from the surrounding facts and inferences of this case, M/s. Mwandiku never fulfilled the required ingredients for being granted title under the claim of Land Adverse possession. For these reasons the Honorable Court finds that the claim for the title by Ms. Behrmann and Ms. Mwandiku for Land Adverse Possession is baseless, unmeritorious and unfounded and hence must fail on arrival.

ISSUE No. (c) Whether the parties herein are entitled to the relief sought.

221. Issues under this sub-heading are now clear, plain and straight forward, there is no doubt the suit land belongs to the 3rd Defendant with all its indefeasible title interest and rights vested on it by law. Ms. Behrmann is entitled to the portion of the land she bought from the 3rd Defendant through a valid sale agreement. This is ¼ acre or in the alternative are fund together with interest and costs for the development caused.

Ms. Mwandiku, is in a very precarious position. As stated, she seems to be holding that she finaced and/or purchased the suit property. She has not been able to demonstrate a clear legal standing apart from the cash of Kenta Shillings Two Million (Kshs. 2,000,000/=) she claimed to have paid up to Ms. Behrmann. For nothing else, and in all fairness, I strongly hold she should be refunded together with interest. Apart from that, she does not have any other legal claim over the land that belongs to the 3rd Defendant. Her claim of title over land adverse possession is clearly an afterthought and ambitious figment of her imagination.

222. I dare not venture into details of her character which this court finds rather disturbing and wanting. She attempted, to drag Ms. Behrmann into a suit as a 2nd Plaintiff using a letter alleging to have been signed by Ms. Behrmann which on close scrutiny were found to be forged as Ms. Behrmann had been abroad from records of her passport, the formation of the 2nd Mubia Holdings Ltd. by proxies but which she denied and even obtaining of the Provisional certificate of title. As indicated, the court had decided to avoid indulging into the details of those incidents to spare her.

Be it as it may, the Honorable Court has clearly stated all the entitlements of the parties hereof and wishes no to be belabor the point whatsoever.

ISSUE No. (c) Who will bear the costs of the two ELC. No. 251 of 2013 and ELC No. 57 of 2016 (Consolidated) herein.

223. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of “Reids



Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....” (also see from the Court of Appeal cases of “Rosemary Wambui Munene – Versus – Ihururu Dairy Cooperatives Societies Limited (2014), eKLR & Cecilia Wambui Ngayo -Versus -Barclays Bank of Kenya Limited (2016) eKLR)

Additionally, the Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

Based on these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The outcome in the instant case, the suit by the Plaintiffs in the ELC No. 251 of 2013 and ELC No. 57 of 2016 have been unsuccessful. Essentially, all facts remaining constant, the Counter Claim filed by the 3rd Defendant herein has been successful.

224. However, for that very fundamental reason where the parties in this matter have had to undergo extremely difficult situations, it is just fair, reasonable and equity that each party bears their own costs whatsoever.

IX. Conclusion & Disposition

225. Consequently, having conducted such an elaborate analysis of the framed issues, the Honorable Court holds that the both the Plaintiffs Ms. Behrmann and Ms. Mwandiku in ELC. No. 251 of 2013 and ELC. No. 57 of 2016 have failed to establish their case on preponderance of probability as pleaded whilst the 3rd Defendant had been able to prove their case through the filed Counter Claim. For avoidance of doubt I specifically order as follows:-

- a. THAT Judgment be and is hereby entered that the two (2) suits ELC. No. 251 of 2013 – Save for the Counter Claim by the 3rd Defendant – (Mubia Holdings Limited (Registered in the year 1975) and ELC No. 57 of 2016 be and are hereby dismissed for lack of merit.
- b. THAT Judgement be and is hereby entered in favour of the 3rd Defendant (Mubia Holdings Limited (Registered in the year 1975) from the filed Counter Claim filed in the Civil Suit ELC No. 251 of 2013 on 12th March, 2019.
- c. THAT there be an order to have the Registrar of Titles Mombasa directed to henceforth remove any registered Caveat and/or restriction and other prohibitory order on Entry No. 5 registered against all that parcel No. Plot No. 533 Section III Mainland North CR No. 14272.
- d. THAT there be a declaration that all the Provisional Certificates of title registered and issued onto all that parcel of land Known as Plot 533 Section III Mainland North CR No. 14272 in



the names of Ms. Behrmann Herta Elfriede Behrmann and Caroline Mwelu Mwandiku and Joseph Likoot Lenangetai are illegal, wrongful and unlawfully, null and void issued and hence to be cancelled and/or revoked henceforth under the provision of Section 26 of Registered Titles Act Cap. 281 (Repealed) and Section 79 (1) & (2) and 80 (1) and 2) of the Land Registration Act, No. 3 of 2012.

- e. THAT there be a declaration that all that parcel of land known as Land Reference No. 533 Section III Mainland North CR No. 14272 be: _
- f. Registered in the names of MUBIA HOLDINGS LIMITED (REGISTERED in 1975); and
- g. The Mubia Holdings Limited (Registered in 1975) with immediate effect be issued/or entry entered into their title deed as per Entry No. 5.
- h. THAT there be an order to have the Board of Directors of Mubia Holdings Limited to fully settle the Income tax owed to the Kenya Revenue Authority and as per the provision of Section 158 (1) of Company Act pass a resolution to either hive off ¼ acres of the suit land and the same to be transferred to Monika Herta Elfriede Behrmann as per the terms and conditions of the sale agreement duly entered on 23rd January, 1994 within the next thirty (30) days from the date of the delivery of this Judgment; or.
- i. In default the Directors to refund Ms. Behrmann a Sum of Denche Mark 20,000.00 together with 14% interest Per Annum from the year 1994 and the expenses of all the development caused on the land to be valued accordingly by a qualified Land Valuer.
- j. THAT there be a direction to have Caroline Mwelu Mwandiku consider exploring the possibility of recovering her monies being a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) together with interest at the commercial rate from M/s. Monika Herta Elfriede Behrmann for the breach of sale agreement dated 21st August, 2013.
- k. THAT in the event that the parties take the option of refund of the monies instead of the hiving off and transfer of land all the Plaintiffs – Ms. Behrmann and Caroline be ordered to vacant the suit property within the next One Hundred and Eighty (180) days from the date of the delivery of this Judgment pursuant to the provisions of Section 152E of the Land Act, No. 6 of 2012 but with the option of being allowed to peacefully remove all their properties from the suit land at their costs or the 3rd Defendant to be at liberty to remove them at the Plaintiff's costs.
- l. THAT each party to bear their costs.

JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 27THDAY OF FEBRUARY, 2023

.....

HON. JUSTICE MR. L.L NAIKUNI, (JUDGE)

ENVIRONMENT & LAND COURT AT,

MOMBASA

In the presence of:

- a. M/s. Yumnah, the Court Assistant.



b. Mr. B.M. Musyoki Advocate holding brief for the Plaintiffs in ELC. No. 251 of 2013 and 1st Defendant in ELC. No. 57 of 2016.

c. Mr. Magiya Advocate for the Plaintiff in ELC. No. 57 of 2016 and 2nd Defendant in ELC. No. 251 of 2013.

d. M/s. N. Kiagayu Advocate for the 3rd Defendant in both ELC No. 251 of 2013 and ELC. No. 57 of 2016

