



**Thathini Development Company Limited v Gachogu & 4 others (Civil Suit
149 of 2014) [2023] KEELC 952 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 149 OF 2014
LL NAIKUNI, J
FEBRUARY 15, 2023**

BETWEEN

THATHINI DEVELOPMENT COMPANY LIMITED PLAINTIFF

AND

**DAVID W GACHOGU 1ST DEFENDANT
PETER OWEN NJUGUNA 2ND DEFENDANT
ANNA WAMBUI NJUGUNA 3RD DEFENDANT
SAFARICOM COMPANY LTD 4TH DEFENDANT
LAND REGISTRAR MOMBASA 5TH DEFENDANT**

JUDGMENT

1. This is a Judgment emanating from a suit initiated by Thathini Development Company Limited – the Plaintiff herein against the 1st, 2nd, 3rd, 4th and 5th Defendants herein. The Plaintiff instituted the suit vide a Plant dated 12th June, 2014 and filed in court on 18th July, 2014. The Plaintiff moved the court through an application filed under Certificate of urgency seeking temporary injunction orders against the 1st and 2nd Defendants from entering, interfering, disposing, alienating, charging or dealing with all that parcel of Land known as Land Reference No. Mombasa/MN/Thathini/112 pending the hearing and determination of the suit. Later on the Plaintiff filed an Amended Plaintiff filed on 31st January, 2017
2. Upon service of the pleadings and the summons to enter appearance in accordance with the Affidavit of service dated 2nd March, 2015 the 1st Defendant entered appearance on 4th August, 2014 and on 28th August, 2014 filed their statement of Defence accordingly.
3. On 13th January, 2017 the 3rd Defendant filed its statement of Defence dated 9th January, 2017. On 31st January, 2017, following the unfortunate demise of the 2nd Defendant the late Peter Owen Njuguna on



5th July, 2019 seeking to substitute the deceased with one Anne Wambui Njuguna, the duly appointed Legal Administrator to the estate.

4. On 4th February, 2020 the 3rd Defendant – the Land Registrar filed its statement of Defence dated even date. Upon obtaining leave of Court on 21st November, 2019 the Plaintiff filed an Amended Plaintiff dated 30th March, 2015. From the amendment the Plaintiff dropped the names of the 2nd Defendant Peter Owen Njuguna. Likewise, on 20th December, 2019 the 2nd Defendant – Safaricom also filed their amended Defence dated 17th December, 2019. Pursuant to this, upon all the parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre-trial conference, on 23rd February, 2021, the hearing of the suit commenced in earnest.

II. THE PLAINTIFF'S CASE

5. The Plaintiff is a Limited Liability Company duly registered and incorporated pursuant to the provisions of the Company Act Cap 486. The Plaintiff averred that at all material times, the Plaintiff was the registered and beneficial owner of all that parcel of land known as Land Reference Number Mombasa/MN /THATHINI /112 measuring approximately three Nought decimal five (30.5) Hectares (hereinafter referred to as “The Suit Land”). It held that on or about the 17th day of March, 20-07, the 1st and 2nd Defendant all being then Directors of the Plaintiff's Company and with sole intention to defraud the Plaintiff Company of its land did execute an illegal transfer of the said land in their favour. The said illegal and unlawful fraud was reported to the police. The Plaintiff provided the particulars of the fraud by the 1st Defendant. Under the Paragraph 6- (a) to (f) of the Plaintiff.

Thereafter having obtained the transfer of the said land to themselves, the 1st and 2nd Defendants went ahead and leased part of the suit land particularly that area known as “Nguu Tatu Hills” measuring about sixteen metres by twelve metres (16m X 12m) to the 3rd Defendant herein (Safaricom) at a consideration of Kenya Shillings One Hundred and Sixty Thousand (Kshs. 160,000.00/=) appreciating at the rate of 5% per annum for a period of nine (9) years and eleven (11) months. Pursuant to that the 3rd Defendant (Safaricom Ltd) then embarked on installation of Safaricom Base station which included a tower equipment shelter antennae and Communications equipment on the said portion of land.

6. The Plaintiff averred that had the 4th Defendant (Land Registrar) herein been diligent in conducting his works as a Land Registrar the said fraudulent transfer would have been avoided and the Plaintiff would not have been deprived of their land. The Plaintiff asserted that as a result of the fraudulent transfer of the land belonging to the Plaintiff, to the 1st and 2nd Defendants and its subsequent lease to the 3rd Defendant, the Plaintiff was reduced to the status of squatters on their own land who had also been deprived of their dues that accrued to the 1st and 2nd Defendants in terms of the consideration of the lease to the 3rd Defendant and this had got no justification whatsoever.

The Plaintiff prayed for judgment against the 1st, 2nd, 3rd and 4th Defendants for cancellation of the fraudulent transfer and offending entries made in the register in favour of the 1st and 2nd Defendants and costs of the to be borne by the Defendant.

On 23rd February, 2021, the Plaintiff commenced its case and summoned three (3) witnesses PW - 1, PW - 2 and PW - 3 who testified as follows:-



Examination in Chief of the PW – 1 by Mr. Mwaniki Advocate

7. PW – 1 is sworn and testifies in English language. He identified himself by names as being Mr. Benjamin Achode Malingu. He lived in Nairobi. He was a practicing Accountant by profession and a Company Secretary. He was the company Secretary of the Plaintiff Company since the year 2010.
8. On 15th November, 2019, he recorded his witness statement. He adopted it as his evidence-in chief. He also relied on the List of the documents by the Plaintiff dated 18th November, 2019 filed in court. He produced them and were marked as Plaintiff exhibits Numbers 1 to.....They also filed further list of documents on 19th November, 2019 which he produced and marked as Plaintiff Exhibit Numbers..... PW – 1 stated that the Plaintiff came to court because the Plaintiff's company land was fraudulently transferred from the Plaintiff company to the 1st Defendant. He urged the Court to have the transfer to be cancelled and the land to revert back to the company. He also prayed for costs of the suit.

Cross Examination of the PW -1 by Mr. Oddiaga Advocate

9. PW – 1 had been the Company Secretary for the Plaintiff since the year 2010. Mainly, he filed annual returns and undertake any other duties he was assigned to do by the Company. He would also take down minutes of the Board if requested by the Secretary of the Board to do so. He also attended Court to represent the company. The business nature of the Plaintiff's Company was to purchase and distribute land to its registered members according to their shareholding as evidenced by the company Register of Members. PW – 1 had never participated in any of the distribution of land to members of the company as that was done before year 2010 a duration he had not joined in.

He was aware of this parcel of land which was distributed to members by the Plaintiff. The procedure was that land was allocated to those who had paid and were in the list. They were allocated land by secret ballot. Whatever ballot one picked would be allocated that particular parcel of land.

The Directors were the ones who were mandated to manage the distribution of land to members who are paid up. The Directors were also members of the Plaintiff's company. They were also paid up and registered members of the company. It was true that one could not be a director if he was not a paid up member and shareholder. The Directors were also entitled to allocation of the parcels of land like all other registered members of the company. He knew of how the land in name of 1st Defendant was acquired. It was in the name of the Plaintiff's company name as stated out under Entry No. 11 of the title deed. The acquisition of the land in the names of the 1st Defendant was under entry No. 2. It measures 30.5 hectares (approximately 75.37 acres). It was quite a big portion of land. The whole parcel of land belonging to the Company measured 4, 318 acres.

10. The larger portion of the land owned by the Company was subdivided into several portions. The suit land portion which was in the name of the 1st and 2nd Defendant's name one from the numerous sub - divisions. Some of the portions were leased out to some members who applied for the leases. He did not have a record of members who received land. The 1st Defendant was then a Secretary of the Plaintiff's Company. He never released the records. PW – 2 confirmed it being true that they had not brought any other beneficiary of the land to court apart from the 1st and 2nd Defendants. He could not remember how many acres of land each member received. He did not have the records. The land was allocated to members. The 1st and 2nd Defendants were a Director and Secretary of the company. They were entitled to land. He stated that any of the Directors who were there then would sign for the members receiving their land. It was procedural for any of the directors to sign the transfer documents. If a Director was to get land, another director would sign for them. There were no hard rules on the transfer. There were governance issues. The rules were found in the Memorandum and Articles of Association of the



company and the company law. The memorandum and Articles of Association was silent on the issue of the transfer of land to members. He agreed having bought land and transferred them to members. He reiterated that the Memorandum and Articles of Association never provided the method of transfer of land. The members were allocated land after the sub -division had been completed. The Plaintiff had only filed the case against the 1st and 2nd Defendants.

11. The 1st Defendant's land had the telecommunication Mast erected by the Safaricom Company. The rental income from the Mast were being paid up directly to the 1st Defendant and not the Plaintiff. It was not true that the case started when the Mast was constructed. PW – 2 informed Court that the members had even lodged a complaint with the Division of Criminal Investigation offices in Nairobi. He did not know what was the position on the investigation undertaken by the DCI. It was his testimony that the suit land belonged to the Plaintiff. He was referred to the Memorandum and Articles of Association, specifically under Paragraph 'aa' of the further list of documents. He confirmed that the Plaintiff's property could be distributed based on shares held or in kind. Further, he was referred to Article (bb). These provisions gave powers to the directors of the company. He noted that the Directors had to deal with issues of finances while distributing the land on behalf of the company.
12. The 1st Defendant was a Director when the distribution was being done. From the records available, the 1st Defendant only owned 61 shares which entitled him to be allocated land measuring 1.93 acres and not the 75.37 acres he got allocated. PW – 2 stressed that the company distributed land according to the number of shares each member had. One had to be a paid up member and with shares. The register he produced had 683 members who held a total of 136,059 shares. The information was contained from the list of documents and marked as Plaintiff Exhibit No. 2. The List of documents never showed its author. It not certified. It was for the year 2010 – eleven years ago. The year 2010 was handwritten. The List was not filed. There was nothing to show that it was an authentic document from the Plaintiff's Company. He did not have the minutes of the pre - subdivision period to show that the ownership of the land would be undertaken in accordance with shareholding of the registered members. The Plaintiff filed returns for the year 2019 in the year 2020. As far as the directorship of the company was concerned, there was no change. Ideally, when one filed documents/returns, an official receipt was issued. They were never stamped.
13. The 1st registered owner of the plot MSA/MN/THATHINI/112 was the Plaintiff company. Currently, the registered owner as per the Title Deed was David W. Gachogu and Peter Owen Njuguna. The Title Deed is in name of 1st and 2nd Defendants. The title deed does not bear Entry No. 1. One could not speculate on the document. The title deed never indicated anywhere the names of the Plaintiff's Company. He averred that Thathini was the area.

Cross Examination of PW – 2 by Mr. Kongere Advocate.

14. PW – 2 stated that he was neither a director nor secretary in the year 2007. He would not know what happened in the year 2007. He could see the transfer at page 29 of the 2nd Defendant's List of documents filed on 13th January, 2017. There was a portion signed by the transferor. There were two signatures appended on behalf of Thathini Development Co. Limited. He could not tell whether they had been forged. He reiterated that Land was being distributed on the basis of a secret ballot.

He confirmed having been the one who prepared his further witness statement filed on 18th November, 2019. Under Paragraph 3 it stated that each member was to get a portion equivalent to the member of shares held in the company register of members/shareholders. He never had any documents from the Plaintiff's company supporting his commission in Paragraph 3.



15. He could see the Plaintiff's list of documents filed on 18th May, 2018. Under Appendix 3, he confirmed it was headed shareholders with Titles. The documents originated from the Plaintiff Company. He was shown Page 28 of 2nd Defendant list of documents. It was a letter dated 23rd April, 2008 from Thathini Development Co. Limited to Safaricom Company. PW - 2 confirmed that the letter was signed.

Cross Examination of PW – 2 by Mr. Makuto Advocate :-

16. PW – 2 stated that he had no company resolution appointing him to be a witness today. He had not produced any documents to confirm that he was a company secretary. He was referred to his further witness statement filed on 18th November, 2018. Under Paragraph 6, he had stated that David Wanyoike Gachogu and Peter Owen Njuguna were not jointly as shareholders. They were both shareholders individually. He confirmed that Peter Owen Njuguna was entitled to a portion of the land.
17. He stated that it was true that a decision was made by the company to sub divide and distribute the land amongst its registered members. The land was issued according to the ballot one picked. He testified that he had not received a register for ballot of David Wanyoike Gachogu and Peter Owen Njuguna. He had not produced any documents in court showing which portion of land David Wanyoike Gachogu and Peter Owen Njuguna picked.
18. From the transfer of land contained in the Plaintiff's further list of documents, there were two signatures. He refuted he had alleged in his statement that there were signatures on the transfer which never belonged to the directors. He said that he produced a list of 683 paid up members. He did not know when the decision to distribute land to members was made. The transfer of the suit land to the 1st and 2nd Defendants was done in the year 2007. The list he produced was for the year 2010. There was no register for the year 2007.

PW – 2 confirmed having lodged a complaint and a report to the police over the allegations of fraud caused by the Land Registrar. There was no single Land Registrar had been prosecuted over fraud over this matter.

He further stated that the provision of Article 13 of the Memorandum and Article of Association was breached. It provided for a minimum of 7 and maximum of 22 as the Directors to the Plaintiff's Company. This was not the case here. Further, there were no returns filed for over 30 years. He agreed that the Land Registrar had no notice of the number of directors. We did not notify the Land Registrar that there were less than Seven (7) Directors. The Plaintiff had not done so to date. He had not produced all the resolutions made by the company in this case.

Re - Examination of PW – 2 by Mr. Mwaniki Advocate

19. PW – 2 testified that the documents to be produced before the Land Registrar during the transfer of land included the Board Minutes (resolutions), list of members, and so forth. The Plaintiff sued the Land Registrar because he never carried out due diligence. Had he carried out due diligence and be more prudent and keen, he would have seen that transferor and transferee on the transfer were same, that there were no minutes, a clear indication that the transfer had not been authorized through an AGM.

There was no proper due diligence was carried out by Safaricom because in the year 2005, the Plaintiff had entered into a lease agreement with the Plaintiff.

PW – 2 stated that the telecommunication Mast was constructed before the transfer. The Plaintiff only sued the 1st Defendant because he obtained land to himself un-procedurally. The registered owners



of the property are David W. Gachogu and Peter Owen Njuguna. There was no such entity in the Plaintiff's Company register.

Examination in Chief of PW - 3 by Mr. Mwaniki Advocate:

20. PW - 3 was sworn and testified in the English language. He identified himself by names as being Mr. Felix Naftali Mutethia. He was a holder of the National Identity card bearing numbers No. 13869560. He worked with the Business Registrar Services. They received witness summons from this court to appear and provide information of a company trading in the names and style of "Thathini Development Company Limited". PW - 2 stated that he had the Memorandum and Article of Association. He read the provision of Article 13. It provided that the Directors should be 7 and 20. The company was registered on 25th April, 1978. The registered offices was on Plot No. 148 of Section XX situated along the Kilindini Road. The Directors of the Company as the 6th March, 2007 were:- (a) Peter John Mwangi (b) Peter Njuguna (c) Alphonse Kinyanjui (d) David Gachogu (e) Mbugua Mbetete (f) Mwaura Kimani and (h) Njeri Gikonyo.
21. He testified that as per the records, there had been no changes of Directors from the 6th March, 2007. Further, he informed Court that there had been no Annual General Meeting held from the incorporation of the Company to date. There was a court order in the year 2016 for them to hold an AGM. It was it's the Directors who were to convene an AGM. Ideally, the AGM should be held annually. From the Company file, PW - 1 stated that he had never come across any official search conducted. He produced the Memorandum and Article and the Report as Plaintiff Exhibit numbers.....

He emphasized that the Company had never held any AGM for 19 years. By the 6th March, 2007 the company had not been in compliance with the laid - down requirements of the company laws. They had never been filing their returns and resolutions of the AGM.

Cross Examination of PW - 2 by Mr. Oddiaga Advocate.

22. PW - 2 stated that the company was authentic meaning it had been legally incorporated. There were two sets of names from his report. To date the Directors had changed. The changes were effected in the year 2016. The report was for the company upto 6th March 2007. From the records, David Wanyoike Gachogu was listed as a Director. From the Memorandum and Article it indicated they did acquire and purchase land and Estate among other activities for their registered members. He could not tell whether that objective was achieved. He would not know of this information. His role was to provide Court of the status of the company as per their records. He affirmed that for the 19 years there had been no AGM. He never had any record to compare with the record he presented meaning for the period post the month of the March 2007.
23. The Registrar of Company would not know how the members undertook the distribution of land within the Company and its registered members. PW - 2 stated the he would not know how the Company acquired and distributed their assets. He remembered there was a court order to suspend an intended election for the Company.

From the record, there was no letter or notice to the company for them to hold AGM. There was no evidence to confirm the deregistration of the Company for being non compliance. Hence, in the given circumstances, it was assumed that the Company was carrying out its business well. There was no complaint lodged.



Cross Examination of PW – 3 by Mr. Makuto Advocate.

24. PW – 3 stated that he had not availed any records of any AGM after 6th March, 2007. He had not availed a copy of Court order to conduct the elections of company. He had not availed the election results of the company.

PW – 3 informed Court that the penalty for failure to conduct an AGM for a sum of Kenya Shillings two thousand Six hundred (Kshs. 2,600/=) annually. After amendment it was now Kenya Shillings its Kshs. 1,000/=.

He stated that there could be a possibility the company may have been holding AGM but failed in filing returns with the Registrar. He admitted there was a Lacuna there.

Re - Examination of PW – 3 by Mr. Mwaniki Advocate:-

25. PW – 3 stated that an AGM was a meeting by the Directors and shareholders. They were required to file the returns annually. A Notice was issued to the Registrar on each of the last day of the year. PW – 3 stated that he never availed these documents as he only came to court to respond to the request by Court on the Plaintiffs Memorandum of Association and Article to give the status/information of the company as at 6th March, 2007 which he had done.

Examination in Chief of PW – 3 by Mr. Mwaniki Advocate

26. PW – 3 was called Mr. Fredrick Mungai Wainaina. He was sworn and testified in the English language. He was a holder of the national identity card bearing numbers 11993837. It was issued on 17th June, 1997. He became a Director of the Plaintiff through a Court order. He recorded a witness statement dated 18th May, 2018.

Cross Examination of PW - 3 by Mr. Oddiaga Advocate

27. The Company dealt with buying and selling of land. It only bought one parcel of land at Mombasa. He joined the Plaintiff's Company in year 2008. He was a director of the company.

He knew Mr. David Wanyoike Gachogu. He was informed Mr. Gachogu was the secretary of the Plaintiff's Company. He bought a share from another shareholder. He did not know all the Directors. He did not know who sanctioned the selling of his shares. He knew about the land in Mombasa. The Plaintiff had three (3) parcels of land. Two of them were sub - divided while one still remained as one block. Many portions/shares were found from the blocked one. There were members who owned titles from the sub - divided portion of land. There were one hundred and twenty (120) shareholders. He did not know the process of the allocation of the land to the share holders. He was aware the process of acquiring shares of land were two ways. These were through balloting and them apportionment of the land. Further, he was also aware that there were many members who could not pay. Only 120 shares had been paid for. Additionally, he was aware that there were many title deeds that were still laying (uncollected) in the Plaintiff Company's offices. Many had not been paid for because the land had been invaded by squatters. Also there were fears by the land owners. I am aware the Directors were negotiating with the Government, Settlement Fund Trust Scheme to buy the land in order to settle the squatters on it. The Plaintiff sued, David Wanyoike Gachogu, the 1st Defendant because out of the 118 shareholders because the process the 1st and 2nd Defendants used to acquire the title deed was irregular and illegal. (a) They took big portion than their entitled shares (b) they never consulted the Directors and (c) The land belonged to the company. There was evidence of the sizes of how much the 118 shareholders were allocated and entitled according to the shares they held in the Company.



28. This was the formular on the distribution and apportionment of the land.
- a. 360 shares was equivalent to 9 acres.
 - b. 60 shares was equivalent to 1 ½ acre.
 - c. 40 shares was equivalent to 1 acre.

The 1st Defendant only had 61 shares. PW – 3 did not have the minutes to this effect. PW – 3 also noted that It's the Directors who were signing for the Transfer forms. But the 1st and 2nd Defendants were signing for themselves. He testified knowing one of the portion of land was situated at Uhuru Mwatate area – from the hill. The company got frustrated as it's the area that would be generating income. The Defendants obtained their title in the year 2007. He had been to the location. It was not rocky but hilly and had the Safaricom telecommunication Masts placed on one of the hills on the land in the year 2005. There was a Lease agreement entered with the company and the Safaricom Company. Even before he joined the Company, the Defendants had taken their share.

29. He did not have the minutes authorizing him to come to court to challenge the title deed issued to the 1st and 2nd Defendants. He stated that the title deed they held was authentic but what was in question was the process upon which they used to acquire it that was irregular. He was shown the original title deed. He stated that there was nothing to prohibit the Directors from acquiring land elsewhere.

Cross Examination of PW – 3 by Mr. Kongere Advocate.

30. PW – 3 testified that as shareholders, it was alright to be allocated land belonging to the Company. The allocation of land would have to be equivalent to the shares one held. The shares never indicated where one was to be appartion or get the land. It could be either along the beach, mainland or near road. It was ballot to determine the location. Initially, the land was in the name of Thathini Development Limited. If the company was unhappy it would complain. If the land was allocated irregularly, the member/shareholder could appeal to the company. PW – 3 was referred to a second paragraph of a letter dated 23rd April, 2008 written from Thathini Development Limited to Safaricom Limited.

Cross Examination – PW - 3 by Mr. Makuto Advocate.

31. PW – 3 stated that from the register by Thathini Development Limited, Mr. David Wanyoike Gachogu had 61 shares. While the late Mr. Peter Owen Njuguna had 181 shares. There were 683 shareholders for Thathini Co. Limited. As stated before, the ownership to land by shareholders was tied to the number of shares one held. The total number of shares by all shareholders were 136,059 shares. The Thathini Development Limited never held any shares. The total acreage of land belonging to the Thathini Development Company Limited was 4,308 acres.
32. He was not sure when the sub - division of the land was undertaken. Neither was he aware when the balloting was done. He only knew that the balloting was done after the sub - division was done. He did not know or have the ballot for Mr. David Wanyoike Njogu and the late Mr. Peter Owen Njuguna. The location where they gave themselves was not where they were entitled to. They allocated themselves joint land and more portions than they were entitled.
33. As a result, the land for Mr. David Wainyoike Njogu measured – 75.37 acres. Out of his 61 shares he ought to have gotten only 6 acres. Mr. Peter Owen Njuguna's land measures 75 acres. They deserved 6 acres. They may have bought shares from other shareholders. The Plaintiff had to reconstruct the records as David refused to release the official records for the company.



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

34. It the Plaintiff who brought Safaricom Co. Limited to the land. He informed Court that both the Thathini Development Company Limited and Safaricom Limited entered into a Lease agreement on 20th July, 2005. But later on the Defendants manipulated the Lease and Safaricom Limited were convinced and they agreed to change the terms. They never had any due diligence. They should have called for the minutes and see the resolutions by the Company.

PW – 3 confirmed that there were squatters all over the suit land. The Plaintiff brought the 2 out of 118 shareholders to Court due to these reasons. They were Joint and owning Common shares. The title deed they were holding should be cancelled.

III. THE 1ST DEFENDANT' CASE

35. The 1st Defendant denied all the contents of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Plaint and prayed that the suit filed by the Plaintiff be dismissed with costs.

On 13th July, 2022, the 1st Defendant as DW-1 testified as follows:-

Examination in Chief of DW – 1 by M/s. Mwanzia Advocate

36. DW – 1 testified and was sworn in English language. His name is David Wanyoike Gachogu. He was a holder of the national identity card bearing numbers 5378737. His date of Birth was 14th February, 1947. He lived in Nairobi. He was a Retiree and a farmer. The two witness statements dated 28th August, 2014 and 6th December, 2019 were adopted. They were relied on as his evidence. DW – 1 also filed two sets of documents dated 28th August, 2014 and 6th December, 2019. The two listed were admitted and marked as Defendants Exhibit No. 1 to 4. He stated that of being aware of the case where he had been sued as the 1st Defendant. The suit land was Its plot No. 112 in a sub-division of the larger land. His testimony was that the Plaintiff's Company bought 400 acres and they wanted it to be sub – divided among the shareholders. This portion was part of the bigger land. The company was incorporated in the year 1978 and a Certificate of Incorporation issued. DW – 1 was a member and a shareholder. He had a Certificate of Share. This plot was an outcome of a sub - division. The Plot No. 112 was registered into his name and that of the late Wa Njuguna. The Thathini Development Company Limited was incorporated to buy land. The land was to be divided among the shareholders and then it to be dissolved. The Company had 650 shareholders. DW – 1 testified that while the company achieved its mandate of purchasing the land but it never succeeded in the other mandate of planning and sub-dividing/allocating it to the members.

37. There were some portions which could not be sub-divided. They were rocky and sloppy. These were at a place called Nguu Tatu. The Company left 100 acres for the squatters. He got his title deed. There were those who could pay being 100 members and were issued with the title deed.

He denied there was any fraudulent or irregularities. They did everything regularly and above board. They had been able to pay and hence got their title deed. The company was not trading. It had no offices.

38. On one parcel of the land for the Company with the hill, there was a communication mast. Hence, Safaricom Company approached us with intention of leasing it. It was in the year of 2005. By then, there was no title deed. We told them of the owners of the portion. They seemed to be in a hurry. In the meantime, Safaricom (k) entered into the Lease agreement with Thathini Development (k) Limited. However, in the year 2007, the titles were issued to the owners of that portion which were the late Wa



Njuguna and him. They started receiving the rental income from Safaricom Limited. It was later on that the Court case was filed and rental income was withheld through a Court orders.

Cross Examination of DW - 1 – Mr. Mwaniki Advocate.

39. DW – 1 stated that he was a member of the Company. He had been summoned several times. They all seem to understand. All the Directors of the Company were very understating and wanted them to agree on an out of court negotiations. The process of the sub - division of the land and distribution to the members started. The acreage of the land was to be determined by the shares a member held. Initially, he had 600 shares. But from the Plaintiff Exhibit No. 4, it showed he owed 61 shares. From this information, he admitted that he would be entitled 1 to 9 acres. DW – 2 stated that they tried but the balloting never worked. From the List of documents – Plaintiff Exhibits No. 6, 24, 20 showed the names of David Wanyoike Gachogu. There was no slot where land was issued to Mr. David Wanyoike Gachogu and Mr. Peter Owen Njuguna.
40. He was the founder of the Thathini Development Company Limited. He signed the Memorandum of Article of Association. During his tenure, as a Board they convened Annual General Meetings. He was not the secretary to the Board. He was a graduate. He was a District Officer. He insisted and knew that they convened AGM's but I did not have the proof of such in form of minutes. He was referred to the minutes – from the Plaintiff's further list of documents – of a meeting held on 8th July, 2006 where there were 4 Directors. From the Memorandum and Articles of Association it provided that there be 7 and not more than 20.
41. A company spoke through the Board and Minutes. He had no minutes to show that he benefited or allocated land to himself. He though that they paid for the Stamp Duty but he did not have any proof. He insisted that they went through the whole process.

DW – 2 informed Court that the land was on a hill – undeveloped. It could not be sub - divided.

Cross Examination of DW – 1 by Mr. Kongere Advocate

Nil.

Cross Examination of DW - 1 – Mr. Makuto Advocate

42. DW – 1 was referred to a copy of the Minutes of 8th June, 2006. From it he confirmed that the total numbers of surviving Directors to the company were only four (4) by that time. Again referred to Minute No. 4 – it indicated that a portion of the suit land measuring 4,302 acres was to be offered to the Government for sale. But the land was never sold. He stated that the same land that was sub-divided among the members.

It was unusual for an individual to be allocated more land. For instance, and he was referred to the list of Documents by the 1st Defendant. It showed that there were 26 plots which were allocated to one individual e.g. John Mwangi and another to Mr. Stephen. Likewise, he stated that he was a beneficiary and so was Peter Owen Njogu. He had a Survey Plan.

He was not able to locate the number of the plots registered in their names. He reiterated that the objective of the Company was to buy land and sub-divided it among the members. It was a profit making company. He was not aware of any challenges the other members faced. The transfer documents were signed by the Directors.

43. For his land, it was Mr. Owen who signed the documents as the Director of the company. He also signed documents for all the other plots. It was the same procedure. While some of the parcels touched



the ocean some were on the main land. They considered the value of the parcels. Some members were allocated away from the ocean and that is why the balloting never worked. The land allocated to the DW – 1 was bigger than the others but being on top of the hill it was of no much value. However, when it came to the payment of rates this issues were never considered. All shareholders were allocated land. But there were still some titles that were within the Thathini Development Company. He got his parcel from the Company.

Re - Examination of DW – 2 by M/s. Mwanzia Advocate

44. DW – 1 confirmed that the Company maintained records. The custodians were the Directors. But when the project took too long – many members started buying shares from other shareholders. This was because members started losing hope.

IV. THE 2ND DEFENDANT’S (SAFARICOM) EVIDENCE.

45. The 2nd Defendant denied the contents of Paragraph 5 of the Amended Plaintiff and averred that to the best of its knowledge the plot Land Reference No. MOMBASA/THATHINI/112 was at 1st April, 2005 registered in the names of the 1st and 2nd Defendants on or about 4th October, 2007. The 2nd Defendant denied having knowledge nor participated in any allegations of fraud as particularized under Paragraph 6 of the Plaintiff. However, the 3rd Defendant admitted having entered into a lease after carrying out all due diligence accordingly. In so doing it relied on the records kept by the office of the Land Registry – the 4th Defendant herein. It held that it would not respond on the presumption of the illegality of the title deed held by the 1st and 2nd Defendants herein. The 2nd Defendant prayed for the suit filed against it by the Plaintiff to be dismissed with costs. On 13th July, 2022, the 3rd Defendant summoned one witness – DW-3 who testified accordingly. The testimony of the DW – 3 was as follows:

Examination in Chief of DW – 2 by Mr. Kongere Advocate

46. DW – 2 was sworn and testified in English language. She was called Doreen Ochondo. She recorded her witness statement on 6th march 2022. She filed a List of Documents dated 9th January, 2017 and filed 13th January, 2017. There were 21 documents marked as the 2nd Defendants Exhibit numbers 1 to 21 which she relied on as evidence. She was a trained as an Advocate of the High Court of Kenya. She was employed by the 2nd Defendant in the designation of a Legal Counsel Technology from March 2018. She stated that as part of expanding the network coverage, the 2nd Defendant would approach the land owners at different parts of the Country. She informed Court that in the year 2005, their contractor upon conducting a survey they identified a portion of land at a place called Nguu Tatu within the County of Mombasa. Following some discussion they got into a lease arrangement by issuing a Letter of Offer dated 1st April, 2005 and later on duly executed a Lease Agreement on 20th July, 2005 between Safaricom Company Limited and the Thathini Development Company Limited for a period of nine (9) years 11 months. However, she informed Court that in year 2008 SafariCom Limited received a letter from the Company indicating the that the ownership of the suit land where the telecommunication Mast was erected had been transferred to Mr. David Gachogu and Mr. Peter Owen Njuguna. They gave them a copy of the Certificate of title. Thus, following this information, they regularized their record and upon conducting due diligence, they started making payments to the 1st and 2nd Defendants herein. They did this until the year 2011 when they received a letter from the Plaintiff informing them that dealing with the 1st and 2nd Defendants was irregular and illegal. They asked for documents to support this assertion but none were given to them. So they continued making payments to the 1st Defendant. In the year 2012 Safaricom Limited received a letter from



the 1st Defendant notifying them that his Co - Proprietors had passed on and a Grant Letters of Administration was being processed. He floated a proposal that the proceeds be split between him and the estate of the deceased. Safaricom proceeded to regularize that position accordingly.

47. She further informed Court that later in the year 2012, Safaricom Limited, received a Court Order issued by the Chief Magistrate Court at Kiambu directing them that there was fraud in dealing with the suit land. They notified their people. Safaricom was not a party to this allegations. As a result, they stopped the payment from the year 2014. The telecommunication mast is on the suit property. That is all.

Cross Examination of DW - 2 by Mr. Mwaniki Advocate

48. DW – 2 informed Court that upon identification and selection of a place to mount the telecommunication mast, they inquired who the owner of land and conduct due diligence. In the year 2005, between the Thathini Company and themselves, they conducted an Official Search. She did not have the CR 12 Form on the file. She would not know whether an official search was conducted or not. She would not confirm or deny that by the year 2005 the Company was operating illegally. That was all.

Cross Examination of DW – 2 by Mr. Makuto Advocate

49. DW – 2 stated that the letter dated 23rd April, 2008 was signed by Mr. Mwanika Kimani of the Thathini Development Company Limited. There was a letter and a copy of the Certificate of title. She did not have the official search. They proceeded operating with the 1st and 2nd Defendants on the basis of the previous Lease agreement executed with Thathini Company Limited . They never executed a fresh Lease agreement with David and Peter. They made payments to David and Peter. The payment to the Defendants started in the year 2012 but she could not say that with certainty. It was vide a letter dated 8th September, 2011. They received a letter from the Directors on the change of Directors. Safaricom was never invited nor involved in the criminal proceedings.

Cross Examination of DW – 2 by M/s. Mwanzia Advocate

50. DW – 1 stated that al these period from the time Safaricom started making payments to the Defendants, it was being recorded by both them and the 1st and 2nd Defendants. She informed the Court that they were still holding the money until they received any further decision.

V. THE 3RD DEFENDANT’S CASE

51. Based on the Defence to the Amended Plaintiff dated 4th February, 2020 and filed even date, the 3rd Defendant the Land Registrar denied the contents of Paragraph 5 and 6 of the Amended Plaintiff specifically that the 4th Defendant colluded with the 1st Defendant to transfer the suit property fraudulently to the 1st and 2nd Defendants. The 3rd Defendant further denied the contents of Paragraphs 7, 8 and 10 of the Amended Plaintiff. The 4th Defendant averred that he was diligent in his duties and hence denied all the particulars and allegations of negligence as brought out under the content of Paragraph 9 of the Amended Plaintiff. On 13th July, 2022, the 3rd Defendant as DW - 3 tendered his evidence in court as follows:-

Examination in Chief of DW – 3 by Mr. Makuto Advocate

52. DW – 3 was M/s. Chepkemoi Mercy. She testified and sworn in English language. She was a holder of the national identity card bearing numbers 24820622. Her date of Birth is 8th March, 1987 and Employment Personnel Number (P/No.) 201500412. She was the Land Registrar Mombasa. She



informed Court that the registered owner to the suit land was Mr. David Wanyoike Gachogu and Mr. Perter Owen Njuguna. The Certified Copy of the Green Card, the official Search, the Certificate of title dated 12th July, 2022 were produced and marked as Defendant's Exhibit 1, 2, 3 and 4 respectively. The suit land was known as Land reference No. MSA/NN THATHINI 112 measuring 30.5 HA (approximately 75.37 acres) was transferred to Mr. David W. Njogu and Mr. Peter Owen Njuguna on 4th October, 2007. The transfer was drawn on 6th March, 2007 from Thathini Development Company to Mr. David W. Njogu and Mr. Peter Owen Njuguna. She produced the transfer documents dated 6th March, 2007 marked as Defendant Exhibit No. 5.

Cross Examination of the Land Registrar by Mr. Mwaniki Advocate

53. The Land Registrar confirmed that there were no names on the transfer documents but it had the Company seals. She further stated that the transfer had signatures of two (2) Directors and the other by a witness who was an advocate. She testified that according to her, the signatures appeared to bear a fair description of the signatures by the Transferor and transferee. To her they looked the same. She did not have the minutes on the resolution enabling this transaction by the Company in the parcel file. Also, she did not have the CR – 12 Form. There was a copy of a receipt of the Stamp Duty paid.

Cross Examination of the Land Registrar by M/s. Mwanzia Advocate

54. DW – 2 stated that the two Directors affixed their signatures on the transfer documents. She stated that if there had been any issue on fraud as alleged, they could have registered/placed a restriction on the Green Card. The entry would read that on restriction, no dealing was allowed until the said investigations was finalized.

Cross Examination of DW – 3 by Mr. Kongere Advocate

Nil.

VI. THE SUBMISSIONS

55. Upon the closure of the case by the Plaintiffs, 1st, 2nd, 3rd and 4th Defendants on 13th July, 2022 parties were directed to file their written submissions accordingly with stringent time frames. Pursuant to that, all parties fully complied and the Honorable Court reserved a date to deliver its judgment on notice.

A)The written submission by the Plaintiff.

56. On August, 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. Mwaniki Gitahi & Partners filed their written submission dated 3rd August, 2022. Mr. Mwaniki Advocate commenced by providing court with a detailed background of the case, whereby he stated that sometimes in the year 1978 the Plaintiff's Company was formed with the sole aim of buying land and sub-dividing it to its shareholders in accordance with the total number of shares held by each shareholder. It brought a total of 4,318 acres. He averred that during its formation of its officials who was listed as a Director and who signed the Memorandum and Articles of Association of the Plaintiff's Company was the 1st Defendant. During the incorporation, it was indicated that he held one share. Hence the Plaintiff filed this case and sought the reliefs as set out accordingly. The Counsel caused an analysis of all the three (3) witnesses – PW-1, PW - 2 and PW - 3 summoned by the Plaintiff according to him. The Counsel held that according to the evidence of PW-1 each member was to get a portion of land acquired by the Plaintiff's Company equivalent to the number of shares held in the company register of members or shareholders.



57. This principle was in tandem with the contents of the 1st Defendant's statement paragraph 5 of his Replying Affidavit. He averred that PW-1 demonstrated to court that the 1st Defendant held 61 shares and hence was entitled to get 1.93 (One decimal nine three) acres of land, a fact confirmed by the 1st Defendant himself during cross examination according to the counsel.

The Counsel averred that the 1st Defendant produced a comprehensive list of all the shareholders who were allocated land. From the list, it showed the 1st Defendant has acquired three (3) plots under category of Plot 'A' and 'F'.

58. The Counsel objected that the suit land was conspicuously missing from the comprehensive list. He alluded the omission of the suit land from the list was because the same had been stolen land. The Counsel observed that from the evidence by PW-3 the company had never held any annual general meeting for past 30 years and had been running illegally contrary to the Companies Act which dictated there be AGM every year. The 1st Defendant was a director and who refused to convene an AGM. The Counsel further observed from the evidence adduced by PW-3 that although all parcels of land were acquired and/or allocated through a process known as balloting, PW-3 indicated there was no such balloting for the suit land. No evidence of such balloting was conducted or produced in court as evidence to show how 1st Defendant got the suit land for instance minutes.

59. The Counsel averred that DW-1's evidence was full of grumbling and lamentation – on how he was being witch-hunted by some of the current Directors and how the company was in dire financial straits. He acknowledged having acquired another parcel which had not been disclosed in the pleadings. He confirmed they had been only four surviving directors the others having passed on.

The Counsel submitted that DW-1 admitted during cross examination, he confirmed having 61 shares which entitled him to 1 acre and not 75 acres he held. He failed to produce minutes of the transfer of the land nor prove of a shareholder of a single entity by the names David Gichogu and Owen Njuguna. The Counsel averred that the 2nd Defendant confirmed no having conducted a search at the Company registry and as such never got a CR. 12 Form of the Plaintiff's Company before and after engaging them. DW-2 confirmed never had any new agreement with the 1st Defendant and the only agreement they had was with the Plaintiff.

60. The Counsel submitted that the provisions of Article 13 of Article of Association Provided that there ought to be minimum Seven (7) directors to transact. He held that the 1st Defendant confirmed that they carried out all the transactions. While only four (4) surviving Directors – which to the Counsel was an illegality. He further pressed on the failure to convene AGMs for 30 years – a forum where the shareholders communicate with their representatives and affairs of the company are deliberated on. To buttress this, he cited the provisions of Section 275 A of The Company Act 2015. Failure to do so meant running the Company illegally and irregularly. He cited the cases of:- "Agricultural Development Corporation of Kenya –Versus- Nathaniel K. Tum and Favor HCCC No. 525 of 2013 and Solomon & Co. Ltd. – Versus- Solomon (1897) A.C. 22 H.C." where the courts held that a Company were entity distinct from its shareholders and the Directors Company operational through human agents that is the board of directors who were appointed in accordance with the Articles of Association and registered with the register of Companies. Therefore, the Directors assume the responsibilities of ensuring that the Company abides by all legal requirements that would preserve its juristic personality and property and avoiding default would attract serious legal sanctions or affect its juristic personality and assets. The legal requirements included accountability of its business to shareholders and to the law, operations, directorship liabilities, assets, payment of taxes only to mention but a few. If a company failed to observe the legal responsibilities and obligations set out in law, it would face legal penalties and sanctions.



61. Further the Counsel urged that the court held that AGM served two (2) important purposes (a) As a mechanism for accountability to shareholders through activities which take place – including presentation of profit and loss account relevant information on the assets and operations of the company directorship, share dividends and public share and the shaping of the business of the Company and (b) AN act of compliance with the law.

He submitted, that in the instant case, the failure to hold AGM for 30 years and there being lack of quorum kept the shareholders in darkness and hence all the acts by the Directors undertook were null and void ab-initio. The Counsel further argued that the 1st Defendant breached the provisions of Section 158 of the Company Act which provides: -

“A company may not enter into an arrangement under which:-

- a. A Director of the Company or of Its holding Company or a person connected with such a Director, acquires or is to acquire from the Company (directly or indirectly) a substantial non-cash assets or
- b. The Company acquires or is to acquire a substantial non-cash assets (directly or indirectly) from such a Director or a person so connected, unless the arrangement has been approved by a resolution of the members of the Company or its conditional on such an approval being obtained”.

Thus, the Counsel held that there were no resolutions of the members to demonstrate the shareholders allowed one of their Directors to acquire 75 acres of their land, for a director who held 61 shares – entitling him only 1 acre. The Counsel averred that, the Land was targeted simply it had the Safaricom Mast erected on it and hence generating income. He reiterated that there was no single entity shareholders known as David Gachogu & Peter Owen Njuguna and as such the title to the suit land was held by strangers to the company.

62. He argued that the title was acquired fraudulently and hence breaching the provisions of Section 26(1) of *Land Registration Act* and it should be impeached and cited the case of “Alice Chemutai Too – Versus- Nickson Kipkurui Korir & 2 Others 2015 eKLR where court proceeded to nullify a title that had been issued fraudulently and un-procedurally. The Court found that it never saw how a person with a perfectly good title should be deprived of his title by activities of fraudsters nor beneficiary of fraudulent activities stood to gain for his fraud and no title holder would be deprived of his good title by con artists.

Counsel contended that courts should nullify titles obtained by land grabbers who state at your face and wave to you a title of the land grabbers and loudly plead principle of indefeasibility of title.

Taking that the 2nd Defendant confirmed never carried out a search at the Company registry and that the lease they had was with the Plaintiff hence they should be ordered to release the rent directly to the Plaintiff whom they have lease with. By conducting a search at the they would have known the actual owners of the suit land.

The Counsel also pleaded to be paid the loss of use from year 2015 when they erected the Safaricom Mast amounting to a sum Kshs. 4,219,858/= as at 1st May, 2022 to be paid by the 3rd Defendant to the Plaintiff.

The Counsel submitted that the Land Registrar, 4th Defendant handled the entire transaction casually – in that they never inquired for the availability of CR-12 Form to have confirmed who the Director of



the Company were, and the minutes Supporting the transfer of the Land, would have assisted greatly as he would not have allowed the transaction to take place as it did.

63. In conclusion, the Counsel urged court to grant the relief sought by the Plaintiff by averting the 75 acres to the Company while the 1st Defendant retained his 1 acre based on the 61 shares he held. In so doing the 1st Defendant would not suffer any prejudice as he continued being a member of the Plaintiff and hence continue to enjoy the shares and provident thereof garnered if anything, it's the Plaintiff that continued to be prejudiced as it is them – as the shareholders who were deprived and denied the rightful shares of 75 acres. The suit should be allowed accordingly.

B. The Written Submissions by the 1st Defendant**

64. On 30th August, 2022, the Learned Counsel for the 1st Defendant – the Law Firm of Messrs. Stephen Oddiaga & Company filed their written submissions dated 30th August, 2022. M/s. Mwanzia holding brief for Mr. Oddiaga Advocate, started her submissions by providing a brief background of the case, where upon in March, 2007, the 1st Defendant being a Director of the Plaintiff executed transfer of the suit land in their favour. Further to the said transfer the 1st Defendant proceeded to lease a part of the suit. In particular area known as “Nguu Tatu Hill” to the 3rd Defendant Safaricom Co. Ltd) for a period of 9 years and 11 Months. The Plaintiff claimed that the whole of this transfer process of the suit land was marred with fraud, irregularities and illegalities which led to them instituting the case herein. The 1st Defendant denied all these allegations.
65. The Learned Counsel submitted under, ideally seven (7) grounds but which the court has condensed them to three (3) broad areas:-
66. Firstly, the transfer with respect of the suit land in favour of the 1st Defendant was legal and proper – on the ground that the 1st Defendant was a member of the Plaintiff's Company whereby he produced a certificate of share No. 6 at Exhibit No. 4 – Hence he was not a stranger. Indeed, the purpose for the establishment of Company was for purchasing of land and sub-divided to the members. The Counsel averred that the DW-1 produced a lists of members who had benefited from the scheme and issued with title deed. Thus she submitted that the 1st Defendant rightfully and legally acquired the suit property and were issued with title deed produced as Exhibit No. 3 by DW-1.
67. Secondly, the Plaintiff had a justifiable claim over the suit property. The transfer of the property was done legally and title deed issued accordingly. The counsel averred that this position was confirmed by the DW-3 who stated that indeed the transfer documents were sufficiently signed by two of the Directors by the Plaintiff on behalf of the Company and subsequently the title was issued to the 1st Defendant and his co-owner.

The Counsel held that DW - 3 testified that the lease agreement was entered in between the 3rd Defendant and the Plaintiff but later on they were served with a Letter indicating change of ownership from the Plaintiff to the 1st Defendant and his co-owner. The DW - 3 witness further confirmed that since filing of the suit they had not been paying the monthly rent so that the correct owner to be identified at the conclusion of this case so that they could pay the outstanding rent arrears.

68. Thirdly, the 1st Defendant averred that the Plaintiff was not able to prove allegation of fraud committed by the 1st Defendants hence they remain mere allegations. Support her submissions she relied on the following decisions “Koinange & 13 Others –Versus- Charles Karuga Koinange (1986) eKLR, Vijay Morjaria –Versus- Nansingh Madhu Singh Dabar & Another (2000) eKLR and Laban Omuhaka Otumbula –Versus Triposha Okutoyi (2019) eKLR where the court held that when fraud was alleged by the Plaintiffs the onus was on the Plaintiff to discharge the burden of proof. Fraud must be



specifically pleaded, and proved through the standard of proof may not be so heard as to require proof beyond reasonable doubt, something more than a balance of probabilities was required.

The 1st Defendant further relied on the Provisions of Section 26(1) of the [Land Registration Act](#) to prove that he was the bona fide owner to the suit land and title issued to him and co-owner in 4.10.2007.

In the long run, she urged court to dismiss the case by the Plaintiff.

C) The Written Submissions by the 3rd Defendant – Safaricom Company Limited.

69. On 3rd October, 2022, the Learned Counsel for the 3rd Defendant – Safaricom Co. Ltd. – the Law firm of Messrs. Muriu Mungai and Company Advocates filed their written submissions dated even date.

70. Mr. Kongere Advocate, commenced his submissions by providing an introduction and brief background to the case. He summarized the cases by the 1st, 2nd and 4th Defendants herein. He held that the 3rd Defendant as a reasonable person did what was expected of them before entering into a lease agreement of the suit property on 20th July, 2005 with the Plaintiffs and being satisfied with the due diligence. However, on 23rd April, 2008, the Plaintiff notified the 3rd Defendant that the land had changed hands – as it was not in the hands of the 1st Defendant and whom the 3rd Defendant should henceforth deal with.

Pursuant to this, being satisfied that the land indeed changed hands, the 3rd Defendant engaged the 1st Defendant and remitted the annual rentals to him and his then Co - Owner and upon the demise of the Co - owner, the rent was remitted to the 1st Defendant.

However, the remittances stopped when in the year 2012 the 3rd Defendant was confronted with a letter dated 14th August, 2012 from the Plaintiff indicating that the transfer of the land to the 1st Defendant was the subject of Criminal Investigations.

On the legal analysis the Learned Counsel submitted on two (2) grounds.

71. Firstly, the Plaintiff had failed to prove its case on the allegations of fraud. He held that the titled that ought to be impeached was registered in the year 2007 and hence the 3rd Defendant disagreed with both the Plaintiff and 1st Defendant who both cited the Provisions of Section 26(1) of [Land Registration Act](#) as being the applicable law. The Counsel rightfully so stated the proper law applicable was Section 143 of “The Registered [Land Act](#) Cap 300 (Repealed) and not [Land Registration Act](#) No. 3 of 2012 – citing the case of “Tukero Ole Kina & Another –Versus- Tahir Sheikh Said & 5 Others (2015) eKLR.

He argued that fraud and negligence were two fundamentally different causes of action attracting different standards of proof. Further the allude fraud the Plaintiff had to prove it but the plaintiff only treated fraud as being synonymous to negligence. It had evidence which could only impute negligence against the 3rd Defendant: - He referred court to case of “Moses Parantai & Peris Wanjiku Mukuru – Versus- Stephen Njoroge Macharia (2020) eKLR.

He argued that the issue on whether the 3rd Defendant failed to obtain a search from the Company’s registry, copies of the minutes by the Board of AGM would only amount to negligence by the 3rd Defendant but certainly not fraud.

72. There was no prove of fraud by the Plaintiff having been committed by the 3rd Defendant. Indeed, from the adduced evidence demonstrated that the 2nd Defendant entered into the lease with the Plaintiff only to receive a letter advising it there was a new owner of land being 1st Defendant and Co-owner henceforth and stopped payments when a dispute was brought to its attention. Certainly, the Counsel argued this was not fraud or having acted in a fraudulent manner. Therefore, the Counsel concluded by stating that the Plaintiff failed to establish a case of fraud against the 2nd Defendant.



73. Likewise, the Counsel's contention was that the Plaintiff failed to prove any fraud against the 1st Defendant for the following reasons;
- (a) The allegation of having fraudulently transferred the land to himself was such a general expression.
 - (b) The accusation that the 1st Defendant failed to consult with the entire Board of Directors before the transfer and the reference to the minimum of seven (7) directors. However, there was no requirement in the Articles Association for all the Directors to convene a meeting before they could sign a transfer over one or other parcel of land. The Counsel held that Article 17 emphasized the Board of Directors to donate "any of the powers to exercisable by them"
 - (c) Although there was a provision for the Company to constitute Seven (7) Directors, but no provision for there to be a quorum of seven at all events.
Further, there was no requirement for there to be a resolution of the AGM for any land transaction to take place.
 - (d) There is nothing to show the 1st Defendant colluded and connived with the 3rd Defendant – as it was its statutory duty to register lawful documents presented to it. The accusation that the 4th Defendant accepted the transfer without stamp duty was denied by the 3rd Defendant.
 - (e) The 2nd Defendant was never misled by the 1st Defendant as they conducted official search which indicated the registered owner of the suit property.
74. The Counsel further argued it was a principle that all members, the Directors included were entitled to receive a portion of the land bought by the Plaintiff. Thus the only dispute was the formula for which no evidence was presented to prove one of the other. Hence the 1st Defendant could not suffer from a conflict of interest for doing exactly that which the Plaintiff had been set up to do.
He further submitted that the transfer was signed by another director, which it was never indicated whether it had been a forged or not and if so what action was taken against the said Director for aiding the 1st Defendant to abuse his position of power.
75. Further, the letter dated 23rd April, 2008 notifying the 2nd Defendant of the change in ownership of land was authorized by Mr. Mwaura Kimani – Director to date of the Plaintiff, Mr. Kimani neither disowned the letter nor he too was facing disciplinary action.
76. In view of this the 2nd Defendant urged Court to dismiss the suit filed by the Plaintiff with costs thereof.

D. The Written Submissions by the 3rd Defendant – Land Registrar

77. On 3rd October, 2022 the Office of the state counsel the Attorney General for the 3rd Defendant herein filed their written submissions dated 27th September, 2022. Mr. Makuto the State Counsel averred the Plaintiff and the 1st Defendant were embroiled in a dispute over the ownership of the suit land. He averred that the Plaintiff and the 1st Defendant were in agreement that the suit land previously belonged to the Plaintiff – a Land Buying Company.

However, from the pleadings and the evidence adduced the Counsel held that the Plaintiff disputed the process through which the paid was transferred from the Plaintiff to the 1st Defendant.

The Counsel argued that the Plaintiff's witness testified and stated that the land was sub-divided into smaller portions and balloting was done and whatever the shareholder picked they were allocated.



78. The counsel asserted that the suit land was registered in the names of David W. Gachogu and Peter Owen Njuguna (Now deceased). The Plaintiff filed an Amended Plaintiff on 25th November, 2019 removing the 2nd Defendant from the pleadings. In effect instead of moving court under Order 24 Rule 4 (1) to substitute the 2nd Defendant – the deceased with a legal representative as required by law, in essence the suit aborted against the deceased therefore no order can be made against the deceased – the late Peter Owen Njuguna

VII. THE ISSUES FOR DETERMINATION

79. I have carefully assessed the filed pleadings by the Plaintiffs the 1st, 2nd and 3rd Defendants the evidence adduced by all the witnesses summoned by the parties, the written submissions the cited authorities the relevant provisions of *the constitution* of Kenya 2010, and the statutes.

80. In order to attain a fair, informed, just reasonable and equitable determination in this case, the Honorable Court has condensed the subject matter into the following three (3) salient issues. These are:-

- (a) Whether the Plaintiff has been able to establish its case from the amended Plaintiff against the 1st, 2nd, 3rd and 4th Defendants.
- (b) Whether the parties herein are entitled to the reliefs sought herein.
- (c) Who will meet the costs of the suit

ISSUE No. (a) Whether the Plaintiff has been able to establish its case from the amended Plaintiff against the 1st, 2nd, 3rd and 4th Defendants

Brief Facts

81. Before embarking on the issues of analysis enumerated under this sub-heading, it's imperative that, the Honorable Court wishes to extrapolate onto the brief facts of this case. From the filed pleadings by the parties herein, It's not in dispute that the Plaintiff's Company was established in the year 1978 under the Provision of the *Companies Act* Cap 486. The Company was solely established as a land buying company for its registered shareholders and members thereof. Upon acquisition of land, it would then without a formula to sub-divide the land among its members equivalent to the number of shares each had acquired. By the time of this suit was filed, the company had legally acquired a total of 4, 318 acres of land which included the suit property ready for the sub – division and the distribution to it registered members depending on the number of shares held through balloting system.

The main bone of contention arose when it came to the attention of the Plaintiff that the 1st Defendant and the deceased had caused the suit land to be registered in their joint names a clear conflict of interest and without adhering with the strict procedures of the company. The Plaintiff averred that this was done fraudulently and out of the negligence by the 1st, 2nd and 4th Defendants an omission and commission that led to the irregular issuing them with a title deed in the year 2007. The Plaintiff held that, on 20th July, 2007, the Company and Safaricom Company Limited, the 3rd Defendant herein, had duly executed and earlier had entered into Lease Agreement terms and conditions stipulated thereof whereby there was an erection of a telecommunication mast there. Indeed, the 3rd Defendant commenced making rental payments to the Plaintiff's Company. However, later on vide a letter dated 23rd April, 2008, it is stated that the alleged Plaintiff's Company notified the 3rd Defendant that the ownership of the land where the 3rd Defendant were leasing had changed hands and it was now under the legal registration of the 1st and the deceased who should be receiving the remittances. Based on



this information and being furnished with searches and copies of title deed, the 3rd Defendant obliged though still using the previous lease agreement started remitting payments to the 1st Defendant. It was only later that the 3rd Defendant was informed of the demise of the 2nd Defendant and would be remitting the rental income to the 1st Defendant to be shared with the estate of the deceased. It is held that in the course of time the 3rd Defendant were served with a Court order indicating that the process was marred with fraud that they stopped remitting the finances anymore. They have continued holding the finances awaiting further decision by the Plaintiff.

82. Although the 1st Defendant hold that they were the legally registered owners to the suit land, a fact which was corroborated by Land Registrar, the Plaintiff holds that they could not have been illegal and regular taking that there lacked any resolution by the Board of Directors, there had been no quorum by the Board – there being only four (4) surviving out of 7 the rest having rested, no minutes with this resolution and no AGM had ever been held for over 30 years. Besides, they held that the 1st Defendant was only entitled to 61 shares hence one (1) acre and not a whopping 75 acres which was being held by the 1st Defendant. The Defendants have all denied the existence of any fraud and held that though the Plaintiff pleaded its particulars it was never able to prove its as required by the standards of law as the burden on its shoulders. They urged for the suit to be dismissed with costs. That is adequate on facts.

Now turning to the issues of the analysis under this sub-heading. This is rather straight forward matter but just complicated deliberately by some of the parties involved in this case. It's not in doubt that the Plaintiff's Company was incorporated as a Company by Limited guarantee, under the Company Act Cap 486 of Laws of Kenya. Under the Provision of Section 111 (3) of the Act it was issued with a certificate of incorporation bearing No. 58/78 dated 25th April 1978 and with memorandum and Article of Association – for the sole purpose of buying land and sub-dividing it depending on the number of shares a registered member for the Company had acquired. The suit land was spread out within the Indian ocean hence found along beach and the mainland of the County of Mombasa. In order to avoid members being short changed on the location where one obtained the portion of land, the company utilized a ballot system.

83. Fundamentally, and from the quick reading through the pleadings and facts adduced herein by the witnesses and through empirical evidence, it's important to note that before proceedings further, the jurisdiction of the Environment & Land Court is governed and donated by the Provisions of Article 162 (2) (b) of *the Constitution* of Kenya and Sections 3 and 13 of the *Environment and Land Court Act*. No. 19 of 2011, Section 101 of *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act* No. 6 of 2012. By and large the *pari materia*” here revolves on the suit land and its use, occupation and title. Hence, I strongly discern that this Court cannot avoid dealing with the subject matter before it. It is justified the Court has jurisdiction to handle the case all the way. In any case all the parties submitted themselves this court and no one ever raised the issue of its jurisdiction. They were all right so to speak, I dare say.

The above notwithstanding, it will be noted that, the Plaintiff's Company and its transaction are to be governed by the terms and conditions of the Company, and hence it will be inevitable for the court to critically assess all the legal instruments of the Plaintiff's Company. In so doing the Court, will not be digressing by seeking guided from the principles enshrined in the famous old case in the company Law parlance of Company Law of “Piercing/Lifting the Corporate Veil” which were discussed in Paragraph 90 of Halsbury's Laws of England 4th Edition Volume 7 (1) as follows:-

“Notwithstanding the effect of a company's incorporation in some cases the Court will “pierce the corporate veil” in order to enable it to do justice by treating a Particular company



for the purpose of the litigation before it, as identical with the person or persons who control that company”.

“This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the person who controls it, it is a relevant feature. In such case the Court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the Persons as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”. (emphasis is mine)

This Court dare say that the concept of the separate corporate personality being the best innovation ever in the Company Law. The Court has further relied on the decision of “Salomon & Co Limited – Versus - Salomon [1897] AC 22 HL and where it was held that:-

“ A Company is different person altogether from the subscribers and directors..... That separate legal personality of a company can never be departed from except in instances where the statutes or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”. (emphasis is mine)

He also relied on the case of “Multichoice Kenya Limited – Versus Mainkam Limited & Anor (2013 eKLR which held:-

“To my mind, there is no doubt that ever since the famous case of Salomon –versus- Salmon, Courts have applied the principles of corporate personality strictly, but exceptions to the Principles have also been made where it is too flagrantly opposed to justice. Other instances include when a fraudulent and improper decision by scheming directors or shareholders in imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as on entity”.

84. In applying these principles to the instant case, the Court assesses the Article and Memorandum of Association Clause 13, the following are listed as the seven (7) Directors. These are:-

1. Peter John Mwangi
2. Mwaura Kimani (Alive)
3. Alphonse Gachoka Kinyanjui
4. Peter Njuguna
5. Mbugua Mbete (Alive)
6. David Gachogu (Alive)
7. Njeri Gikonyo

This fact is supported by the current CR -12 Form dated 10th December, 2021 and produced in Court by the Defendant witness No. 4. It was attested that only four (4) directors were surviving the rest having passed on.



Clause 13 holds:-

“Until otherwise determined by the General meeting the number of Directors shall not be less than seven and more than twenty”

85. Based on this, it is expected that all the policy making processes and decision making for the affairs and management of the Company are conducted and undertaken by the Directors and shareholders of the Company. The said policy and decision are sanctioned at the Annual General meeting the body organ for the Company and implemented by the Board of Directors. The empirical documentary evidence for this are resolutions carried out in well written minutes. In this case the activities of the Plaintiff's Company were the buying, sub – division and distribution of land among its members. The Court wishes to applaud the Plaintiff Company as from all the records kept and the legal instruments such as minutes available, the testimony adduced by PW - 1, PW - 2 and DW - 1 graphically demonstrated that all the registered members who had acquired shares were entitled and were allocated land through sub – division and distribution in tandem with their shares attained. Indeed, this happened and the 1st Defendant produced a very comprehensive list of the land granted to the shareholders against the shares. So far so good matters were proceeding on so smoothly, until the 1st Defendant started changing the course of events. This is how it happened necessitating the filing of this case. From the evidence available, it is on record that the 1st Defendant had 61 shares from the list which he produced and hence was entitled to 1 acre. But for no apparent good reason nor justifiable cause, the 1st Defendant and the deceased jointly ended up attaining a portion measuring 30.5 Hectares (75.36 acres). They were issued with a title deed by the 4th Defendant on 4th October, 2007 it's not yet clear the justification acquired the size of this land. The said list shows that in Plot A, the 1st had acquired two (2) plots further Plot F he had acquired another plot. But from the said list the suit land did not feature. On the admission by the Land Registrar, apart from a seal affixed, the transfer documents did not bear the signatures of the transferor and transferee. It is actually the deceased who signed on behalf of the Directors. By what coincidence, that this land happened to be where the telecommunication mast was erected by the 3rd Defendant, an going concern and income generating venture for the Company. The Court fully appreciates that the members got so traumatized and frustrated by this acts of omission and commission perpetrated by the 1st Defendant and the deceased.
86. To worsen the situation, this Honorable Court is persuaded by the submissions by the Counsel and as already stated earlier, as a principle of Company law, all Companies including the Plaintiff its decision are carried out during the Annual General Meetings. The Provisions of Section 275 A holds that:-
- “Annual General Meetings (1) Every Company shall convene a general meeting once a year. (2) Sub-Section (1) does not apply to single member companies. (3) The Registrar may on the application of the Company or for any other reason the Registrar thinks fits, extend the period referred to in sub-section (1) even if as a result, the period is extended beyond the calendar year. (4) Company directors that fail to comply with this section commits an offence and are liable to a fine not exceeding one hundred thousand shillings.
87. From the evidence adduced in Court by the PW - 1, PW - 2, DW - 2 and DW - 3 the Plaintiff's Company had never held any AGM for 30 years. One then wonders how they would be causing any transactions including the buying of the land, its sub – division and distribution to its registered members and even now leasing of it to the 3rd Defendant without the resolution of this very important legal organ. On this aspect I seek refuge from the authorities cited herein by Court and the Plaintiff's Counsel of:-”Agricultural Development Corporation (supra) and Salmon – Versus Salmon (Supra) cited herein. To this end, I find the submission by the 1st and 2nd Defendants to the effect question the relevance of



there being any resolution of an AGM or the Board of Directors when land was being transferred or any land transactions of land being conducted rather curious and perplexing to say the least. It's a total and willful departure from trite and established law.

88. There is no doubt and I fully concur that title deeds are indefeasible and sacrosanct but only to the extent they are acquired through the laid down proceedings of law. But before I can address this issue, I wish to deal with the applicable law considering that the suit land was registered under the Registration of *Land Act*, Cap. 300 which is now repealed. Guided by the legal provision of Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap 2 holds that:-

“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, obligations or liability acquired, accrued or incurred under a written law so repealed”. Thus, in this case the provisions of the Registered *Land Act*, Cap. 300 are applicable in this matter. In that case I will rely on the provision of Sections 27, 28 and 143 of the said Act.

Section 27(a) “Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

The provision of Section 28 of the Act provides that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

The provision of Section 143 (1) of the Act provides thus:

“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

- (2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default comes to play here as in the case of the instant case meted by the 1st Defendant and the deceased herein.”

Nonetheless, the effect of the Registration of Lands is founded in the provisions of Section 24 of “The *Land Registration Act*” which provides as follows:-

“Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;



To buttress their point they relied on the case of:- “Court of Appeal Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR where court held:-

“When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a 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 the 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” and Huber L. Martin & 2 others –Versus- Margaret J. Kamau & 5 Others (2016) eKLR.

Clearly, in the given circumstances, the Certificate of title issued to the 1st Defendant and the deceased by the 4th Defendant was done through misrepresentation of facts, mistake and omission and therefore must be cancelled and/or revoked through a Court Order and the rectification of the register by the Land Registrar, the 4th Defendant under the provision of Section 143 (2) of the Registered *Land Act*, Cap 300 (now Repealed).

89. Additionally, as provided for under Section 158 (1) of the Company Act the acts by the 1st Defendant and the deceased in transferring the suit land to themselves to be one being on breach of conflict of interest and responsibility as the directors and driven by human greed for self-aggrandizement and enrichment. It’s a case of the shepherd (the Directors) turning around against it flock (the registered members) and starting to feed on all them and dressing on the wool from the poor sheep. In the case of Chapakalal Pawn Shah – Versus - The Attorney General & Another, Mombasa HCCC, No. 145 of 1997 Justice Waki as he then was stated as follows:-

“By the same token the concept of indefeasibility of title should not indiscriminately be allowed to camouflage unlawful activities towards the acquisition of such titles in the process amounting disorder and encouraging land grabbing.

Its high time the court must stand up and condemn such acts being depicted and practiced in the corporate world. There must be instilled high standards of integrity, accountability and transparency in such Corporate bodies which are some of the Core values well stipulated under the provision of Article 10 (1) and (2) of *Constitution of Kenya, 2010*.

I dare state that it appears the land was targeted as it already had the Safaricom (K) Company Limited – the 3rd Defendant, telecommunication Mast erected on it and it was already generating high revenue to the chagrin and frustration, trauma and agony of the registered members. I have noted that there exists no single entity known as David Gachogu and Peter Owen Njuguna. The suit land belongs to the Plaintiff Company which includes the 1st Defendant and the deceased. The title deed must be impeached.

Issue No. (b) Whether the parties herein are entitled to the reliefs sought herein.

90. As clearly stated above the Plaintiff has been able to demonstrate that the suit land was initially the property of the Company as indicated from a copy of the green card under entry No. 1 dated 4th October, 2007 and under Entry No. 2 and 3 to the 1st Defendant and the deceased of the same date which by itself raises eye brows.



Further to the letter dated 23rd February, 2012 by the 1st Defendant to the Manager of Safaricom Co. Limited in admission states:-

“This site – Nguu Tatu Hill No. 2036 – originally was owned by Thathini Development Company Limited, a buying Company Limited. The parcel of land where site 2036 stand was allocated to Peter Owen Njuguna (Deceased) and David Wanyoike Gachogu in 2007 payment continued to me made in the name of Thathini Development Company limited but the proceeds were passed on to the registered owners.....”

Any such transfer ought to have been supported by a resolution of the Board of Directors and the AGM. There is no such evidence to that effect. The 1st Defendant and the deceased have not persuaded this court how they would have acquired the suit land belonging to the Plaintiff on the same day it was allocated to it.

91. Be that as it may, I fully concur to the Counsel for the 1st and 2nd Defendants to the effect the allegation of the title having been acquired by the 1st Defendant in collusion with the 3rd Defendant and as per the particulars of fraud under Paragraph 6 of the Amended Plaint has not been proved. Apart from reporting to the police, for their investigations, the Plaintiff has failed to demonstrate or prove that indeed any allegation of fraud took place at all.
92. The Court has been informed that there was a Lease Agreement entered between the Company and the 3rd Defendant. But later on and based on the letter dated 23rd April, 2008 the alleged Company directors informed the 3rd Defendant that there was now a change on the ownership of the suit land the same having been transferred to the 1st Defendant that the 3rd Defendant started making payments to the 1st Defendant. It is interesting and defeats logic that the 3rd Defendant one of the leading international blue chip corporate entity would adversely failed and committed an inexcusable and unexplainable and unforgivable mistake by failing to raise a red flag by questioning the existence of an AGM and Board of Directors resolution nor even insisting on executing a fresh Lease Agreement terms and conditions stipulated thereof even it meant extending the lease of the previous lease. The provisions of Section 143 (1) of RLA comes to play here. Therefore, it is my view that the Certificate of title deed was issued to the 1st Defendant and the deceased by mistake and omission and that there will be inevitable need to hence forth have it cancelled and/or revoked by this Court and rectified by the Land Registrar and for it to revert back to the Plaintiff's Company. The error by meted the 3rd Defendant should be rectified immediately by the Plaintiff Company through invoking its internal Corporate mechanisms as provided for by law and in particular the Company Law.

ISSUE No. (c) Who will meet the costs of the suit

93. 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.....”

94. 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.

95. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is the Plaintiff herein has succeeded in establishing its case. For that very fundamental reason, therefore, the costs of this suit will be borne by the 1st Defendant herein.

VIII. CONCLUSION AND DISPOSITION

96. Ultimately, after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the Plaintiff has on balance and preponderance of probability established its case against the 1st, 2nd 3rd and 4th Defendants. Therefore, for avoidance of any doubts, I proceed to specifically order:-
- a. THAT Judgment be and is hereby entered in favour of the Plaintiff and against the 1st, 2nd 3rd and 4th Defendants jointly and severally.
 - b. THAT the 1st Defendant directed to surrender the original Certificate of title to all that parcel of land known as Land reference No. MOMBASA/MN/THATHINI/112 within the next fifteen (15) days to the Land Registrar, Mombasa, the 4th Defendant for its cancellation and/or revocation and rectification of the entries of the Land Registries to be in the names of Thathini Development Company Limited pursuant to the provision of Section 143 (1) and (2) of the Registered *Land Act* Cap 300 (Repealed)
 - c. THAT the 1st Defendant directed to remit all the monies received in respect of the Lease entered between the Plaintiff and 3rd Defendant from the date of the execution of the Lease on 20th July, 2005 to date without fail.
 - d. THAT an order be and is hereby that the 3rd Defendant herein to henceforth release all the financial proceeds owed to the Company and emanating from the duly executed Lease Agreement between the Plaintiff's Company and the 3rd Defendant within the next thirty (30) days from the date of this Judgement.
 - e. THAT an order be and is hereby made for the 3rd Defendant to be allowed to continue operating its telecommunication mast erected thereof as per the terms and conditions stipulated in the duly executed lease dated 20th July, 2005 with the Plaintiff but subject to fresh renewal as per the desires of the parties herein.



- f. THAT there be an order directing the Board of Directors of the Plaintiff's Company to convene an Annual General Meeting as per the Provisions of Section 275A of the Companies Act within the next three (3) months to deliberate on:-
- i. The status of the company and court case.
 - ii. Elections of and/or appointment of the Board of Directors.
 - iii. Renewal and/or extension of the Lease for the Safaricom Company Limited, the 3rd Defendant herein.
 - iv. Annual returns to the Company registry.
 - v. Any other business.
- g. THAT costs of the suit be borne by the 1st Defendant.

IT IS SO ORDERED ACCORDINGLY

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS.....15THDAY 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. Asena Advocate holding brief for Mr. Mwaniki Advocate for the Plaintiff.
- c. No appearance for the 1st, 2nd, 3rd and 4th Defendants.

