



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT TRANS NZOIA COUNTY

COURT NAME: KITALE ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCC/E014/2021

CITATION: ZURAH NIGHT SAKWA VS NATIONAL HOUSING CORPORATION

JUDGMENT

The Plaintiffs' claim

1. Plaintiffs commenced this suit vide an The Plaintiffs commenced on 8th March 2021 by a Plaint dated 5th March 2021. The Plaint and the Defence were amended on various occasions, with the last Amended Amended Plaint being dated 16th May 2022. The 3rd and 4th Defendants filed their Amended Defence and Counterclaim dated 9th June 2022 on 13th June 2022 while the 5th Defendant filed its Amended and Counterclaim dated 7th June 2022 on 8th June 2022.

2. Before going further, it is worth noting that initially the case was against four Defendants. On 12th April 2021, the 1st Plaintiff (then the only one) withdrew the case against the 1st and 2nd Respondents who were the National Housing Corporation and the National Land Commission respectively. Then on 9th June 2021 the Court ordered the Interested Party, the Ethics and Anti Corruption Commission (EACC), and it successfully joined in the proceedings as such. Then on 18th June 2021, the Plaintiff filed an Amended Plaint by which she included two other Plaintiffs, and the Interested Party, the EACC as ordered. On 1st of July 2021, the Interested Party made a formal application to be joined as a Defendant instead. The application was dated 1st July 2021. It was allowed on 15th July 2021 was allowed. The Interested Party was joined as the 5th Defendant.

3. On 28th July 2022, the Plaintiff was granted permission to amend the Plaint and include a claim the value of the land. The 5th the Defendant filed a Defence and Counterclaim dated the 8th September 2021 on 9th September 2021. It pleaded amongst other allegations that the suit land was fraudulently and irregularly registered in the name of the plaintiffs. It gave the particulars of fraud and illegality on the part of the plaintiffs. The 3rd and 4th Defendants too filed their Defence and Counterclaim dated 21st March 2022 by which they alleged Misrepresentation and Fraud on the part of the Plaintiffs. They particularized fraud and misrepresentation.

4. In brief, in the Amended Amended Plaint (the Plaint was amended twice) which was not amended properly to show that the case against the 1st and 2nd Defendant had been withdrawn, hence they were not parties, it was the Plaintiff's claim that she was the beneficial owner of the parcel of land known as Kitale Municipality Block 11/18. She acquired it through transmission after the death of



her husband who had initially acquired it in the year 2002. Further, that of the 1st and 2nd defendants (sic) (but against whom the plaintiff had withdrawn her case against as stated earlier) had with the collusion of 3rd Defendant and without the Plaintiff's consent or knowledge to dispossess her so that some critics, government officials can take the land and had further purported to make complaints to the Interested Party (sic) (who had since been made the 5th defendant) who had allegedly making investigations and had obtained injunctive orders against her with lack of evidence.

5. She gave the particulars of fraud on the part of the Defendant as follows:

- a) Attempting to obtain registration of someone's land.
- b) Misrepresenting facts that they said parcel was free and there's allocated by government.
- c) Misrepresenting facts and particulars before the land registrar, Kitale.
- d) Misrepresenting facts before the district land adjudication settlement officer, Trans Nzoia.
- e) Attempting to obtain the registration on the property or really allocated to Charles Leleche Lugano.
- f) Capitalizing on the plaintiff's widowhood and thus wanting to defraud her of her ownership documents.
- g) Misrepresenting every and all particulars of facts and law touching on block 11/18 Kitale Municipality.
- h) Secretly and unlawfully forging documents to appear as if they were valid ownership documents.
- i) Attempting to sell, transfer and or otherwise the aforesaid parcel of land without the plaintiff's knowledge or consent.
- j) Procuring title documents bereft of any transaction with the plaintiff before obtaining grant of letters of administration in respect of the estate of the deceased.
- k) Purporting to allude to corrupt practices when the evidence is clear that the land was never registered as public land in favour of the defendants.

6. It was the Plaintiff's claim, at paragraph 11 of the Complaint, that the Court does issue a declaration that the land belongs exclusively to her and in the alternative she be compensated for the land by the 3rd, 4th and 5th Defendant to the tune of Kenya Shillings Seventy Million (KShs 70,000,000=), being the market value. However, she did not seek this relief in the final prayers.

7. Therefore, by the Amended Amended Complaint dated 16th May, 2022 the Plaintiffs sought the following orders:

- a) A declaration that the Defendants do not have legitimate claim over land Parcel No. Block 11/18 Kitale Municipality and the suit land belongs to the Plaintiff and in the alternative, the 3rd, 4th and 5th Defendants jointly and severally do compensate the Plaintiff to the tune of 70 million the current market value of the suit land.
- b) An order for a permanent injunction restraining the 3rd and 5th Defendants by themselves, servants and/or agents restraining from ever laying claim on the suit parcel of land, disrupting operations, interfering, subdividing, alienating, transferring, leasing, encumbering, intermeddling, or selling and/or in any other manner dealing with Land Parcel Block 11/18 Kitale Municipality.
- c) Costs of the suit and interest thereon.

The 3rd and 4th Defendants' claim

8. The 3rd and 4th defendants filed an Amended Defence and Defense to the Counterclaim. They denied the allegations in the Amended Amended Complaint. Further, they denied the current market value of the parcel of land was Kenya shillings seventy million (KShs 70, 000,000/=) or that the plaintiff was entitled to any compensation at the current market value of the property. Further, they pleaded that the plaintiffs had no legitimate or registrable interest in the property since it was government land. Therefore, they were not entitled to any compensation of whatever nature, including the market value. They pleaded that the suit was fundamentally defective, incompetent,



scandalous and statute barred. Further, the suit land was government land which contained Government House number KITA/HOU/HG/2.

9. They pleaded that attempts by the government to sell its nonstrategic houses in the then districts was made in the year 2007 when the government through the Inter Ministerial Committee noted that a number of such houses or plots in Kitale were allocated to private individuals without due process. The list of the affected properties was generated and forwarded to the Permanent Secretary for Housing for purposes of approving boarding and the validation of the allocations but the exercise was cancelled, having been initiated in utter violation of existing policies. There was no reasonable or probable interest by the plaintiffs in the suit property since it was public utility. The title in the name of Charles Lugano was acquired unlawfully by mistake and misrepresentation since the said Charles Lugano misled the Commissioner for Lands regarding the ground status of the suit property and therefore wrongfully acquired governmental property which had a Government House in occupation. The suit property was never available for allocation or transferred to private entities as it was never boarded or released by the government. Under Article 62 of the Constitution, the land was not part of the estate of Charles Lugano and was not available for transmission to the plaintiffs upon his demise.

10. They averred that in an attempt to conceal the status of the suit property, the plaintiffs caused goons to descend onto the Government House and demolish it on 27 February 2021, which act was reported to the Kitale Police Station on 28th February 2021. The result of the demolition of the strategic high grade Government House which was rented by civil servants paying 7000/= shillings per month was lost, and the 3rd and 4th Defendants claimed the value of the house and lost income.

11. The said Defendants raised a Counterclaim in which they stated that the purported allocation or transfer of the land in the name of Charles Lugano was procured unlawfully, unprocedurally and illegally, and the property remained public land reserved for the state Department of Housing and Urban Development. They pleaded particulars of fraud and misrepresentation as follows:

- (i) Purporting to acquire public land comprising of a house, KITA/HOU/GC/2 reserved for this state Department of Housing and Urban Development.
- (ii) Purporting to acquire public land that houses the house, No. KITA/HOU/HG/2
- (iii) Purporting to acquire or maintain and rebuild the due compliance with the provisions of the Government Land Act, Chapter 280 Laws of Kenya.
- (iv) Failing to exercise proper due diligence before being registered as proprietor of resort property.
- (v) Obtaining title to the suit property without any or any PDP, letter of allotment or payment of the requisite statutory charges.
- (vi) Reporting to exercise or alienate land owned by government.
- (vii) Obtaining title without the consent of the Commissioner of Lands
- (viii) Purporting to obtain painting without the commencement of Trans Nzoia County.
- (ix) Torching a Government House Number KITA/HOU/HG/2 to conceal information and mislead the general populace.

12. They averred further that the allocation, transfer, registration and issuance of a Certificate of Lease in respect of the suit property to Charles Lugano was illegal, null and void for all purposes and inefficient to confer any good title and the plaintiffs' title was a better candidate for cancellation. Further, any attempt to treat the suit property as part of the estate of Charles Lugano or pass the title of the suit property to the plaintiffs through transmission was a nullity ab initio. Additionally, in February 2002 the Plaintiffs purported to and indeed unlawfully or illegally converted to the HG Government House for their own use by evicting the tenant who was residing therein and paying government rent of KShs 7,000/= per month. Further, in an attempt to conceal the status of the suit property, on 27th February 2021, they hired goons to, and did, demolish the government's HG house on the suit land, an incident which was reported to the Kitale Police Station on 28th February 2021.



The house was being rented at a rate of Kenya Shillings 7,000/= per month and consequently the 3rd and 4th defendant Counterclaimed for the loss of the rental income at the rate of 7000 per month with effect from February 2000 when the plaintiffs evicted the tenant therein, to the date of suit. The Defendants also Counterclaimed for the value of the house in the sum of Kenya Shillings three million (KShs 3,000,000/=).

13. Consequently, the 3rd and 4th Defendants sought for the following reliefs:

- i. An order declaring the purported allocation, transfer, registration or issuance of certificate of lease over LR No. Kitale Municipality Block 11/18 to Charles Lugano or any other person as unlawful, illegal, null and void.
- ii. A declaration that the attempt to treat the suit property as part of the estate of Charles Lugano and the further attempts to pass the suit property to the plaintiffs through transmission is nullity ab initio.
- iii. An order declaring the title issued to Charles Lugano or any other person over land parcel No. Kitale Municipality Block 11/18 as having been acquired unlawfully and illegally and the same be cancelled forthwith.
- iv. An order declaring that LR No. Kitale Municipality Block 11/18 is public land reserved for State Department of Housing & Urban Development.
- v. An order of permanent injunction restraining the plaintiff, its servants, agents and or any other person acting under it from ever laying claim to, interfering with or in any manner dealing with LR No. Kitale Municipality Block 11/18.
- vi. Costs of the counter-claim.
- vii. Lost income at the rate of Kshs. 7,000/= per month effective February 2002 to the date of the judgment.
- viii. The value of the demolished HG house at a global sum of Kshs. 3,000,000/=.
- ix. Damages for illegal demolition and trespass on the suit land and loss of user.
- x. An order of dismissal of the Plaintiffs' suit.

CLAIM BY THE 5TH DEFENDANT

14. The 5th Defendant also filed its Amended Defence and Counterclaim dated 7th June, 2022. The 5th Defendant filed an Amended Defence and Counterclaim dated 7th June 2022. The 5th Defendant too also denied the allegations in the Amended Amended Plaintiff. They averred that the Plaintiff was not entitled to any compensation, whether monetary as described in the plaint or otherwise, from the 5th defendant as they had no legal right to claim it or any interest over the suit property. They averred further that the Government was entitled to compensation for their loss occasioned by the plaintiffs' occupation of the suit property without consent. They prayed that the suit be dismissed.

15. It raised a Counterclaim in which they pleaded almost on similar facts as the 3rd and 4th Defendants. More specifically they pleaded that the suit parcel of land known as Kitale Municipality Block 11/18 measuring 0.7009 hectares situated along the Eldoret Kitale road was alienated public land reserved for a public purpose, for use and occupation of government officials within Trans Nzoia County. The reservation was made in 1928 following the survey of the suit property. Further, in or about 1950 to 1967 the government constructed a house on the suit property and upon completion, entered it into the Government Building Register and assigned it the number KITA/HOU/HG/2. The house comprised of a main house, a servant quarter and a provisional parking. It was placed under the management of the Ministry of Housing and allocated to the judiciary to provide housing for senior judicial officers serving in Kitale Law Court.

16. On or about 18th June 1999. Charles Lugano (deceased) fraudulently and illegally solicited and caused a letter of allotment for the suit property to be issued in his name. Consequently following his acceptance of the offer for a Lease for period of 99 years was issued in his favour in 2002. Consequently, the property was registered in the name of Charles Lugano who took possession in



2002 by evicting the judicial officer occupying the house at the time.

17. Further, it pleaded that the land on which the house stood was never boarded for disposal as required by Government Financial Regulations and Procedures, Chapter 19 of 1989 and the Ministry of Works Circular No. 2/58 of 1958 and it remained a public utility for a public purpose. They added that the suit property was never available for alienation in any manner and the issuance of documents of title to Charles Lugano was irregular null and void, and could not confer any title to Charles Lugano. Consequently, no legal title, lease, interest or estate could be conferred or transmitted or purported to be transferred or transmitted to the Plaintiffs by way of succession or through any other means. The eviction of judicial officers and the continued subsequent occupation by Charles Lugano and the Plaintiffs' deprivation of the house to government officials who were intended beneficiaries therefrom and occasioned loss in rental income to the government, which is contrary to public interest.

18. In 2007, the government communicated its intention to sell and validate nonstrategic houses in the districts but the house was not among the houses identified for sale or validation as it was not considered non-strategic. The intended sale and validation of non-strategic government houses in districts was consequently cancelled in 2008 and no Government House was sold.

19. On 27th February 2021, the plaintiffs who were the administrators of the estate Charles Lugano, without any colour of right or authority, fraudulently, illegally and maliciously demolished the House, number KITA/HOU/HG/2. The house was built by public funds and the demolition amounted to unlawful demolition of public property and was an affront to the law and public interest. They gave particulars of irregularity and fraud on the plaintiffs as follows:

- a) The plaintiffs, as the administrators of the Estate, solicited for allocation, accepted the allocation and made payment in respect of the soft property while knowing it to have been set aside for the use of government officials as a public utility.
- b) The plaintiffs alienated or caused to be alienated the land housing Government House number KITA/HOU/HG/2 2 which had already been alienated and was in actual use by government officials, knowing that the government had not approved the change of user from official government residents to private residence.
- c) The plaintiffs alienated or caused to be alienated land housing the House which had already been alienated and was in actual use by government officials, knowing that the procedure for boarding or disposing government buildings as required by the government Financial Regulations and Procedures of 1989 had not been followed.
- d) The plaintiffs knowingly and without authority evicted the last judicial officer occupying their own property when they were in fact the entitled beneficiaries of the suit property.
- e) The plaintiffs, without any authority, demolished the Government House without any authority from the Ministry of Housing, which was managing the property on behalf of the public.

20. They gave particulars of illegality as follows:

- a) Unlawfully acquiring public property contrary to the provisions of Section 45(1)(a) of the Anti-Corruption and Economic Crimes Act 2003.
- b) Dealing with suspect property contrary to the provisions of section 47 of the Anti-Corruption and Economic Crimes Act 2003.
- c) Malicious damage to property contrary to section 339 of the Penal Code.
- d) Alienating government property without following their laid down procedures for boarding for the disposal of government property according to the Government Financial Regulations and Procedures, 1989.

21. Consequently, the 5th Defendant prayed for a declaration that the transmission of the property to the Plaintiff was illegal, null and void and incapable of conferring an interest onto the Plaintiffs.

22. Then it sought for the following orders:



- a) A declaration that the allocation of the suit property to Charles Lugano, the lease and certificate of lease are null and void for being fraudulently and unlawfully obtained and therefore incapable of conferring any interest to the Plaintiffs and/or any other person whatsoever.
- b) In the alternative, an order of cancellation of all entries relating to the registration of the suit property in favour of Charles Lugano.
- c) An order for registration of the suit property in the name of the Government as the land housing Government House number KITA/HOU/HG/2.
- d) An order of permanent injunction against the Plaintiffs, their employees and or assigns from any dealings over the suit property other than Dy way of transfer or surrender to the Government of Kenya.
- e) Specific damages of Kshs. 2, 950, 0000/- for the destruction of the Government House Number KITA/HOU/HG/ 2.
- f) Specific damages of Kshs. 1, 596, 0000/-for lost rental income for the period between February 2002 and February 2021 at the monthly rent of Kshs. 7,000/-.

The Plaintiffs case in evidence

23. ZURAH NIGHT SAKWA, testified as PW1. She testified that she knew the late Charles Lungano, who died in 2009. That he was her husband. She adopted her witness statement dated 18th January, 2022, as her evidence-in-chief. She also produced a list of 14 documents filed on 18th February, 2022 as her evidence, which documents were admitted as P. Exhibit 1-14. She testified that there was a valuation report dated 4th May, 2022, prepared by Premium Valuers Ltd, which she expressed to call its maker. It was marked as PMFI-157.

24. She testified that her late husband, Charles Lungano, bought the land from the government and put her in possession in 2002. She added that when she took possession of the land in 2002, she only found a house on it with no connection to the government. She testified that from 2002 until when she filed the suit, no one disputed her ownership or possession. She testified that the claims by the 4th and 5th Defendants that the land was for the government or that there had been any fraud was false. She also testified that the neighboring parcels of land or plots were not government properties.

25. It was her testimony that she renovated the house when she got ownership. Also, she followed up on the ownership documents. She added that she pulled down the house as it had become old and dangerous to live in. I was then that it led to police involvement. She testified that the police, including an officer named Omondi, arrested her. She explained that the police told her that the Housing Department claimed she had demolished their house.

26. She testified that following the arrest she was taken to the police station, where she reported several times until she sued and the case began. She also added that when she went to the Land Registrar's office to transfer the property from her late husband's name to hers, she found that the 4th and 5th Defendants had not filed any documents that showed the land belonged to the government or was public land.

27. Upon cross-examination by Odongo State Counsel (SC) for the 3rd and 4th Defendants, PW1 confirmed that she was the second wife of Charles Lungano, whom she married in 1996 under customary law. She stated that her late husband bought the land from the government, for a price that she didn't know. She stated that she saw the lease agreement. However, she did not provide it as evidence: she possessed only the title deed. In addition, she stated that there was a house on the land when the title deed was issued to her husband. She, however, stated that she could not confirm if the house belonged to the government. She also stated that the house was government-owned before the sale.

28. She was referred to P. Exhibit 2 (the Certificate of Confirmation of Grant) of which she stated that she had filed a succession case being Kitale High Court Succession 8 of 2010 which resulted in



it being issued to her and the suit parcel number as an asset claimed in it. She stated that in the case, she claimed ownership of parcel No. Kitale Municipality Block 11/18 as the wife/widow of Charles Lugano. She stated that the original certificate was submitted to the Lands Office (for transmission of the property to her).

29. She confirmed that P. Exhibit 6, (the letter dated 5th May, 2020), was addressed to the Director Land Administration and not herself. She added that she had obtained it from the national lands office in Trans Nzoia County. She stated that she had requested for it in writing. But she admitted that she had no receipt of payment for the letter. She was referred to P. Exhibit 7, (letter dated 11th June, 2020), and P. Exhibit 8, (letter dated 9th November, 2020), about which she admitted that they were not addressed to her or her husband. She also admitted that she had no proof to show that she had requested of paid for them.

30. PW1 was referred to P. Exhibit 9, (letter dated 20th November, 2020), from the 5th Defendant to the Land Registrar, she denied knowing that the house was rented to government officers or that they paid Ksh.9,000/= per month for rent. She confirmed that there were processes for buying land from the government. But she denied that Charles (Lugano) did not follow them. She stated that the sale was advertised by the government, which qualified as bonding, though she had no Kenya Gazette to prove it.

31. She was referred to the 3rd and 4th Defendants' bundle (DMFI-1-20), specifically DMFI-2 (letter dated 26th August, 2009), she stated that the reference to Kitale Municipality Block 11/2018 as illegally acquired by Charles Lugano was false. She denied the claim in DMFI-3 (letter dated 13th July, 2015), by Ministry of Housing and Urban Development officer which asked for repossession of illegally acquired parcels. She stated that she only pulled down the house for renovation purposes. She denied destroying government property. PW1 stated that she didn't know that a procedure was needed for demolition, or that she needed authority from Public Works.

32. Upon cross-examination by Ms Githinji counsel for the 5th Defendant, she stated that her late husband bought the house in 2002. That was the year they moved into it. She added that she never knew when he started the purchase process. She went on to state that the house was empty when bought. She denied that a court officer had previously lived there. She described the house as a two-bedroom house with a sitting room, a kitchen, a toilet, and a small servants' quarter, built with bricks and iron sheets. She stated that she resided in the house for 20 years and renovated it. She admitted that she understood that there was a procedure to buy government houses. She confirmed that the government had advertised its sale before they bought it. (PW! started from a basic common premise and understanding that the house she entered into, lived in and finally pulled down was built on property, Kitale Mun. Block 11/18 which was initially government land, and

33. PW1 was referred to 5th DMFI-27 (advertisement of 30th July, 2008), regarding cancellation of sale of government houses. Of this, she stated that she was not aware about the cancellation of the advertisements. She added that she did not know that the advertisements were made only in 2007 and not in 2002.

34. She further stated that parcel No. Kitale Municipality Block 11/18 was not on the list in 5th DMFI-25. She confirmed that they never paid rent for the house as they had bought it. She was also referred to the 5th DMFI-24 (circular dated 24th January, 2007) from the Ministry of Housing and Urban Development where she stated that it never contained the suit parcel as one of the houses for sale. She stated that the suit parcel was still in her late husband's name and that she was not ready to change ownership to hers.

35. She was also referred to P. Exhibit 12 (a notice to make a register for Kitale Municipality Block 11/18 dated 17th April, 2022), she stated that it was given by the Land Registrar for reconstruction of the file. She added that they subsequently published a gazette notice (P. Exhibit 13) on 30th April, 2020, which stated that the register was lost or destroyed. She denied being aware of P. Exhibit 9



(the letter dated 20th November, 2020 from the 5th Defendant to the Land Registrar, Trans Nzoia) were released after their application for reconstruction. She stated that she did not have a certified copy or original of the letter, (P. Exhibit 9).

36. She stated that she did not have any letter from the Land Registrar to the 5th Defendant asking about the parcel, and added that P. Exhibit 9 never referred to such a letter. She also stated that she did not know that Christine Natome, the legal officer who signed the letter, was not the 5th Defendant's North Rift officer at the time. She stated the letter was written after their gazette notice but was not meant to "sanitize" their title claim. She also stated that she did not see any letter from the 2nd or 5th Defendant or other government offices, when she got the title.

37. Upon re-examination PW1 stated that she had not been shown any document which proved that the Ministry of Housing and Urban Development owned the plot. She explained that when she said that her late husband bought the land from the government, she meant that it was not registered in anyone's name. She referred to the 3rd and 4th DMFI-1 (unsigned and unauthored letter dated 26th August, 2009, referring to illegally acquired land) where she stated that she never received any such claim on it since its issuance. She also referred to DMFI-2 (letter communicated to the Ministry of Land for repossession), she stated that she had not been shown any attached copies.

38. EDWIN KIPCHUMBA METO a registered testified as PW2. He testified that he had prepared a valuation report dated 10th May, 2022, concerning LR No. Kitale Municipality Block 11/18, with the purpose of advising on the market value for court purposes.

39. PW2 testified that the report concluded the value to be Ksh. 70,000,000/= (Seventy Million).

40. He further testified that for a valuation, valuers were supposed to requisition Registry Index Maps (RIM) and get a certificate of official search. In turn, he testified that he obtained the RIM from the survey office but that he could not get a search certificate from the Lands office in Kitale because the land records were under lock and key. He testified that at page 5 of his report, he stated that the property was not set aside for public use based on his review of survey plans and the Ndungu Report.

41. He testified that the neighboring properties were not for public use, citing the presence of petrol stations and commercial buildings. He testified that based on his report, originally marked as PMFI-15, as P. Exhibit 15 the date on the first page, "9th May, 2021," was a typographical error and should have been "9th May, 2022".

42. Upon cross-examination by Odongo, PW2 stated that his report was prepared by Premium Valuers Ltd, a registered limited liability company, of which he was the sole director. He admitted that he did not have proof of registration in court. He stated that the instructions to conduct valuation were oral, received via a phone call from the Plaintiff's advocates. He stated that the company was paid Kshs. 2,500/=, for which a receipt was issued but admitted that he did not have it in court.

43. PW2 stated that he visited the land and found debris of a demolished house. He added that he established the location using a RIM. He admitted that he did not have the RIM in court. He stated that the RIM copy was obtained from the Ruaraka Survey office in Nairobi. He also admitted that the report did not bear the stamp of the Director of Survey or Survey offices of Kenya, and that he had no correspondence which showed that he had requested or paid for it. He stated that he had not inquired about the person who demolished the house or the nature of the previous structure. He added that he was not aware if it was a government house.

44. He confirmed that it was necessary to establish the registration status of a property via an official search for valuation. He admitted that he had not filled out a form or paid for the search. He admitted that without a search, the report was incomplete and inaccurate. He stated that he was not informed why the records were in a strong room.

45. He stated that he relied on the certificate of lease (pages 9-12 of his report) and the RIM (page



13). He explained that the certificate of lease was delivered to his office by an advocate's employee without a forwarding letter. He confirmed that he had not presented a copy of the certificate to the Land Registrar separately from the search application. He also confirmed that a Certificate of Lease was not conclusive evidence of ownership but an official search or certified register extract was. He admitted that his report was inconclusive on ownership.

46. He stated that his finding that the suit property was not public was based on the Ndungu Report. He admitted that he had not attached the relevant extract which proved that the specific area was not public property. He stated that he derived the Kshs. 70,000,000/= valuation from comparative analysis with adjacent parcels, estimating an acre at Ksh. 40,000,000/=. He, however, stated that he never attached supporting documents for his comparative analysis. He admitted that the figure was presumptive without basis in law.

47. Upon cross-examination by Githinji, he stated that he obtained the acreage of 1.732 acres from the certificate of lease but did not use any machine to physically confirm it. He clarified that the relevant survey plans he perused in his report were the RIM, which distinguished them from more precise survey plans that measure area. He admitted that the RIM did not indicate acreage, and did not obtain the more precise survey plans. He stated that RIMs that indicated property users were usually for settlement schemes, which this property was not. He stated that using the RIM relied on he would not have advised on the property user.

48. He was referred to the 5th DMFI-2 (a survey plan) where he confirmed that it showed that all plots were reserved for official residences and that the property he valued was identified as No. 4, with the same acreage of 1.732 acres as on the lease. He confirmed that, according to this plan, the instructions for the valuation should have come from the government, as it indicated that it was government land. He stated that he only located the property using Google Maps (page 14 of his report), which did not provide acreage. He stated that he had not provided coordinates or boundaries in his report and added that he could not confirm the acreage from his report. He also confirmed that if the ground size differed, his valuation would not be accurate, and without confirmed or authenticated parameters (ownership, size documents, and physical measurement), his stated value would not be accurate.

49. Upon re-examination, PW2 stated that the first proof of ownership for a property was the title deed. He added that he had not been shown any evidence that the title was fraudulently acquired or any document from the Registrar of Lands stating it was fraudulent. He stated that he identified different users on the ground from what he observed and not from the RIM. He also added that he had not physically measured the acreage, and that the 1.732 acres from the title was not at variance with the survey plan shown as 5th DMFI-221. He stated that DMFI-2 did not have a stamp from the Survey of Kenya. He stated that the document indicated "All plots were listed for official residence" but that out of 12 plots, only two were indicated for specific departments.

50. He confirmed that he was unable to equate official residence to government residence. He added that, apart from the survey plan (DMFI-2), he had not been shown any document that proved that the land belonged to the government.

51. The Plaintiff closed her case at that point.

3rd and 4th Defendant's case

52. WYCLIFFE WERE ODUNGA, the County Director of Housing under the State Department of Housing and Urban Development testified as DW1. He produced his statement dated 21st March, 2022 which was adopted it as his evidence in chief. He also filed 20 documents, which were admitted as 3rd D Exhibit 1-20. He was later recalled for a site visit and further testimony.

53. He testified that Parcel No. Kitale Municipality Block 11/18 was located in Milimani Estate and was public land. DW1 testified that it contained a government house, KITA/HOU/HG2 (Kitale Housing High Grade 2), as per the Housing Register. He testified that the house was a 3-bedroom



bungalow with a servant quarter, and was reserved for judicial officers at Kitale Law Courts, specifically the Chief Magistrate. He added that in 2005, the judicial officer who was in occupation was evicted, and the 1st Plaintiff took over the house until its demolition in February 2021.

54. He testified that there was a letter dated 9th May, 2007 (3rd D. Exhibit 6), which indicated that Kitale Municipality Block 11/18 was among properties irregularly allocated. He testified that a letter, from a Government Valuer, showed the property's market rate was Ksh. 2,950,000/= and that it yielded Ksh. 9,000/= per month in rent to the government. He further testified that the 1st Plaintiff demolished the property. He produced a letter dated 1st March, 2021 which reported the demolition to the Provincial Secretary and others (3rd D. Exhibit 21).

55. He testified that the government's standard procedure for disposing of non-strategic properties entailed seven key steps; One, the publication of the intention to sell. Two, the formation of an Inter-Ministerial Committee to identify properties and report to the Permanent Secretary (PS) of Housing and Treasury for approval. Three, the valuation of approved properties to ascertain market value. Four, the gazetting of the properties in the Kenya Gazette and advertising in at least three local dailies to invite bidders. Five, the payment by bidders of a requisite deposit, whose bids are then evaluated, and awarded to successful ones. Six, the payment by the successful bidder for the property, followed by a boarding process to confirm payment and identity, which authorized the Treasury to remove the property from the government register. Finally, the Title is then issued to the successful purchaser after the boarding process.

56. Having outlined the procedure, DW1 testified that none of these procedures were followed for the suit property. He added that the government's intention to sell properties in districts was canceled due to public outcry, citing a circular dated 24th January, 2007, which listed 16 properties for sale in Trans Nzoia but excluded Block 11/18. He testified that this circular was later canceled on 28th July, 2008, via another circular and a press statement.

57. He testified that after the government tenant was evicted in 2002 his office realized the property had been illegally allocated to Charles Lugano, the 1st Plaintiff's late husband. He testified that there was irregularity and illegality, due to the procedures not followed (failure to follow procedures) and the property being occupied by a sitting civil servant. He added that a list of illegally alienated government properties, including the subject property (No. 1 on the list), was forwarded to the Permanent Secretary in a letter dated 26th August, 2009 (3rd D. Exhibit 2). He also mentioned that the 5th Defendant took up the matter, filing Kitale ELC No. 156 of 2015, which resulted in a judgment in favor of the 5th Defendant.

58. He testified that demolition was done without condemnation by Public Works, Public Health, and Public Housing departments, and the 1st Plaintiff had no authority.

59. Upon cross examination by Mukabane, DW1 stated that the sale process was for pool houses (government houses for any public servant), but not institutional houses (for specific ministry officers). He stated that the house in question was a pool house. He admitted that a letter dated 9th May, 2007 (3DExh. 6), indicated Kitale Municipality Block 11/18 and Charles Lugano as the owner. He however stated that the letter was to validate values of illegally acquired properties, not that they were lawfully acquired. He stated that the records regarding the sale of government houses were with the PS of Housing, and he didn't have records for Phase 1 sales.

60. He stated that he had listed 17 impugned properties in his counterclaim, some with concluded cases in favor of the government, but the Kipseon Ltd and Wilson Gachanja cases were not among them. He stated government officers were living in the house in 2005 but had not produced records.

61. He stated that the 1st Defendant did not manage these types of houses, as its mandate was to facilitate construction for the general public and not public servants. He confirmed that his office knew of the illegality in 2005 when an officer was evicted. He further stated that the Land Registrar never confirmed ownership but rather requested the status of the property. He stated that the



Plaintiff occupied the land at the time of demolition. He confirmed that the 1st Plaintiff had a leasehold interest that expired in 2023 but could not confirm if the land would have automatically reverted to the government.

62. Upon cross-examination by Githinji, DW1 stated that his duties included management of government houses, collection of rent, and maintenance. He stated that the house was constructed in 1966 by the government for public servants and was still government property within its register. He added that non-strategic properties were those that the government no longer wanted to own or use due to dilapidation or cessation of function. He further stated that the suit property was not declared non-strategic and was reserved for judicial officers. He continued to state that no inter-ministerial committee was formed to authorize disposal of this property and no communication regarding sale of government houses existed before 2007. He stated that the 2007 circular, which excluded this property, was canceled, and no government houses in Trans Nzoia were sold.

63. He stated that the 3rd D. Exhibit 20 (a letter from 5th Defendant dated 20th November, 2020, which stated that the plot was issued to Charles Lugano, and instructed the Land Registrar to proceed with registration) was copied to his office but that he never received it. He also stated that the letter lacked a reference number.

64. DW1 stated that he had not received the letter as it would have his office's stamp if received. He stated that he was invited by the Land Registrar who informed him of the letter. He stated that the 5th Defendant lacked the power to determine that the land belonged to Charles Lugano and was legally acquired, and could only investigate and recommend. He confirmed this was the first recovery case related to the suit land.

65. Upon re-examination by Odongo, DW1 stated that House No. KITA/HOU/HG2 was a pool house reserved for Kitale Law Courts officers. He stated that there were two government housing allocation phases: Phase 1 (Nairobi), which had materialized, and Phase II (districts) which had not materialised due to public outcry. He stated that no houses were sold in the districts, and if they were, his office would have been involved as secretary of the Inter-Ministerial Committee. He stated that the 1st Defendant had no role in management of government houses, but that its role was social housing. In conclusion, he stated that the land was government land with a government house, and that the 1st Plaintiff demolished it after gaining entry by evicting a public servant. He stated that this occurred yet his office had not authorized the 1st Plaintiff's occupation.

66. That marked the close of the 3rd and 4th Defendant's case.

5th Defendant's case

67. LEONARD NJENGA MUNGAI an Investigation Officer attached to the 5th Defendant's North Rift Office testified as 5 DW1. He adopted his statement dated 22nd December, 2021, as his evidence in chief. He also produced 47 documents and a valuation report as 5th D. Exhibit 14.

68. He testified that his involvement began with a complaint received by the 5th Defendant in 2018, dated 2nd February, 2018 regarding an illegal development on the Parcel No. Kitale Municipality Block 11/18 within Milimani, Trans Nzoia County. He testified that the complaint specifically alleged the illegal allocation of a government house (KITA/HG/2) to Charles Lugano.

69. He testified that a second complaint followed on 1st March, 2021, which reported the demolition of the same government house. He testified that upon receiving these complaints, the 5th Defendant applied for and was granted preservation orders and restrictions on the property to allow for investigations. He explained that he then conducted an analysis using documents and statements from various institutions including the Directorate of Survey, Physical Planning, Land Administration, State Department of Housing, and the Judiciary. He testified that his analysis led him to recommend that the Commission institutes a case for the recovery of the land, as it was public property.

70. He further testified that he had established that a fixed survey conducted in 1928, documented



in survey map F.R 28/60, designated several properties, including the subject property (initially referenced as LO 2116/IX/4, or LR 2116/IX/4, Plot 4), as reserved for official residences. He added that this survey was approved in 1930, and that the property's area was 1.732 acres.

71. He also testified that between 1950 and 1966, an official residence, a three-bedroom house with a servant's quarter and verandah, was constructed on the property. 5 DW1 testified that the house, registered as KITA/HOU/HG/2 (Kitale Housing High Grade 2), was entered into the Government Buildings Register, and was for use by public officers/civil servants.

72. It was his testimony that a development plan for Kitale town, prepared in 1973 and approved on 17th January, 1974, by the then Commissioner of Lands, designated the subject property as residential (zone '0') within the 026 zone, which was for government houses. He testified that in 1992, with a change in the land legal regime, the property's reference was converted from LR 2116/IX/4 to Kitale Municipality Block 11/1816. He also testified that this conversion was based on the 1928 survey (FR 28/60). He testified that after this conversion, any transactions should have reflected the new parcel number.

73. It was his testimony that an allotment letter (Ref. No. 20089/XXIV) was issued to Charles Lugano on 8th June, 1999, for "LR No. 2116/IX/4 Kitale Municipality". The 5 DW1, however, testified that this was irregular because the property had already acquired the new number, Kitale Municipality Block 11/18, in 1992. He testified that the letter of allotment did not mention the County Council, the plan number, or a PDP (Part Development Plan) number, which he stated was a crucial indication that the proper processes was bypassed. He testified that Lugano also failed to comply with the allotment terms, which included formally accepting the offer and paying the stipulated amount within 30 days. He testified that instead, his acceptance and payment were made three years later, on 10th January, 2002, when the offer had already lapsed.

74. He testified that a private surveyor, O.M. Wainaina, conducted a survey in 2002 on behalf of Charles Lugano, based on the 1928 survey. He testified that the purpose was stated as a "new grant", which 5DW1 deemed to be irregular because the land was already reserved for public use, and a private surveyor could not change its public status. He testified that following this, the Commissioner of Lands instructed the Director of Survey to amend the RIM, and a lease was prepared and registered for Block 11/18 in Lugano's favor on 18th February, 2002.

75. He testified that regardless of the registration, the Land Registrar, P.O. Ngete, on the same day of 18th February, 2002 wrote to the Commissioner of Lands stating that the plot contained the residence of the District Magistrate (Hon. Moses Serem).

76. He went on to testify that the house had been recently renovated, and yielded Kshs. 9,000/= per month in rent. He testified that Mr Ngete sought clarification and noted that the allocation seemed to have been carved out without the benefit of the official ground report and no authority from the Board of Survey and requested guidance before authorizing registration. 5DW1 testified that the said letter was never responded to by the Commissioner, and that judicial officers, including Hon. Lady Justice Hedwig Ong'udi and Hon. Lady Justice Olga Sewe occupied the house before Serem.

77. He testified that Serem was evicted by Charles Lugano and the 1st Plaintiff in 2002, who then occupied the house. However, he testified that the property never ceased to be government property and continued to appear in the government register, while an inventory from December 2, 2020, listed it as illegally alienated irregularly.

78. He testified that the government's standard procedure for disposing of non-strategic properties involved publishing intent, forming an Inter-Ministerial Committee, valuation, gazettelement, advertising for bidders, payment, and a boarding process. He testified that none of these procedures were followed for the suit property.

79. 5DW1 testified that while the government had intended to sell non-strategic properties in districts in 2007 (through circulars dated 24th January, 2007, and 2nd March, 2007, the suit



property was not among the 16 properties listed for sale in Trans Nzoia. He testified that this intention was later cancelled due to public outcry via a circular dated 28th July, 2008, and a press statement. He stressed that no government houses in Trans Nzoia were sold as a result of these advertisements.

80. He went on to testify that the house was demolished in February 2021 by the 1st Plaintiff without approval from the Ministry of Housing or condemnation from relevant public works/health/housing departments. 5DW1 also testified that two suspect letters purportedly from the 5th Defendant, one dated 20th November, 2020 allegedly signed by Christine Natome and an undated one claimed that the plot belonged to Charles Lugano and was legally acquired. He testified that the dated letter instructed the Land Registrar to proceed with registration.

81. 5DW1 testified that the 5th Defendant did not have the mandate to issue such determinations or direct registration. Additionally, he testified that the forensic examination of Christine Natome's signature on the dated letter proved that it was not hers, and the letter heads of both suspect letters differed from authentic 5th Defendant's letter heads. He testified that the said letters did not originate from them.

82. Upon cross-examination by Odongo, 5DW1 stated that the property was public land and not available for allocation in 1999. He further stated that there were irregularities in the allotment letter to Lugano by use of old parcel number, lack of county council and plan number, absence of PDP, no application by Lugano, late acceptance, no ground status report or site inquiry. He confirmed that there was no report that declared the house on the suit land as non-strategic, nor any recommendation to dispose of it. He confirmed that there were particulars of irregularities and unprocedural acquisition listed in the 3rd and 4th Defendants' counterclaim and supported their claims for lost rent and the value of the demolished house.

83. Upon cross examination by Mukabane, he stated that he was a procurement manager by profession and that he joined the 5th Defendant in 2015. He admitted that he had not called the 1st Plaintiff to record a statement during his investigation. He stated that all plots (1-14) on 5D.Exhibit 2 (survey plan) were public properties, but that he only investigated the suit land due to the specific complaint. He stated that government land should be registered under the P.S. Treasury or the Ministry Department to which it belonged such as the Ministry of Housing. He added that while he used the building register to confirm government housing, he noted that it did not bear a signature or a parcel number. He stated that the 1st Defendant protected public land but added that it did not have direct communication from them regarding this specific fraud. He stated that neither Charles Lugano nor any other person had been criminally charged over fraud or soliciting related to this matter.

84. He stated that the cancellation of government house sales applied to both Phase 1 (Nairobi) and Phase II (other counties). He stated that this was because the land was illegally alienated government land, according to the government plan, survey plan, government register, and the testimonies of officers who resided there. He confirmed that the 1st Plaintiff obtained the property through a confirmed grant in a succession cause, and the 5th Defendant had not lodged an objection to the estate.

85. Upon cross-examination by Githinji 5DW1 stated that his investigations commenced in 2021 following the demolition report, and that the 5th Defendant was not a party when the plaint was originally filed, thus he could not interrogate the Plaintiffs then. He stated that the 1928 survey plan (5D.Exhibit 2) intended to establish government houses, which had been built and registered. He further stated that the 1974 Development Plan (5D.Exhibit 1) confirmed the land's reservation for residential purposes. He added that the conversion in 1992 (5D.Exhibit 3) changed the reference number but did not alter the public purpose of the land. He stated that the allocation to Lugano was fraudulent and irregular because the land was not available for allocation, proper procedures like



involving physical planning and conducting ground reports were not followed, and sitting judicial officers were evicted. In conclusion, he stated that the property should have been registered in the name of the Ministry of Housing.

86. ROBERT SIMIYU an Assistant Director in Land Administration, testified as 5DW2 where he adopted his witness statement, dated 11th August, 2021 as his evidence in chief. He testified that for government land to be allocated, it must first be available, and there must be proof of this availability. He further testified that a mandatory ground status report was required, which was to be prepared by the District Land Officer after a physical visit to the site to determine if the land is free, occupied, marshy, or has existing structures.

87. He testified that if a house was present, the land was generally not available for allocation. He also testified that the Senior Planning Records Office (S.P.R.O.) also checked if the land was already committed and maintained records and maps of government land.

88. He testified that in the instant case, no ground status report was conducted, which was a mandatory requirement. He testified that there were irregularities in the parcel numbers used, such that while the letter of allotment to Charles Lugano dated 8th June, 1999 referenced LR No. 2116/IX/4, the Registry Index Map (RIM) prepared in 1993 already showed the property as Block 11/1856. He testified that by the time of the allotment, the property should have been referred to as Block 11/18, making the LR.2116/IX/4 reference pertain to a non-existent plot.

89. He went on to testify that the letter of allotment should have included an FR (Folio Reference) and a deed plan for properties registered under the Registered Titles Act (R.T.A.), but none were referred to. He testified that the standard unit of acreage used was hectares, not acres, and observed that acres had been erased on the document.

90. It was his testimony that the offer in the letter of allotment was not accepted within the stipulated 30 days since Charles Lugano's acceptance was on 10th January, 2002. He testified that when the period lapsed, a renewal of the letter of allotment was required, which was not done in this case, nor was any explanation provided for the delay. He testified that if a government house existed on the land, it would not be available for allocation unless a boarding process had been followed. He testified that a PDP was generally not needed for already surveyed land, but rather for unsurveyed land.

91. Upon cross-examination by Mukabane, DW2 stated that he did not personally check the S.P.R.O. records but that the records he had checked confirmed the land was allocated to Charles Lugano. He added that all documents in the correspondence file (5D. Exhibit 17) emanated from his office and were not forgeries.

92. He stated that he had no direct communication which showed that the suit land was reserved for public use. He stated that he based his conclusion primarily on the survey plan (5D. Exhibit 2).

93. Upon re-examination, 5 DW2 stated that the allotment letter used a non-existent plot number (LR 2116/IX/4) at the time of allocation, as the property had already been converted to Block 11/1811.

94. He also stated that a title obtained without a re-planning process and the consent of the 1st Defendant was null and void because it was illegal. He stated that his office's records showed no evidence of a re-planning process for PDP No. 91 nor any consent from the Commissioner of Lands to convert the land for private use.

95. He stated that there was a difference between a general Development Plan and a specific Part Development Plan (PDP). He stated that both indicate government interest in land. He stated that if a government house existed on the property, the Development Plan would confirm its purpose. He also stated that without approval of change of user and consent from the Commissioner, the suit land remained government housing.

96. CHRISTINE NATOME the Regional Manager for 5th Defendant in the Western Region, based in Bungoma testified as 5 DW3. She adopted her witness statement dated 3rd May, 2021, as her



evidence in chief. She testified that she was not the author of the letter dated 20th November, 2020, addressed to the Land Registrar, Trans Nzoia, concerning the status of Kitale Municipality Block 11/183.

97. It was her testimony that as of 20th November, 2020, she was based at the 5th Defendant's Nakuru office as Deputy Regional Manager, having been transferred there from the North Rift office in Eldoret on 3rd October, 2017. She testified that she never handled this particular matter while in the Eldoret office.

98. She further testified that the letter did not conform to the standard format of the 5th Defendant's letters, as it lacked a reference number, which was mandatory for all 5th Defendant's correspondence. She added that the 5th Defendant's letters were typically signed for the CEO with the signatory's designation indicated, a format not followed in the disputed letter. She also testified that the letterhead's details, road name, telephone numbers were incompatible with actual 5th Defendant's letterheads.

99. She testified that the 5th Defendant did not have the mandate to issue plots to individuals or to direct the Land Registrar on property registration, functions that the disputed letter had. She testified that the letter was dated 20th November, 2020, but was purportedly received by the County Director of Housing on 22nd November, 2020, which was a Sunday, a day when the Commission does not conduct business. She testified that her known specimen signatures were subjected to forensic examination by the 5th Defendant's Forensic Documents Examination Laboratory, and that the report concluded that the signature on the disputed letter was not hers.

100. Upon cross-examination by Mukabane, she stated that the specimen signatures were taken in the presence of the regional manager and were consistent with her signatures on her statement. She stated that the specimen signatures were sent to the EACC forensic lab, not the Directorate of Criminal Investigation (DCI). She further stated that she later submitted her signatures to the DCI for a pending case, from which a report was yet to be given. She admitted that she had not produced any document to formally show her transfer from Eldoret.

101. Upon re-examination 5DW3 stated that she did not author the letter and that it was served on a Sunday, a non-working day. She also stated that her specimen signatures were received by the regional manager and examined in Nairobi, and she was not involved in the examination process. She stated that there was no other report contrary to hers regarding her signature.

102. WILSON KIBICHII the Head of Survey Records Office and a Principal Cartographer in the Survey Department of the Ministry of Lands, Public Works Housing and Urban Development testified as 5 DW4. He adopted his statement dated 14th July, 2021, as his evidence in chief.

103. It was his testimony that a fixed survey was conducted in 1928 for LR. 2116/Section 9 Plot 4 which produced survey plan FR No. 28/602. He testified that a fixed survey was highly precise, with an error margin of no more than 3 centimeters for beacons, using latitudes and longitudes to define properties specifically on the globe. He added that the survey plan was signed by the District Surveyor, who was a regional representative of the Director of Surveys. He testified that the properties surveyed, including the suit land (LR No. 2116/1X/4, identified as Plot 4), were reserved for official residence, meaning for government use.

104. He testified that the survey plan was approved by the Director of Surveys on 13th August, 1930. He further testified that the property LR.2116/1X/ 4 was later converted to Kitale Municipality Block 11/18 on 27th March, 1992, as shown in (5D. Exhibit 36). He went on to testify that the said conversion was based on the 1928 survey (FR 28/60), and that no other survey had been conducted before this conversion.

105. He testified that the Survey of Kenya performed another survey of the property, conducted by licensed surveyor O.M. Wainaina on 17th January, 2002. He testified that this survey was based on an allotment letter dated 8th June, 1999, issued to Charles Lugano, which referenced the property



as LR. No. 2116/1X/4 - Kitale Municipality, with an area of 1.732 acres. He added that it was irregular for the allotment letter to use the pre-conversion number (LR. 2116/1X/4) since the conversion to Block 11/18 had already taken place. He testified that as of 1999, no other survey existed apart from FR 28/60, meaning the 1928 reservation was still in effect.

106. He testified that the computation file (5D.Exhibit 19) showed that Wainaina's survey used FR 28/60 as the data plan. He further testified that the survey was approved on 28th January, 2002, with the purpose indicated as new grant. 5 DW4 testified that since the property was reserved in 1928, it was not available for allocation to any private person, despite being indicated as a new grant. He testified that the purpose of Wainaina's survey was to confirm the corner beacons, which was evidenced by a beacon certificate signed by the surveyor. He testified that the allottee should also have signed it according to regulations.

107. He went on to testify that after the survey and authentication, the Registry Index Map (RIM) for Kitale Municipality Block 11/18 was amended, and a copy was prepared and sent to the Commissioner of Lands for lease preparation. He testified that RIM was amended on 30th January, 2002, upon instructions from the Commissioner of Lands. He testified that an earlier compilation stage for the RIM was not an amendment but a process of gathering all parcels within a block for publication of the conversion list. He testified that the later survey should not have been done as the property was not available for allocation.

108. Upon cross-examination by Odongo, he testified that the 1928 survey's purpose was for official residences, and that a survey plan was an instrument for reservation of public land. He testified that regarding the 2002 re-survey (plan No. 408/31), it superseded FR 28/60 meant that it was the most current and not that it reversed the 1928 reservation. He testified that if public land use was to change, a government body must initiate a new survey, making Wainaina's private survey irregular. He testified that the difference between tracing and hard copy survey plans was that the traced copies were the final, authenticated product.

109. He testified that in the RTA to RLA conversion, the original RTA mother title (LR No. 2116/1X) ceased to exist on 27th March, 1992. He testified that the transactions after this date ceased and should have used the new parcel number Kitale Municipality Block 11/182122. He testified that the allotment letter to Charles Lugano referring to the old number (2116/1X/4) was for an unknown parcel.

110. He further testified that for previously reserved public land to be allocated privately, the reservation must first be set aside by the Director of Survey, Commissioner of Lands, Physical Planning Department, and the relevant Ministry. He testified that he had not seen any document showing the 1928 reservation (FR 28/60) was set aside, nor any resolution from the Ministry of Housing surrendering the land, nor any change of user approval.

111. It was his testimony that the beacon certificate for this property was not properly signed by the allottee, nor did it indicate the allottee's name, making it not a valid beacon certificate.

112. Upon cross-examination by Mukabane, 5 DW4 stated that he had not seen any title registered to the Ministry of Lands. He also stated that he had not found any letter from the Commissioner of Lands specifically stating the land was reserved for the government. He stated that after a survey plan, either a deed plan or RIM was issued, leading to a title deed.

113. He stated that the approval of a survey plan by a District Surveyor was constituted by the Director of Surveys' signature of approval. He stated that while Plot 2 (Survey Department) and Plot 3 (Veterinary Department) on 5D.Exhibit 2 had specific departmental reservations, Plot 4 (the suit land) had a blank for its specific purpose, and its FR number (28/60) was written outside the map margins. He confirmed that FR numbers in red on the map indicated cross-referencing for new surveys.

114. He stated that the Physical Planning, S.P.R.O., and the Department of Housing were other



places to check for government land status. He however admitted that he had not checked with these specific departments for the suit land. He stated that the documents from his office (Director of Survey) were not forgeries. He stated the reason he considered the land government land was because of the survey plan.

115. Upon re-examination by Githinji, 5DW4 stated that the purpose of the 1928 survey plan was to reserve plots for official residences. He added that plan (FR 28/60) was sufficient to confirm the reservation without a title being issued to the government. He stated that all plots reserved by the map were for government residences, with some specifically for agencies such as Survey, Veterinary, Water Works and others for general official residences. He stated that Plot 4 had no new survey done after the 1928 reservation.

116. He also stated that the conversion from LR 2116/1X.4 (R.T.A.) to Kitale Municipality Block 11/18 (R.L.A.) meant that the old number ceased to exist, and that this conversion was based on FR 28/60, with no other survey preceding it. He stated that the compilation of parcels in Block 11 did not change the reservation. He stated that the registration of the title to Charles Lugano was not legitimate and that such registration did not set aside the public reservation, nor was the survey regular.

117. STEPHEN YEGO, a Forensic Document Examiner with the 5th Defendant testified as 5DW5. He testified that he received a request from 5DW1 to compare signatures on two specific documents with specimen signatures of 5DW3. It was his testimony that he examined Document A-1(ii), A letter from the 5th Defendant dated 20th November, 2020, to the Land Registrar, Trans Nzoia County, concerning Kitale Municipality Block 11/18., Document A-2(xv): Identified as documents filed in ELC Case No. 18 of 2021, including a letter purportedly from the 5th Defendant. He testified that the undated letter, allegedly from the PS and CEO of 5th Defendant, purportedly stated that the land belonged to Charles Lugano and was legally acquired and Documents B(i-iii): Specimen signatures of Christine Natome.

118. It was his testimony that he did his examination on 27th September, 2021 which revealed that there was no agreement between the signatures on documents A-1(ii) and A-2(xv) and 5DW3 specimen signatures. He identified differences in four key characteristics; character formation and connection, pen movement, pen lift and initial stroke and terminal stroke.

119. He testified that he utilized a videospectra comparator and a forensic comparison microscope to identify these characteristics. He further testified that his report, 5D Exhibit 45, contained the findings.

120. He concluded that based on the said differences, the signatures were not made by the same person. He testified that he did not issue a report for the second letter (A-2(xv)) as it was typed and lacked a signature. He also presented sample 5th Defendant's letterheads (5D. Exhibit 49) and demonstrated that the two disputed letters did not originate from the 5th Defendant.

121. Upon cross-examination by Odongo, he stated that he had 14 years of cumulative experience as a Forensic Document Examiner, including his previous work with the DCI. He also confirmed that the 5th Defendant and DCI used similar principles and machines for document examination.

122. He stated that his report was not tailored to exonerate Christine Natome 5DW3. He further stated that his work was independent and without prejudice. He confirmed that he had not personally met 5DW3 but knew her as the 5th Defendant's staff member.

123. Upon cross-examination by Mukabane, 5DW5 confirmed that the 5th Defendant handled corruption cases that may involve forgery.

124. ALFRED MULAMBI MWANZIA, the Deputy Director of Physical Planning within the Ministry of Lands, testified as 5DW6. He adopted his witness statement dated 16th July, 2021 as his evidence in chief.

125. He testified that a development plan was a physical framework designating various land uses



for an entire town or city, including residential, commercial, industrial, educational, transportation, public utilities, and open spaces. He testified that these plans were accompanied by a planning report. He testified that the preparation of a development plan involved data collection and analysis, considering features like topography, soil, and existing developments, often aided by survey and cadastral maps. He testified that the analysis projects future needed over 5-30 years, retaining compatible existing developments.

126. He further testified that draft plans were circulated to stakeholders, like the Department of Housing, for comments, which were then incorporated into the final plan.

127. He testified that the finalized plan was then submitted to the Commissioner of Lands (now Cabinet Secretary Lands) for approval, which made it a legal instrument for land allocation and reservation. He further testified that the Commissioner's signature and the Director of Physical Planning's certification would then appear on the plan's legend, and an approved development plan number was assigned and registered. He stated that an unapproved plan could not have an approved number.

128. He testified that modification or revocation of an approved plan occurred due to implementation difficulties or changing demographics, following the same preparation process, including public notice and comments. He testified that land reserved for government or public purposes was protected by the Land Act and is not supposed to change use or be allocated to private individuals.

129. He testified that the PDP was a mandatory document for allocation of public land to private individuals and must be quoted in the allotment letter. He testified that it served as the basis for surveys and deed plans.

130. He testified that without a PDP number, the processes were bypassed, and the original plan remained unchanged. He testified that the Development Plan for Kitale township (5D.Exhibit 1), prepared on 1st January, 1973, and approved on 17th January, 1974, by Commissioner J.S. Longhlin, designated the suit land (within zone 026) for government housing, and that existing parcels on the plan were indicated by continuous lines.

131. He testified that his office never received any request for a change of user for this land, nor was there authority to redesignate it from the Commissioner of Lands, the 1st Defendant herein. He went on to testify that any such conversion would require replanning and 1st Defendant's consent. He testified that his records showed no evidence of replanning or consent for conversion to private use.

132. He further testified that while the legend uses 'zero' for residential, its public or private nature was clarified by the planning report, which was not tendered. He however testified that zone '026' was specifically for public use, and the suit land fell within it. He testified that a Survey Plan like the 1928 one, (5D.Exhibit 2) could be used as data for planning, and that its existence alongside the Development Plan was not irregular. He testified that the 1928 survey plan was approved by the Director of Surveys.

133. He testified that if a government house existed on the property, the Development Plan would confirm its purpose as an already existing government house. He testified that his office did not prepare a PDP for this property, and no approval for a change of user was given

134. Upon cross-examination by Odongo, he stated that the Development Plan for Kitale was for government residential purposes and that his office received no request for a change of user. He stated that once land was reserved for public use by a Development Plan or PDP, it was unavailable for private allocation without mandatory consent by the 5th Defendant and a replanning process. He stated that a title obtained without such a process and consent would be null and void.

135. Upon cross examination by Mukabane, 5DW6 stated that plot No. 4 (the suit land) on the 1928 survey plan (5D. Exhibit 2) did not have a specific department indicated or a cross-referencing FR No., unlike other plots, which would indicate a new survey. He further stated that the 1928 Survey



Plan (5D. Exhibit 2) which showed the property's public purpose was sufficient for confirmation.

136. HON. HEDWIG ONGUDI J a Judge of the High Court testified as 5DW7 where she adopted her statement recorded with the 5th Defendant on 11th August, 2021 as her evidence in chief. It was her testimony that from 2001 to early 2005, she was stationed at the Kitale Law Courts as the Senior Principal Magistrate in-charge. She testified that during this period, she resided in a government house designated for judicial officers, specifically house No. KITA/HOU/HG/22, and it was located on land parcel No. Block 11/182.

137. She testified that she lived in the house after Justice Olga Sewe, who was also a Senior Principal Magistrate, transferred to Kisumu. She testified that she maintained the house during her occupancy, although the Judiciary was ultimately responsible for its maintenance. She testified that she left the house in mid-2002, and Moses Serem, the current Registrar of the Court of Appeal, took over the residence from her.

138. She testified that she did not pay rent, and consequently did not receive a house allowance. She testified that she would ordinarily be entitled to house allowance if she were not in a government house, forfeiting it by staying there.

139. She further testified that no private individual visited the house or demanded rent from her during her stay. She testified that at the time she occupied the house, she did not know the specific parcel number, but only became aware of the parcel number Block 11/18 when she recorded her statement with the 5th Defendant. She however, testified that she knew the house's location which was along Kitale Eldoret road, on the left of Kitale club, and neighboring a petrol station.

140. She testified that the house she resided in was owned by the Government of Kenya and was allocated to the Judiciary's Kitale Law Courts. She testified that Hon. Moses Serem, who took over the house from her, was later evicted from the house by Charles Lugano in 2002. She testified that Lugano claimed that the land had been allocated to him by the government. She testified that Justice Serem felt unsafe due to Lugano's repeated visits with strangers and sought alternative accommodation. 5DW7 testified that she was not informed of any change of user for the property after Serem's eviction.

141. NELSON ODHIAMBO the Registrar in charge at the Kakamega Land Registry, testified as 5 DW8 where he adopted the statement he recorded with the 5th Defendant on 17th August, 2021 as his evidence in chief.

142. He testified that he became aware of Kitale Municipality Block 11/18 when handling a succession matter where records, specifically the green cards and white cards, were missing. He testified that he was station in Kitale Lands office between 2018 and 2022. He went on to testify that the succession cause was Kitale Succession 8 of 2010, presented by the 1st Plaintiff, who sought to have the names of the beneficiaries (Zuhra Night Sakwa, Alice Maina Maruguti, and Francis L. Maliano) on the Certificate of Lease, as their existing one was lost.

143. He testified that before he proceeded with the reconstruction of records, he prepared the necessary documents and sought to confirm the property's location. He testified that he established that the house on the land belonged to the government. He testified that he visited the site with the Physical Planner and a Surveyor, finding a house on the suit land, which he later learned belonged to a magistrate in Kitale.

144. It was his testimony that he wrote to the Director of Housing on 24th June, 2020 (5th D. Exhibit 35), where he inquired about the status of the land due for registration. He testified that he attached a forwarding letter from 12th February, 2002, concerning leases for registration, and copies of the lease document and certificate of lease registered in favor of Charles Lugano on 18th February, 2002 (5th D. Exhibit 6, 10, 11).

145. He testified that the Director of Housing responded on 24th June 24, 2020 (5th D. Exhibit 36), stating that the parcel had been "illegally acquired" by Charles Lugano. He testified that the



Director confirmed that the property contained a government house (KITA/HOU/HG/2) which was still intact and that the matter had been forwarded to the 1st and 5th Defendant Defendant for investigation and potential repossession.

146. He further testified that he then initiated the reconstruction process, where he received a deed of indemnity and an application for reconstruction from the 1st Plaintiff and others (5th D. Exhibit 29). He testified that he issued a notice for reconstruction of the lost land register on 17th April, 2020, and wrote to the Government Printer to gazette it (5D. Exhibit 31), which was done on 30th April, 2020 (5D. Exhibit 40). He however testified that he did not reconstruct the register due to the irregularities raised by the Director of Housing, specifically the ongoing investigations by the 1st and 5th Defendants.

147. He testified that he learned of the house's demolition through a letter dated 1st March, 2021, from Wycliffe Were Odunga, the County Director of Housing (3D. Exhibit 21 and 5D. Exhibit 38). He testified that this letter indicated that the demolition of the government house (KITA/HOU/HG/2) in Milimani Estate occurred on 27th February, 2021, based on documents allegedly from the 5th Defendant and the Lands Department. He testified that his office never received the purported 5th Defendant's letter dated 20th November, 2020 (5D. Exhibit 2), which claimed the land was issued to Charles Lugano.

148. He went on to testify that the 5th Defendant did not have the mandate to confirm land issuance or direct the Land Registrar to proceed with registration, as such directions could only come from the Chief Land Registrar, which he never received.

149. He further testified that a pre-registration report was mandatory before registration of a lease. He testified that the letter from P.O. Ngete (5D.Exhibit 9) dated 18th February, 2002, informed the Commissioner of Lands that the plot that fell within the District Magistrate's residence, was government property (HG2 on Block 11/18), and generated Kshs. 9,000/= in monthly rent.

150. He testified that Ngete questioned if the intention was to allocate a government house or vacant land and noted that the allocation might have occurred without an official ground report or board of survey authority. He testified that it was improper to register the land and issue a title to Charles Lugano given this report, and that he never saw a response from the Commissioner of Lands.

151. He also testified that most government properties did not have registers in the land offices, and added that he had not seen a register for the land. He testified that alienated land was set aside for a specific public purpose, like housing or schools, and that such land is public. He testified that the suit was public land based on letters from the Director of Housing, information from the Physical Planner, and the Surveyor. He also testified that if the government wanted to register a property, it was registered in the name of the Permanent Secretary Ministry of Finance, with the beneficiary department indicated for example Judiciary.

152. Upon cross-examination by Odongo, he stated that his office stamped and recorded all incoming correspondence. He added that the purported 5th Defendant's letter (5D. Exhibit 42) were not stamped, hence they were not officially received. He stated that he would not have complied with such a letter, as the 5th Defendant had no mandate to direct land registration. He stated that upon his initial information search, he found no white card or other records indicating prior individual registration, but only that it was public land with a government house. He further stated that the P.O. Ngete letter (5D.Exhibit 9) accurately reported the property as the District Magistrate's residence, a government property.

153. Upon cross- examination by Mukabane, he admitted that he did not author the letter from Mr. Ngete (5D. Exhibit 9), and that he had not discussed it with him, but that he could confirm its veracity. He stated that the Director of Land Administration was the office that confirmed land ownership. He stated that he had been shown 5D.Exhibit 34 (a letter from Mr. Osodo purporting to



confirm Charles Lugano as owner), but stated that it was not stamped by his office, and it did not follow proper receiving procedures, and thus he had never officially received communication from the Director of Land Administration confirming the land was public.

154. He stated that he had not known where the Director of Land Administration got the record to state the land belonged to Charles Lugano, but he wrote to them because they held such records. He stated that his office did not have a register for the land, and that he had not received any claim from the PS Ministry of Treasury concerning the land. He stated that the land was public based on information from the Director of Housing, Physical Planner, and the Surveyor.

155. Upon re-examination, he stated that alienated land was set aside for public purposes. He added that most public lands did not have formal registers. He stated that the house on the suit property was confirmed to be a government property, as per Mr. Ngete's report and his own ground visit. He also stated that the caretakers of the property should be the Judiciary, PS Treasury, and Ministry of Finance, and that the Director of Housing confirmed their findings due to his inventories of government properties. He stated that he found no confirmation that the land's purpose had changed from public to private, and that there was no communication of disposal from the Director of Land Administration, Commissioner of Lands, or Department of Housing. He stated that the letter from Mr. Osodo (5D.Exhibit 34) was irregularly delivered and noted that it did not confirm the legality of the allocation or mention the government house.

156. JULIUS WAWERU MWANGI the Director of the Estate Management Department within the State Department for Housing and Urban Development testified as 5DW9. He adopted his statement dated 18th July, 2021, as his evidence in chief.

157. He testified that the government house registered as KITA/HOU/HG2 (Kitale Housing High Grade House No. 2), located on Block 11/18 Kitale Municipality, was allocated to a private developer named Charles Lugano, who took possession in 2005 and later demolished it. He testified that the Ministry of Housing was not involved in disposing of this property. He testified that the house remained a public property and was still in the Ministry of Housing's register, with no records showing its removal. He testified that it was a "pool" house, meaning that it could be occupied by any officer from any ministry, but at the time of allocation, it was designated for Judiciary officers.

158. He testified that the disposal of government properties was governed by specific regulations and ministerial circulars, including the Government Financial Regulations and Procedures, Chapter 1924, and the Ministry of Works Circular No. 2/58 of 1958, which was updated in 2003.

159. He testified that properties could be disposed of if there was a need to change their use, if they are beyond economic repair, or if they are destroyed by a natural calamity. He added that when disposal was considered, the accounting officer in charge applied to convene a Board of Survey Committee. He testified that if granted, the Board meets, deliberates, and makes recommendations, filling out a form (FO 58) along with meeting minutes.

160. He also testified that these documents are then forwarded to the Permanent Secretary (PS) of the responsible department for approval. He testified that after the PS approves, the documents are sent to the PS Treasury for concurrence. He testified that, afterwards the PS can authorized the removal of the property from the government property register, and title is then issued to the purchaser.

161. He testified that valuation is conducted, which becomes the reserve price, and that the properties are then gazetted in the Kenya Gazette and advertised in at least three local dailies to invite bidders. He testified that successful bidders are awarded, pay the value, and the boarding process (confirmation of sale and payment) is completed before title issuance.

162. He testified that the government intended to sell non-strategic houses in two phases: Nairobi (Phase 1) and other districts (Phase 2). He also testified that circulars for Phase 2 were issued on 24th January, 2007 (5D.Exhibit 24) and 2nd March, 2007 (5D.Exhibit 25). He testified that the suit



property (KITA/HOU/HG2) was not among the properties offered for sale in these advertisements, and that it was considered strategic, meaning it was to remain government property.

163. He testified that the advertisements had conditions of sale, including validation where claimants of ownership were given a chance to prove how they obtained the properties, regularize them, and compensate the government for lost rent, building costs, and market value of the land at the time of alienation, plus interest.

164. He further testified that the suit property appeared on a list dated 9th May, 2007, where validation was considered, with a recommended value of Kshs. 2,950,000¹⁴. He however testified that the letter proposing validation was improper because the house was not officially on offer for sale.

165. He testified that the sale of non-strategic properties ultimately never materialized because it was cancelled by the cabinet through a circular dated 28th July, 2008 (5D.Exhibit 26) and a newspaper advertisement on 30th July, 2008 (5D. Exhibit 27).

166. He also testified that this property had never been officially boarded (removed from government register) and was still in the government register.

167. It was his testimony that the Ministry of Housing did not authorize the house's demolition in February 2021, but that the government lodged a complaint with the 1st Defendant and the 5th Defendant, after the demolition. He testified that the registration of this property to Charles Lugano was irregular and illegal because it did not follow due process and the land was not on offer, having been alienated as early as 1957 with its status unchanged when allocated. He also testified that the demolition was illegal.

168. Hon. Moses Serem the Registrar of the Court of Appeal testified as 5DW10 where his statement recorded with the 5th Defendant on 11th August, 2021 was adopted as his evidence in chief. He testified that from 2002 to 2003, he was stationed at the Kitale Law Courts as a District Magistrate. He testified that during this period, he resided in a government house, KITA/HOU/HG/2, which was designated for judicial officers. He testified that he took over the residence from Justice Hedwig Ong'udi, who was a Senior Principal Magistrate transferred to Kisumu, and that the house was located on land parcel No. Block 11/184.

169. He further testified that the house was a 3-bedroom unit with a servant's quarter and parking for two vehicles, and that the residents were responsible for its maintenance, though the Judiciary was ultimately supposed to maintain it.

170. He testified that he occupied the house for about a year before his transfer, and was evicted from the house in 2002, shortly after he had just moved in, by a person named Charles Lugano. He testified that Lugano claimed to have been allocated the land by the government and was accompanied by two other people. He testified that Lugano did not show him any documents of ownership. Moreover, he testified that feeling unsafe due to Lugano's repeated visits with strangers, he sought alternative accommodation and did not know who occupied the house after his departure. He testified that he was not informed of any change of user for the property after his eviction.

171. He testified that while residing in the government house, he did not pay rent and did not receive a house allowance, as he would have been entitled to if he had not resided in a government house, and that no private individual visited or demanded rent from him during his stay.

172. He testified that he did not know the specific parcel number of the house (Block 11/18) until he recorded his statement with the 5th Defendant. He testified that the house was government-owned, reserved for judicial officers, and situated on public property. He testified that he did not interact with the District Housing officer. He testified that the Kitale Law Court Executive Officer did not confirm to him that it was government property. He testified that the house was located along the Kitale-Eldoret road, near the Kitale club, and that it was next to a petrol station, and emphasized that the house had never been occupied by a private person before him.



173. Upon cross-examination by Odongo, he confirmed that the house was KITA/HOU/HG2 and that it was reserved for judicial officers. He stated that the house sat on public property. He added that he had not interacted with the District Housing officer. He stated that he took over the house because it fell vacant after the head of station who used to occupy left. Other than the house and servant quarter there was no private person occupying the land. He also stated that Charles Lugano had not served him with a court order.

174. Upon cross-examination by Mukabane, he stated that he was not aware of the description of the title on which the house KITA/HOU/HG2 was sitting on. He also stated that he had not come across any record as to whether the property belonged to the government. He added that the Kitale Law Court Executive Officer never wrote to him to confirm that the suit property was government property. He confirmed that during his stay in the property, he did not pay rent. He was referred to 5D. Exhibit 4 at page 96 where he stated that he was not privy to the letter and that he could not comment on it.

175. Upon re-examination, he stated that he occupied the house as a judicial officer immediately after the head of station was transferred to preserve the house. He stated that it was normally used by the head of station. He added that it had never been occupied by a private person. He stated that he had not received any house allowance during the period.

176. ALFRED MURAMBI MWANZIA was recalled and upon further cross-examination by Odongo, he stated that a PDP was one of the instruments for reservation of land for a particular proceed. He stated that reservation of land meant when land was set aside for public purposes e.g. housing, forest, offices and so forth through a PDP. He added that a PDP was an instrument for reserving land for public purpose. He also stated that when land was reserved for public purpose it was not necessary that a title be issued in respect of that land. He confirmed that a PDP was evidence of ownership of land.

177. He was referred to a Development Plan where he stated that a Development Plan serves the same purposes as a PDP if it was approved and was for public land. He confirmed that a Development Plan was evidence of ownership of land by a public body. He produced the Development Plan approved on 17th January, 1974 for Kitale town and prepared on 1st January, 1973.

178. He confirmed that the Development Plan was registered and indicated as #91 with the department reference number 10/72/7. He stated that an unapproved development plan could not confer interest in land, including to a public body.

179. He stated that the relationship between a Development Plan and a Survey Plan was that they related with each other since when surveying they use the Development Plan, thus, the shape of the plan will be similar.

180. He stated that once a parcel has been reserved for a public purpose in the Development Plan or PDP is not available for allocation for a private use. This is because the propose for which it was reserved have to be achieved. It is not available because a Development Plan or PDP created an interest on the land by government or public body.

181. He stated that they did not have any consent from the Commissioner of Lands to convert the land to private use.

182. Upon cross-examination by Mukabane, he stated that there was a difference between Development Plan and a P.D.P. He stated that a clear plan was a plan that encompassed the entire area while a PDP was specific for allocation purposes but it was based on an Approved Development Plan.

183. He stated that it could not contradict an Approved Development Plan. He added that a Development Plan would contain both private and public land for a city but a PDP would be specific.

184. He stated that both the Development Plan and a PDP would show government interest



conferred to public or government. He was referred to 5D. Exhibit 1 where he stated that the same was a development plan. He stated that the legend of the development plan showed that the parcel or parcel No. 026. He added that at the legend 'zero' denoted 'residential'. The specifics are contained in the planning report.

185. He stated that for the development plan to be implementable it had to contain the signature of the Commissioner of Lands and Director of Planning. He was shown 5D. Exhibit 1 where he confirmed that it had a signature of the Director of Planning. He stated that survey came after the planning. He added that it was not irregular for 5D. Exhibit 1 and 5D. Exhibit 2 to exist.

186. He stated that he had not come across any document from the Commissioner of Lands that showed the land was allocated to government. He however stated that he had received communication from the Commissioner of Lands that showed the approval of the plan. He admitted that he had not availed it in court.

187. Upon re-examination, he stated that a Survey Plan could be used as data for planning purposes. He stated that there was a Survey Plan of 1928 and a Development Plan of 1974. He also stated that in the Development Plan (5D. Exhibit 1) the property was indicated as '4' which is residential. The legend indicated existing which meant that there was an already existing government house.

188. He stated that if there was a government house that existed on the suit property, the Development Plan would confirm the purpose. He stated that he had not come across any other Development Plan for Kitale Municipality between 1928 and 1974.

189. He stated that in the legend of 5D. Exhibit 1 there was an indication of No. '4' as public utility. He stated that the zoning was about 'use'. He stated that they zoned it as 'zero' and that would zone '026' for public. He confirmed that it was specifically for public and it would not change the purpose.

190. He stated that he never come across any document that disputed this development plan. He added that the office of the Director of the Physical Planning never prepared a PDP in respect of this property.

191. He further stated that if there was a change of user the Commissioner of Lands had to approve. He added that in the present case, there was no approval of change of user nor consent by the Commissioner. He stated that in the absence of such a consent, the suit land remained for government housing.

Site Visit

192. The court conducted a Site Visit on 9th October, 2024 whereby PW1 was recalled. She testified that her late husband, Charles Lugano, bought the suit land, which initially had only a house and an open field with a wire mesh gate facing the petrol station. She added that the house was dilapidated.

193. The court observed that there was a large open field with grass and trees, adjacent to a Shell Petrol Station off Kitale - Moi's Bridge road, about 2km from the town center. A demolished house site and a demolished servant quarter site was also observed. The main house floor was partially undestroyed, with one room having light bluish floor tiles. The land was bordered by a brick wall to the North, houses to the West (divided by a murram road), and a curved road to the South and East. The servant quarter site was about 2 meters from the main house site.

194. PW1 testified that she was in occupation from 2002 until 2021. She stated that to the East, houses were occupied by Ministry of Water workers, and to the West, a murram road separated her land from Asian community neighbors, who had private properties, and that the servant quarter had two rooms and a toilet.

195. Upon cross-examination by Odongo, she stated that the main house was permanent, with a verandah, 3 bedrooms, a chimney, a corridor, and a kitchen. She stated she had put the tiles in Bedroom 1 and demolished both the main house and the permanent servant quarter, believing they were hers. She stated she did not know if the Asian neighbor to the North (Super Expo) or Mr. Nderitu to the South had title to their land or if their land was public or private. She also stated that



did not know if the land occupied by the "muindi" (Asian community person) to the West was public land. She stated that the houses to the East (after the curved road) were occupied by Water Department workers and still are.

196. Upon cross-examination by Githinji, she stated that she resided on the land from 2002 until February 2021. She stated that the house and servant quarters were standing, but were old when she destroyed them in 2021, and that the servant quarter was not occupied. She stated that her husband had title to the land and gave it to her, and that she did not know how her neighbors legally or unlawfully obtained their houses.

197. That marked the close of the Plaintiffs case.

198. DW1 was recalled and during examination in chief, he testified that his role was in Trans Nzoia and included supervision of government estates, including the suit property. He further testified that the property had a main house and a servant quarter, both permanent structures, and that they were demolished without the Ministry of Housing's involvement. He added that the estimated land size was approximately 2 acres and stated that all neighboring properties are government or public land. He also testified that there were government houses to the South, the County Commissioner's house to the North, and public works/water houses to the East.

199. Upon cross-examination by Mukabane, he stated that no Judicial Officer stayed in the house during his tenure (2014-2022), and that he had conducted an inventory in 2014, where he found the 1st Plaintiff inside. He stated that the last inventory showed that it was government property before the 1st Plaintiff entered, though he could not remember when it was taken. He also stated that there were ongoing investigations by the 5th Defendant into neighboring government properties taken over by private individuals.

200. Upon re-examination, he stated that the house was reserved for the Judiciary, and the Plaintiff, not being a civil servant, had no right to it, as there was no change of use.

201. That marked the close of the 3rd and 4th Defendants' case.

202. 5DW1 was recalled to give evidence during the site visit. He testified that the location of the suit parcel of land, identifying it on the survey map (FR 28/60, 5D. Exhibit 2) as Parcel No. 4 (LR 2116/IX/4, later Kitale Municipality Block 11/18)13120. He stated that the land was 1.732 acres and that the map showed the entire area (plots 1-14) as official residences. He testified that neighboring properties were also public, including the Ministry of Water houses (Plot No. 5), a property reserved for the Veterinary Department (Plot No. 3, now Shell Petrol Station), and a property for the Survey Department (Plot No. 2, now a "nyama choma" structure). He also testified that the suit land had a main house (KITA/HOU/HG/2) and a servant quarter, which were given to the Judiciary and occupied by judicial officers (including Hon. Moses Serem) until Serem's eviction by Charles Lugano. 5DW1 testified that the land remained government land, and the demolition of the structures by Zuhrah Night was without approval, with the house still listed in government records.

203. That marked the close of the 5th Defendant's case.

Submissions

204. Counsel for the Plaintiff filed his submissions dated 7th November, 2024 where he gave a summary of the evidence and identified four issues for determination. The first issue was whether or not the Plaintiff is the legal bona fide owner of the suit property. While submitting in the affirmative, counsel argues that evidence from PW1 and PW2 proved that the suit property was alienated and that the Plaintiff was properly allocated the land and issued with a Certificate of Lease.

205. It was his submission that the Deputy Director Land and Administration confirmed that the suit land had been allocated to Charles Lugano. He added that he confirmed that the suit land was not in the government register.

206. He submits that Charles Lugano accepted the offer letter on 10th January, 2002 and also paid the requisite charges of Kshs. 146,430/=. He further submits that the Defendant confirmed that



allocation did not require a PDP since the land was already surveyed plot.

207. He submits that the contradictory statement of fact by each of the Defendant puts into question the veracity of the 3rd , 4th and 5th evidence.

208. It was his submission that the 3rd Defendant was not a known legal entity to present the instant suit. He added that the Attorney General ought to have enjoined the Permanent Secretary of the State Department of Housing and Urban development to file the Counterclaim.

209. He submits that the 3rd Defendant cannot purport to commence proceedings on behalf of a Ministry or State Department without approval from the Permanent Secretary of the relevant Ministry.

210. Counsel relied on the case of Livavo Farmers' Cooperative Society V Kamau [KEELC] 1317 (KLR) and Moses Oketch Owuor & Another V Attorney General & Another [2017] KLR

211. He also relied on the case of Nelson Kazungu Chair and 9 Others V Pwani University (2014) eKLR and African Line Transport Co. Limited V Attorney General Mombasa HCCC 276 of 2013. He submits that it cannot be that survey was conducted before planning which actions were undertaken almost 50 years apart contrary to the normal events of allocation. He relied on Sections 2 and 7 of the Government Land Act.

212. He also relied of Sections 107 and 108 of the Evidence Act and submits that the onus was on the Defendant to prove that the suit property was reserved for public use which it failed. He submits that it was incumbent upon the Defendants to produce relevant cogent admissible evidence to prove that the suit land had been set aside for public use.

213. It was his submission that the land was not in the register of the SPRO and neither was there a PDP that identified the suit land as public land.

214. The second issue was whether or no the suit property is public land by virtue of a survey plan, development plan and a building register. He submits in the negative and argues that the said documents do not confer interest in land.

215. He submits that a building cannot confer interest lest majority of persons would invade into parcels of land. He further submits that the list produced by the 5th Defendant as Dexh 21 dated 26th August 2009 is unknown and that the document cannot be owned to enable the author be cross examined.

216. It was his submission that the documents tendered by the 5th Defendants as exhibits 3, 20, 21 and 23 are neither signed thus incomplete. He submits that DEXH 3 dated 27th March, 1992 and titled conversion list was not signed by the Land Registrar.

217. He submits that the Development plan was never signed by the Commissioner of Land thus invalid. He further submits that the development plan did not comply with Section 17 and 25 of the provisions of the Physical Planning Act.

218. He further submits that the survey plan produced as 5th DEXH 2 was not signed by the Director of Surveys. He relied on Section 30(1) of the Survey Act. He added that he field notes and computations relating to the plans were never produced.

219. He also submits that the legend of the survey plan did not indicate that the suit land was reserved for public use. He submits that the plan failed to pass the test of survey and thereafter confer interest.

220. The third issue was whether or not the Plaintiff and or the Defendant have discharged their legal burden of proof on a balance of probabilities to be entitled to the reliefs sought in their respective claim.

221. It was counsel's submissions that the Plaintiff discharged her burden of proof while the Defendants failed to do so. He submits that the Plaintiffs Exh 1 was a lawful court order that granted the Plaintiff the suit property which order has not been set aside or discharged.

222. He submits that the 5th Defendant produced Dexh 42 being a letter dated 20th November,



2020 which the Plaintiff disputed as forgery. He argues that there was no police report or OB or investigation conducted.

223. It was his submission that the Defendants failed to discharge their burden so as to be granted the prayers sought in its counterclaim. He adds that upon conducting a site visit, he submits that it was evident that the structure was not there and that the adjacent parcels were habited by private individuals.

224. He submits that the Defendants evidence was inconsistent and contradictory. He submits that there were discrepancies regarding the time 5DW7 and DE8 occupied the suit land.

225. Counsel relied on the case in Kitale Judicial Review App No. 38 of 2011 V Commissioner of Lands & 2 Others and the case of Kenya Anti-Corruption Commission V Kisumu Service Station Ltd & 2 Others [2022] KEELC 148 22[KLR].

226. In conclusion, counsel urges the court to allow the Plaintiff's suit and dismiss the Defendants counter claim with costs.

227. Counsel for the 5th Defendant on the other hand filed his submissions dated 4th February, 2025 where he gave a summary of the case and identified four issues for determination.

228. The first issue was whether the suit land was alienated land reserved for public purpose and therefore not available for private allocation. He relied on Section 3 (a) of the Government Land Act, Article 62 of the constitution and CoA case in Frann Investment Limited V Kenya Anit-Corruption Commission & 6 Others.

229. He submits that the suit property was alienated government land following a survey conducted in 1928 which resulted in survey plan number FR 28/60 reserving it for public purposes. He further submits that the survey plan approved by the Department of survey confirmed that the suit land among others had been reserved for official residence. He adds that at the time of survey, the suit property had been assigned L.R No. 2116/IX/4.

230. It was his submission that the government had constructed houses to provide accommodation to government officials later being allocated to judicial officers who served at the Kitale Law Courts.

231. He submits that the reservation had been affirmed vide the approved Development Plant No. 91 in 1974 and the property was indicated as number 4. He further submits that due to a change in the land legal regime, the suit land was converted from LR No. 2116/IX/4 to Kitale Municipality Block 11/18 in 1992 and relied upon the survey of 1928. 5DW7 and 5DW10 confirmed that they occupied the suit property as officers of the court.

232. He submits that government land that has been reserved thus alienated was not available for allocation. He relied on the case of Dina Management Limited V County Government of Mombasa & 5 Others Petition No. (E010 of 2021) [2022] KESC 24 (KLR) and Ethics and Anti-Corruption Commission V Kapsoen Estatic Ltd & Another ELC 156 of 2015.

233. He argues that the Plaintiff never provided any evidence to impeach the survey plan. He added that PW2 in his testimony availed the original survey plan.

234. He submits that that the Development Plan 5th Exhibit 1 was properly certified by 5DW6 as a public record and thus valid. He further submits that it had the necessary approvals with approved reference numbers.

235. The second issue was whether the allocation to Charles Lugano was in accordance to the law. Counsel submits that having established that the suit property was alienated government land with a public utility thus not available for alienation, he submits that the alienation to Charles Lugano was null and void ab initio.

236. He further submits that the allocation was irregular and unprocedural. He cited the case of James Joram Nyaga & Another V Attorney General & Another [2007] eKLR.

237. He explained the process for allocation of unalienated land which he submits was not done by the Plaintiff in the present case. He submits that Charles Lugano had been issued with an allotment



letter dated 8th June, 1999 for a parcel described as LR No. 2116/IX/4 despite the property having already been converted to Kitale Municipality Block 11/18 in 1992.

238. He submits that Charles accepted the allotment which acceptance was received on 10th January, 2002 almost 2 years after expiry of the 30-day period in the allotment letter. He added that there was no extension of acceptance by the Commissioner of Lands.

239. He further submits that reservation of the suit property for public purposes was still intact as at that date and nothing had been done to change the user from public to private or declare the land unalienated. He relied on the CoA case in Kipsirgoi Investment Ltd V KACC Civil Appeal No 288 of 2010.

240. He submits that prior to allocation of the suit property to Charles, no allotment letter or lease had been issued by the Commissioner of Lands. He added that the 5th Defendant offered evidence that demonstrated that the land was set aside during a survey of 1928 for official residences thus it could not be available for further alienation for private use.

241. Counsel for the 5th Defendant relied on the case of Chemey Investment Ltd V Attorney General & Others Nairobi Civil Appeal No. 349 of 2012 and submits that the suit property had been alienated for a public purpose thus the allocation to Charles Lugano was irregular.

242. He submits that the root of title held by the Plaintiffs was tainted with illegality and fraud thus defeated.

243. The third issue was whether the Defendant has proved its case on a balance of probabilities. Counsel while submitting in the affirmative relied on the case of Nelson Kazungu Chai & 9 Others V Pwani University [2014] eKLR.

244. On the final issue on costs, he urged the court to grant the 5th Defendants costs of the suit.

Analysis and Determination

113. Having carefully read the pleadings and considered the evidence on record and rival submissions, I do find the issues for determination are as follows:

- a) Whether the suit property is public land.
- b) Whether or not the Plaintiff is the lawful owner of the suit property.
- c) Whether the Plaintiff is entitled to the prayers sought in the Plaint.
- d) Whether the Defendants are entitled to the prayers sought in their Counterclaims.
- e) Who should bear the costs of this suit.

Whether the suit property is public land.

114. In order to determine this issue, it is important to give a breakdown of the history and evidence given.

115. The 1st Plaintiff claims that she acquired the suit property LR No. Kitale Municipality Block 11/18 from her late husband Charles Lugano. She produced a copy of the allotment letter and Certificate of Title in her late husband's name. She added that her husband (deceased) bought the said land. The 3rd Defendant claims that the land was and has always been had a three bedroom High Grade (HG) house which housed civil servants, and as at the time of the alleged allocation and occupation was assigned a judicial officer, the last one being Serem (5 DW 10). The 5th Defendant on the other hand contends that the suit property is public property that was set aside to accommodate public servants working with the judiciary.

116. PW1 during cross examination confirmed that her late husband bought the suit land from the government in 2002 after which she moved in and later renovated to a point where she completely brought down the house. She also admitted that she had not known that the property was government land.

117. DW1, the County Director of Housing testified that the suit land contained a government house, KITA/HOU/HG2 (Kitale Housing High Grade 2), as per the Housing Register. He also confirmed that the alleged allotment letter to Charles Lugano did not have a reference number.



118. 5DW1, one Mungai, the Investigation Officer, testified that he had received complaints from the 5th Defendant regarding illegal demolition and reconstruction of the suit property.

119. It was his testimony that a fixed survey had been conducted in 1928 and documented in survey map FR 28/60, which designated the suit property (initially referenced as LO 2116/IX/4, or LR 2116/IX/4, Plot 4), as reserved for official residences.

120. 5DW6, the Deputy Director of Planning gave detailed evidence as with regard history of the reservation of public land for public use. He confirmed that the Development Plan for the suit property was for government residential purposes and that his office never received any request for a change of user. He also explained that once land was reserved for public use by a Development Plan or PDP, it was unavailable for private allocation without mandatory consent by the 5th Defendant and a replanning process and that any title obtained without such a process and consent would be null and void.

121. 5DW6 confirmed that plot No. 4 (the suit land) on the 1928 survey plan (5D. Exhibit 2) did not have a specific department indicated or a cross-referencing FR No., unlike other plots, which would indicate a new survey. He also confirmed that the 1928 Survey Plan (5D. Exhibit 2) showed the property's public purpose.

122. The 5th Defendant also led evidence that a house had been constructed on the property between 1950 and 1966 and was officially entered into the Government Buildings Register (5D. Exhibit 20) as KITA/HOU/HG/2 being a high-grade pool house for public officers/civil servants. It is noteworthy that the register confirmed it as a government house.

123. It also came out from the evidence that the house was specifically reserved for Judicial Officers working at Kitale Law Courts, including Hon. Justice Hedwig Ong'udi (5DW7) and Hon. Moses Serem (5DW10), both Judicial Officers who testified that they resided in the house as government property, without paying rent and foregoing house allowance. This corroborates its status as government housing.

124. He testified that a Development Plan for Kitale town (5D. Exhibit 1), was prepared in 1973 and approved on 17th January, 1974 which also indicated the suit land as being in a zone designated for "residential purposes," specifically government housing (zone '026'. He also explained that a PDP was similar to a Development plan as was issued in the present case.

125. Upon further cross-examination, he confirmed that according to the Development Plan the suit land was on a zone marked 026, being parcel 4 that was reserved for government housing.

126. This Court has perused the Development Plan dated 1st January, 1973 and the same in fact confirms that number 4 is designated for public purposes. Further, the plot indicated as the suit land and which was registered as KITA/HOU/HG/2 was on a plot indicated as 4 on the map.

127. The witness went on to explain the specific government procedures in the process of acquisition of government land which entailed the boarding process, a procedure for disposal of public property, which involved forming a Board of Survey, valuing the property, gazettment, and advertising for bidders. The evidence was supported by 5DW1, Leonard Njenga Mungai and in part by 3DW1, Wycliffe Were.

128. It is not in contention that the above process was never followed by the Plaintiffs, or in the least there was no evidence to that effect. And in terms of Section 107 of the Evidence Act, he who alleges must prove the fact, unless the law specifically places the burden on another.

129. Actually, to demonstrate the plaintiffs' paucity of evidence in that regard to the failure to follow procedure of acquiring the land, this Court notes that to establish the root of the title, the Plaintiff, PW1, whose testimony was that she was not present when her late husband purchased the house, only stated that he did so by following the allocation process. She never produced the evidence to that effect. She did not produce the letter of allotment as evidence in support of her oral testimony. Instead, to support the process of the registration of the Certificate of Lease (PEXh 3) to the late



Charles Lugano PW1 produced PEXh 6 (the letter dated 5th May 2020 by the Land Registrar Trans Nzoia to the Director of Land Administration) inquiring the status of the land as per the records of the Ministry of Lands Headquarters; PEXh. 7 (the letter dated 10th June 2020 by the Director of Land Administration) indicating that the title was issued to Charles Lugano and lease prepared in his favour on 12th February 2002; PEXh 8 (a letter dated 09/11/2020 by the County Director of Housing Trans Nzoia County) addressed to the land registrar Trans Nzoia indicating that their investigations showed that the plot was allocated to Charles Lugano legally and they had no objection to developing it; PEXh. 9 a letter dated 20th November, 2020 purported to be written by Christine Natome the Legal Officer of the 5th Defendant in the Region) addressed to the Land Registrar Trans Nzoia informing him that the land was allocated to Charles Lugano and the registration process would continue; PEXh 10 a letter dated 25th August 2020 written by David Kipchoge the County Coordinator of Trans Nzoia National Land Commission (NLC) office referring to a letter dated 10th June 2020 sent to the Director of Land Administration. This Exhibit (10) was to confirm that the Land Registrar of c/o Kitale Ardhi House informing him that the NLC recommended it (sic). She also produced PEXh 12 being Form LRA 14 an Application for Reconstruction of Land Register Title in respect of the suit land (Kitale Municipality Block 11/18). It was dated 30th March 2020 and commissioned by the three Plaintiffs before one Aggrey L. Kidiavai Advocate but it was incomplete, especially on the part of how the three were identified by the Commissioner and also it missed the photographs of the three as required by law.

130. The summary above is critical in regard to the establishment of the legality of and procedural process of acquiring the title by Charles Lugano in respect of parcel No. Kitale Municipality Block 11/18, and the subsequent transmission of the same to the Plaintiffs, as evidenced by PEXh. 1 and 2. While that is so, this Court examines the evidence of the Defendants in regard to title in issue.

131. The 5DW6, Alfred Mulambi Muanzia, in addition, stated that a fixed survey (FR No. 28/60, 5D. Exhibit 2) conducted in 1928, was considered a highly precise survey, designated the property (then LR No. 2116/1X/4) for official residences. He explained that the said survey plan was approved by the Director of Surveys in 1930 with the sole purpose of setting aside plots for government use.

132. This evidence was closely replicated by 5DW1 (Leonard Njenga Mungai), and 5DW2 Robert Simiyu in part, 5DW4 Wilson Kibichii of the Survey Department, and 5DW9, Julius Waweru Mwangi of the State Department for Housing and Urban Development. All were on all fours on the procedure that is followed for land to be allocated or alienated by government. One of the ways that government has always used to alienate land for itself under the law is the reserve it for public purpose. Once that is done, the land is no available for allocation for provide ownership unless the process of allocating it to private individuals is followed. These were the processes that were explained by the witnesses from their respective departments, especially 5DW1 and 5DW6 and evidenced by the circulars and Financial Regulations Procedures (see 5DExh 47 and 5DExh 23).

133. Then 3DW1 (Wycliffe Were Odunga, the Court Housing Director who was serving in Kitale at the time of demolition of the house in issue explained in his evidence how the house, identified as KITA/HOU/HG/2 was in the Government Buildings Register, 5DExh 20, and it was allocated by the Ministry of Housing to the Judicial Officers serving in Kitale Law Courts and it was so until 2002 February when the last officer to occupy it was evicted from it.

134. 5DW7, Hon Lady Justice Hedwig Ong'udi and 5DW10 Hon. Moses Serem testified that they resided in the House on the suit land for the times they served as Judicial Officers in Kitale. Their evidence confirmed that indeed the house used to be occupied by officers of the Judiciary from the time it was given for the staff to occupy and they paid rent in the sum of KShs 7,000/= per month.

135. The Land Registrar who was then serving in Kitale, one Nelson Odhiambo confirmed that the property was government land. That when he was called upon to reconstruct the lost file he did. He denied that the Ethics and Anticorruption Commission did not have any mandate to confirm issuance



of title deeds to any individuals. This discounted the letter produced by the Plaintiff as PExh 9, the letter dated 20/11/2020. The authorship and issuance of the letter was actually denied by Christine Natome, 5DW3, who was alleged to have written it. She stated that it was a forgery of her signature and that it was even purported to have been received in the Lands Office on 22/11/2020 a Sunday, which was not a working day. The Document Examiner, 5DW5, too discounted the signature on the letter as belonging to Christen Natome, 5DW3.

136. Lastly, it is worth noting that all the Plaintiff's documents which were purporting to be public documents were copies which were not certified in accordance with Section 80 and 81 of the Evidence Act hence they were unreliable. In terms of the decision in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR.

137. In the *Kenneth Nyaga Mwige* case (supra) the Court of Appeal expressed itself as follows; "18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents - this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence."

138. Further, it is noteworthy too that some of the documents which the plaintiff relied on as exhibits were neither addressed to her nor the late husband. For instance, PExhs 6, 7, 8 9 and 12. The 1st Plaintiff did not explain how she got to possess them. When cross examined by the State Counsel how she or her husband got receive them, she admitted that there were procedures for a private individual accessing and being in possession of them. She added that she knew her late husband



paid for them. But what is clear it that she did not have any evidence of payment for the documents. Similarly, some of the were purported to be authored long after the demise of her husband. It therefore follows that the documents fall in the category of illegally obtained evidence and ought not to be relied on in earnest.

139. In the case of Kenya Railways Corporation & 2 others v Okoit & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment) the Supreme Court held;

“87. This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in Njonjo Mue case (supra). In that case, we recognised that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

88. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.”

140. Additionally, in Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling), the same Court held as follows:

“(24) The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information.”

141. That aside, even assuming that the documents the Plaintiffs sought to rely on were properly obtained and to be relied on, which is not the case though, regarding the proof of the ownership of the suit land by the plaintiffs, this Court now turns to Section 26 of the Land Registration Act, 2012 which provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

142. In Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), it was held that,

“As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

143. Similarly, this Court held, in Ochieng v Agricultural Development Corporation & 3 others; National Land Commission (Interested Party) (Environment & Land Petition 2 of 2022) [2025]



KEELC 3844 (KLR) (23 April 2025) (Judgment) that

“119. It is this court’s view that the duty was upon the Petitioner to clearly explain the root of his title. In addition, Section 107 (1) and 108 of the Evidence Act places the burden of proof squarely on the party that alleges. In the present case, the burden thus lay on the Petitioner to prove that indeed he legally acquired the suit property...

124. It is my opinion that with all the evidence adduced, the Petitioner’s case was marred with various inconsistencies as he failed to properly explain the root of his title.”

144. Also, in *Korir v Njoki & another* (Civil Appeal 34 of 2020) [2023] KECA 439 (KLR) the court held as follows:

“In this case, the appellant’s title was being challenged on the ground that the proprietors of the suit land were not aware of the circumstances under which he allegedly acquired interest thereunder. It was that very title whose authenticity was in dispute. In those circumstances he could not just come to court and place the very same title before the court and claim that the evidence was sufficient. He ought to have gone further and explained the process by which he obtained the said title. In this case there was no such evidence and since he was not physically involved in the transaction, he ought to have called the person who transacted on his behalf even if he could not call the alleged seller.”

145. In the case of *Munyu Maina V Hiram Gathiha Maina* [2013] KECA 94 (KLR) the court held as follows:

“We state that when a registered proprietor’s root of title is under challenge: it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that it is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

146. The Court of Appeal in the case of *Elizabeth Wanjiru Githinji and 29 Others V Kenya Urban Roads Authority* [2019] eKLR, Justice Otieno Odek, JA, [as he then was] held as follows:

“I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.”

147. The Plaintiff, PW1, adduced evidence that her husband bought the suit land from government. She could not tell when the government advertised for the sale of the nonstrategic houses but 3DW1 and 5DW1 and 5DW6 confirmed that the advertisement was made in the year 2007 as per 5DExh 24 and 5DExh 25 and 5DExh 22 and cancelled in the year 2008 as per the 5DExh 17 and 5DExh 26 respectively. Further, that even so, the house which stood on the suit land was not among them. This evidence coincided or rhymed regarding the original state and ownership of the suit ad and house in issue. It means, from the outset of the Plaintiff’s evidence that the land used to be (if one were to use past tense literary) public land which contained the house she was put into possession by her late husband. This evidence of the witnesses automatically confirms then that indeed the land was reserved in 1928 for public use as evidenced by 5DExh 2 the F.R 28/60 Survey Map and 5DExh 1 the Kitale Development Plan and 5DExh 18 the Survey Folio, and confirmed by the testimonies of 3DW1, 5DW1, 2, 4 and 6, and a house was built on it by government, as per the 3DExh1 or 5DExh 20. In view of the adduced evidence, this court is convinced that the suit parcel, Kitale Municipality Block 11/18, is public land and not private land.

Whether or not the Plaintiff is the lawful owner of the suit property

148. The Plaintiff’s claim on the suit property emanates from the allotment letter dated 8th June, 1999 issued to her late husband Charles Lugano that led to the registration of the Certificate of



Lease issued to him on 18th February, 2002. The Defendant on the other hand contends that the suit property was public land and therefore she was the legal owner.

149. As stated above, in the case of *Korir v Njoki & another* (Civil Appeal 34 of 2020) [2023] KECA 439 (KLR), the court held as follows:

“In this case, the appellant’s title was being challenged on the ground that the proprietors of the suit land were not aware of the circumstances under which he allegedly acquired interest thereunder. It was that very title whose authenticity was in dispute. In those circumstances he could not just come to court and place the very same title before the court and claim that the evidence was sufficient. He ought to have gone further and explained the process by which he obtained the said title. In this case there was no such evidence and since he was not physically involved in the transaction, he ought to have called the person who transacted on his behalf even if he could not call the alleged seller.”

150. It is this court’s view that the duty was upon the Plaintiff’s to clearly explain the root of his title. In addition, Section 107 (1) and 108 of the Evidence Act places the burden of proof squarely on the party that alleges. In the present case, the burden thus lay on the Petitioner to prove that indeed he legally acquired the suit property.

151. Julius Waweru Mwangi (5DW9), an officer with the State Department for Housing and Urban Development confirmed that the house was allocated to a private developer known as Charles Lugano who took possession in 2005 and later demolished the house. But he testified that it was wrongly allocated to him as it was not available for allocation.

152. He also confirmed that in 2007 the government opened a window for sale of government houses to civil servants only but it was revoked. He stated that the boarding process of 2007 was not done and thus the sale never materialized. In 2008 it was cancelled. This also was the evidence of 5DW1, Leonard Mungai who gave a detailed account of the origin and existence of the title in issue, including its conversion.

153. 5DW9 explained that the boarding process was not to sell the land but only the structure as the land was to remain owned by government. It was his case that boarding never affected the ownership of the land by government. Similarly, 5DW6 testified as much while 3DW1 also confirmed the evidence.

154. In the case of *Munyu Maina V Hiram Gathiha Maina* [2013] KECA 94 (KLR) the court held as follows:

“We state that when a registered proprietor’s root of title is under challenge: it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that it is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

155. Further, the Court of Appeal in the case of *Elizabeth Wanjiru Githinji and 29 Others V Kenya Urban Roads Authority* [2019] eKLR, Justice Otieno Odek, JA, [as he then was] held as follows:

“I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility.

If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.”

156. It is not in contention that Charles Lugano's formal acceptance and payment for the allotment was made on 10th January, 2002, approximately three years after the allotment letter which was issued in 1999, which clearly exceeded the stipulated 30-day acceptance period. Even if the allocation would have been lawful and regular, Charles Lugano could not purport to accept and offer



that did not exist, the period of offer having lapsed and the conditions thereto not fulfilled.

157. It is this court's view that at the time of acceptance, the offer had lapsed, and there was no evidence of request or record of an extension.

158. The Plaintiff also relied on a letter that she had been issued with a letter dated 20th November, 2020 (A-1(ii), P. Exhibit 9) from the 5th Defendant's legal officer (5DW3) granting the Land Register permission to proceed with registration of the suit property in her husband's name.

159. It is plain that 5DW3 denied having authored the said letter. She insisted that it was a forgery. It was also not in dispute that the Plaintiff admitted that she never knew that 5DW3 had left their Eldoret office at the time the letter was drafted.

160. The 5DW3 confirmed that the letter lacked a reference number and was not signed for the CEO. She added that the letter was also purportedly received on a Sunday, a non-working day for EACC and other public institutions.

161. The 5th Defendant in support of 5DW3's evidence, went further and called Sephen Yego (5DW5), a Forensic Document Examiner who testified that the purported letter purportedly did not bear 5DW3's actual signature.

162. He successfully identified multiple differences in character formation, pen movement, and strokes by use of advanced equipment for his analysis.

163. In light of the above, the said letter as relied on by the Plaintiff came out as forged and thus this discredited her evidence and the court cannot therefore rely on the same as evidence. Further, for the reason of the Plaintiff having relied on a forged letter, her evidence regarding how the other government offices such as the lands office and chief land registrar and the National Land Commission who were said to have authored PExh 6 to 12 except 9, which are photocopies in the first place and not authenticated by any of the purported makers, this Court finds the said documents unreliable. Furthermore, none shows the root of the allocation of the land, and especially how the government followed procedures to turn the public land to private land as the law and policy provided.

164. Further, this court has keenly perused the allotment letter to Charles Lugano dated 8th June, 1999 and it is not in dispute that it referenced the old parcel number LR No. 2116/1X/438. It is this court's view that this was irregular since the land had already been converted to Kitale Municipality Block 11/18 on 27th March, 1992.

165. It is this court's view that from the 5th Defendant's evidence that there was a laid down procedure for allocation of public land which was never followed in the alleged acquisition by the Plaintiff. 5DW6.

166. It was also clear that the Land Registrar (5DW8) explicitly questioned the allocation in a letter dated 18th February, 2002 (5D. Exhibit 9) by P.O. Ngethe, a lands officer from the Ministry of Lands noting that the plot contained a District Magistrate's residence and sought clarification from the Commissioner of Lands. The land registrar confirmed that the said letter was never responded to, yet the registration was done. He confirmed that registration could not have proceeded without a response from the Commissioner.

167. From the evidence tendered in court including the testimonies of all the witnesses, I opine that the Plaintiff's root of title was never explained. To my mind, the evidence by 5DW6 and 5DW9 confirmed that the suit property was never available for allocation.

168. It is this court's view, that the burden of proof was upon the Plaintiff to prove that her late husband rightfully obtained its title from the Commissioner of Land, but she failed to discharge it. It is this court's view that she cannot thus claim that she acquired the suit property by way of transmission through her late husband.

169. In addition, it was clear from the evidence that there was no change of user since the suit land was already set aside for a housing of public officers working with the judiciary.



170. Furthermore, the Plaintiff could not give evidence to show that indeed the land was degazetted before allocation, since the suit parcel was public land to begin with. In essence, she failed to show the process of acquisition of the land to establish the legal root thereof.

171. In the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), it was held that,

“As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

172. Further, I reiterate and reproduce Section 26(1) of the Land Registration Act, Chapter 3 of 2012 which provides that a title is prima facie evidence of ownership of land. It stipulates that, “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

173. In line with the facts and evidence adduced before this court and while relying on the legal provisions cited, I find that the Plaintiff failed to explain the root of his title. The various experts called by the 5th Defendant who testified also confirmed the unprocedural and irregular manner the Plaintiff acquired the title to the suit property.

174. PW2’s testimony that the land was not public and that its market value lacked sufficient foundational evidence were contradicted by documents adduced by the Defendants, including the very survey plan he was shown.

175. It is this court’s view that PW2’s evidence led to the conclusion that the suit property was public land.

176. It is noteworthy that the Plaintiff also sought for an alternative prayer of compensation from the 3rd, 4th and 5th Defendants in the sum of Kshs. 70 million as current market value of the suit property.

177. It is my opinion that the evidence led by PW2 did not assist her case in any manner. The valuation report and testimony were significantly undermined by his own admissions during cross-examination.

178. In addition, PW2’s reliance on a Certificate of Lease, which he admitted was not conclusive proof of ownership, and his failure to secure an official land search, raised serious doubts about the comprehensiveness and accuracy of his valuation.

179. It is therefore without a shadow of doubt that the acquisition by Charles Lugano was irregular, unprocedural and illegal and in the circumstances, I find that the Plaintiff has failed to prove her case to the required balance of probabilities and is therefore not the lawful owner of the suit property.

180. The Defendant’s on the other hand have successfully convinced this court that the property is public land and therefore it is proper to conclude that they have proved their case on a balance of probabilities.

Whether the Plaintiffs are entitled to the prayers sought in the plaint.



181. Having found that the Plaintiffs have failed to prove her case to the required standard, they are therefore not entitled to the prayers sought in the plaint.

Whether the Defendants are entitled to the prayers sought in their counterclaim.

182. This court having found that the Defendants have proved that the land was public land and not private or alienated to private land any time later. It means further that on a balance of probabilities the Defendants are entitled to the prayers sought in their counterclaims. This means further that the 3rd and 4th Defendants proved that there were civil servants, specifically, judicial officers, who used to reside in the house before the last one of them was evicted. They used to pay rent in the sum of KShs. 7,000/= per month.

113. The 3rd and 4th Defendants claimed the income as rent which was lost by government from the time of dispossession of the civil servants by the 1st Plaintiff. They sought the lost income to be paid at the rate of KShs. 7,000/= per month from February 2002 to the date of the judgment, and the value of the demolished house in the sum of KShs. 3,000,000/= plus damages for illegal demolition and trespass on the suit land and loss of user.

114. Regarding these claims, this Court is of the view that indeed the government lost income. The question is: would government claim it from the time of dispossession to the time of judgment? In my humble view, in the same manner that the Limitation of Actions Act gives the time limit for certain claims which become stale after the time, it should be that government could legitimately claim rent for only three years from the time of dispossession to the time of the lapse of the limitation period. However, since that claim would be time barred if the relief is awarded for that period, the relief awardable is for a similar period (of three years) prior to the time of demolition of the house. This translates to a sum of KShs. 7000/= for 36 months which totals to Kenya Shillings two hundred and fifty two thousand (KShs 252,000/=) only.

115. Regarding the value of the demolished house, a valuation was given in evidence by the said 5th Defendant. The 3rd and 4th Defendants put the value at KShs. 3,000,000/=. I found that the sum of KShs 3,000,000/= was reasonable and awardable.

116. As for the award of damages for trespass, I doubt whether the claim can be awarded since it is a tortious one whose limitation period for claim is three years from when the tort arises. I do not award it. In any event the Court has awarded the value of the house destroyed.

117. The 3rd and 4th Defendants also prayed for an order declaring the land to be public land reserved for State Department of Housing & Urban Development, and any purported allocation, transfer, registration or issuance of certificate of lease over LR No. Kitale Municipality Block 11/18 to Charles Lugano or any other person as unlawful, illegal, null and void, a cancellation of the registration of the title in Charles Lugano's name, and an order declaring any attempt to treat the suit property as part of the estate of Charles Lugano is nullity ab initio, permanent injunction restraining the plaintiff, its servants, agents and or any other person acting under it from ever laying claim to, interfering with or in any manner dealing with LR No. Kitale Municipality Block 11/18.

118. As for the 5th Defendant, it sought similar orders as the 3rd and 4th Defendant save for the variation of the values. For instance, it put the value of the house at 2,950,000/= and the lost income in the sum of KShs. 1, 596, 0000/- These sums cannot be awarded twice to the same party over the same cause.

119. I therefore proceed to enter judgment in favour of the Defendants as against the Plaintiffs in the following terms:

- a) The Plaintiffs' claim is dismissed.
- b) A declaration be and is hereby issued the allocation of the suit property to Charles Lugano, the lease and certificate of lease are null and void for being fraudulently and unlawfully obtained and therefore incapable of conferring any interest to the Plaintiffs and/or any other person whatsoever.
- c) An order directing the national government Land Registrar in charge of Trans Nzoia County to



cancel all entries relating to the registration of the suit property in favour of Charles Lugano and any subsequent registrations in that respect.

d) An order for the registration of the suit property in favour of the Government, specifically under the Permanent Secretary, Treasury or Ministry of Housing and Urban Development.

e) An order of permanent injunction against the Plaintiffs, their employees and or assigns from any dealings over the suit property other than any way of transfer or surrender to the Government of Kenya.

f) Specific damages of Kshs. 3, 000, 0000/- for the destruction of the Government House Number KITA/HOU/HG/ 2.

g) Specific damages of Kshs. 252, 0000/- for lost rental income for the period of three years or thirty six months immediately prior to February 2021 at the month rent rate of Kshs. 7,000/-.

h) The Plaintiffs to pay the costs of the suit, and the Defendants to be awarded the costs of the Counterclaims.

120. Orders accordingly.

Judgment dated, signed and delivered via the Teams Platform this 4th day of July 2025

Hon. Dr. iur Nyagaka

Judge

In the presence of,

Kagunza Advocate holding brief for Mukabane Advocate for the Plaintiffs,

Ms Githinji Advocate for the 5th Defendant

Ms Githinji Advocate also holds brief for Ms Odeyo (State Counsel) for the 3rd and 4th Defendants

SIGNED BY: DR. IUR FRED NYAGAKA, J



THE JUDICIARY OF KENYA.
KITALE ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT
DATE: 2025-07-23 17:04:25

