



**Shaiya v Board of Management, Umoja Primary School & 6 others (Environment & Land Case E018 of 2021) [2025] KEELC 3076 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3076 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E018 OF 2021**

**JM ONYANGO, J  
MARCH 26, 2025**

**BETWEEN**

**MOHAMED ABDILLAHI SHAIYA ..... PLAINTIFF**

**AND**

**BOARD OF MANAGEMENT, UMOJA PRIMARY SCHOOL .... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR GENERAL OF PHYSICAL AND LAND USE  
PLANNING ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF LAND ADMINISTRATION ..... 4<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**CABINET SECRETARY, MINISTRY OF EDUCATION ..... 6<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. At the centre of this dispute is a portion of land known as Land Reference No. 4953 /1959 measuring 0.1056 of a hectare (hereinafter referred to as the suit property) which forms part of the land occupied by Umoja Primary School in Thika town. Whereas the said parcel of land is registered in the name of the Plaintiff, the 1st Defendant claims that the suit property was allocated to it by the Thika Municipal Council. Sometime in 2011 the 1st Defendant school constructed a perimeter wall confining the suit property within the school. After his attempts to get the 1st Defendant to demolish the wall failed, he approached the National Land Commission to resolve the dispute. The National Land Commission conducted its investigations and prepared a report in which they concluded that there was a problem of double allocation by the Commissioner of Lands on one hand and the Municipal Council of Thika on the other hand without the two entities consulting each other. When the Plaintiff's proposal to resolve



the dispute through Alternative Dispute Resolution was met with resistance by the 1st Defendant, the Plaintiff decided to file suit.

2. The Plaintiff initiated this suit against the 1st Defendant through a Plaint dated 10th February 2021. The Plaintiff's case is that he is the owner of land reference number 4953/1959 (hereinafter known as "the suit property") having purchased it from one Mohammed Ali Saleh in 2008. The Plaintiff averred that he holds a grant pursuant to a transfer registered at the land registry on 17th June 2008. The Plaintiff took issue with the 1st Defendant for encroaching onto the suit property in 2017 and for building a wall, as a result, confining it within Umoja Primary School.
3. The Plaintiff subsequently amended the Plaint to include the 2nd to 7th Defendants. This was done after the plaintiff and 1st Defendant had testified, closed their cases and filed their submissions as the court (Eboso J was of the opinion that that the 2nd – 7th Defendants were necessary parties whose participation would aid the court in arriving at an informed decision.
4. Through his Amended Plaint dated 1st August, 2023 the Plaintiff seeks the following reliefs:
  - a. A declaration that the Plaintiff is the lawful, absolute and indefeasible proprietor of the suit property herein known as Land Reference No. 4953/1959.
  - b. A declaration that the 1st Defendant, 1st Defendant school, the 1st Defendant's agents, servants, employees and/or anyone else claiming to act under instructions or authority from the 1st Defendant have no proprietary right, interest and/or valid claim over Land Reference No. 4953/1959 and the access roads serving the same.
  - c. A declaration that the Plaintiff is entitled to obtain possession of Land Reference No. 4953/1959 from the 1st Defendant, the 1st Defendant school, the 1st Defendant's agents, servants, employees and/or anyone else claiming to act under instructions or authority from the 1st Defendant.
  - d. A mandatory injunction and/or eviction order compelling the 1st Defendant, the 1st Defendant school, the 1st Defendant's agents, servants, employees and/or anyone else claiming to act under instructions or authority from the 1st Defendant to, within two (2) days of the order, remove the perimeter wall and any other structures erected on or encroaching onto Land Reference No. 4953/1959 as well as its adjacent access roads and vacate from Land Reference No. 4953/1959 as well as its adjacent access roads.
  - e. In default of compliance with the court order issued pursuant to prayer 4 above, the Plaintiff be at liberty to remove the perimeter wall and any other structures erected on or encroaching onto Land Reference No. 4953/1959 as well its adjacent access roads and evict the 1st Defendant, the 1st Defendant school, the 1st Defendant's agents, servants, employees and/or anyone else claiming to act under instructions or authority from the 1st Defendant from Land Reference No. 4953/1959 and its adjacent access roads and in such instance, the Officer Commanding Station, Makongeni Police Station, do supervise such eviction and all the costs attendant thereto be borne by the 1st Defendant.
  - f. A permanent injunction restraining the 1st Defendant, the 1st Defendant school, the 1st Defendant's agents, servants, employees and/or anyone else claiming to act under instructions or authority from the 1st Defendant from encroaching, wasting, damaging, trespassing, building, alienating, disposing, selling and/or in any other way interfering with Land Reference No. 4953/1959 as well as its adjacent access roads.



- g. The Officer Commanding Station (OCS), Makongeni Police Station, do supervise the implementation and enforcement of court orders herein.
  - h. Damages for trespass/mesne profits.
  - i. Punitive and exemplary damages.
  - j. Interest on (g) and (h) above at court rates.
  - k. Costs of this suit.
  - l. Interest on (j) above at court rates.
  - m. Any further or other relief that this honourable court may deem fit to grant.
5. Although they were duly served with the Amended Plaintiff and Summons to enter appearance the 2nd, 3rd, 4th, 6th and 7th Defendants neither entered appearance nor filed their Defences. The 5th Defendant merely entered appearance but filed no Defence.
  6. On its part, the 1st Defendant filed a Statement of Defence dated 28th September 2021, through which it contended that the suit property is public land allocated to Umoja Primary School by the then Municipal Council of Thika. It is the 1st Defendant's case that the suit property was originally designated as a settlement area and that the council had initially earmarked the area for a cemetery before converting it to a settlement for squatters in 1996. In 2001, the Municipal Council formally converted part of the settlement area to a public school and recommended that the area be fenced. The 1st Defendant averred that the suit property was part of the said area which was converted to a school.
  7. The 1st Defendant contends that the claims by the Plaintiff were addressed by the National Land Commission which noted that the Municipal Council of Thika had recommended cancellation of the Plaintiff's title.
  8. The case was set down for hearing and Plaintiff testified without calling any witness. The Head teacher of Umoja Primary School testified as the sole Defence witness.

### **Plaintiff's Evidence**

9. On the date fixed for hearing, the Plaintiff testified under oath as PW1. He adopted his witness statement dated 10th February 2021 as part of his sworn evidence-in-chief.
10. In the said witness statement, he states that he is the registered proprietor of Land Reference Number 4953/1959 having purchased it from one Mohamoud Ali Saleh in 2008. He states that prior to acquisition of the suit property he conducted extensive due diligence over the suit property's ownership and boundaries and established that Mohamoud Ali Swaleh had been allocated the land by the government of Kenya way back in 1991 and he was issued with a title in 1992. He had been paying the applicable land rates to the Municipal Council of Thika as well as the land rent to the Commissioner of Lands. He states that at the time of its acquisition, the suit property and its adjacent parcels were vacant and devoid of any developments although it had beacons. Further that the school's structures were located about 400 metres away from the suit property and there were about three plots between the school structures and the suit property.
11. He further states that sometimes in the year 2017, the 1st defendant through his agents unlawfully encroached onto the suit property and built a stone perimeter wall on and through the suit property and its adjacent access roads within the property thereby confining the suit property in the school compound while claiming that the suit property formed part of the school land. He subsequently



wrote to the school and demanded that it removes the wall from the suit property but the school was adamant and insisted that the wall was built on land that had been allocated to the school.

12. He states that since he was keen to have the dispute resolved expeditiously, he referred the matter to the National Land Commission. The National Land Commission requested a government surveyor to conduct a survey which established the suit property was in the school compound. After conducting its investigations, the National Land Commission prepared a report in which it made a finding that the genesis of the problem was double allocation as both the Commissioner of Lands and the Municipal Council of Thika purported to issue the same parcel of land to 2 different people. While Mohamud Ali Saleh was issued with an allotment letter by the Commissioner of Lands in 1991 and a title in 1992, the school was allocated the suit property by the Municipal Council of Thika in 1998 although no minutes or letter of allotment were provided. The report further noted that the school's land is unsurveyed and it formed part of what had been land set aside for a cemetery before it was converted to a settlement for squatters in 1996. In 2001, the Municipal Council recommended that the school be fenced and in 2011 the school was fenced using funds from the Juja Constituency Development Fund. The report also noted that the Municipal Council of Thika had recommended that the title issued to Mohamud Ali Saleh be revoked although this was not effected.
13. He stated that in response to his complaint, the 1st defendant claimed that the land was allocated to the school by the defunct Municipal Council of Thika in 2001 but their documents did not support their claims.
14. He stated that he had looked at the defendant's defence. At paragraphs 7 and 8 the defendant contends that the land was allocated to the defendant by the Municipal Council of Thika. He stated that he had not seen any document relating to ownership of the land by Thika Municipality.
15. He said that he had seen the minutes in the defendant's bundle and there was nothing in the minutes related to the suit property. He also stated that he had not seen any survey plan by the school.
16. The National Land commission made findings to the effect that the school land was not surveyed. He stated that the school has not exhibited any title.
17. It was his testimony that according to those minutes the school was built by the squatters. He told the court that his predecessor's title was issued in 1992 long before the purported allocation of the suit property to the school in 2001. Allotment of the suit property to his predecessor was done in 1991. He stated that the municipality had no power to allocate the same land in 2001.
18. He stated that the finding of the National Land Commission confirms that the suit property was allocated to his predecessor in 1991. He stated that the allegation by the defendant that the suit property belongs to it is false and was intended to intimidate him.
19. The Plaintiff produced the following documents contained in his List of Documents:
  - i. A Grant for Land Reference No. 4953 /1959
  - ii. Sale agreement dated 14.3.2008
  - iii. Transfer document
  - iv. A letter of allotment dated 16.1.1991
  - v. Letter dated 27.7.2017 from the plaintiff to the Defendant
  - vi. Undated letter from the Defendant to the Plaintiff



- vii. A letter dated 20.8.2019 from the National Land Commission to the National Government Surveyor
  - viii. A letter dated 6th September 2019 from the Government Surveyor, Thika to the National Land Commission together with an attached report
  - ix. Undated note by the Head teacher Umoja Primary School
  - x. Minutes of a meeting held on 28th July 2017
  - xi. A bundle of minutes from the Municipal Council of Thika
  - xii. A letter dated 28th November 2019 from the County Co-ordinator National Land Commission, Kiambu to the Acting CEO/Secretary, National Land Commission together with the attached report
  - xiii. Municipal Council of Thika Transfer Form and rates bill
  - xiv. Photographs of the perimeter wall at Umoja Primary School
  - xv. Survey Plan
20. During cross-examination, the Plaintiff stated that he purchased the suit property in 2008. It was his testimony that at the time of purchase, the vendor gave him the original title, a copy of the sale agreement, transfer document, copy of letter of allotment and clearance certificates. PW1 testified that the title to the suit property was issued to Mohamed Ali Saleh who transferred it to him on 17th June 2008. He confirmed that special condition No. 9. prohibited transfer, subletting, charging or parting with the suit land without the consent of the Commissioner of Lands. He admitted that he had not exhibited the consent.
21. He testified that at the time of purchase, the suit land had been surveyed. However, the vendor did not give him a copy of the part development plan.
22. He said that he had exhibited a copy of the allotment letter. He stated that since the vendor had a registered title, it was presumed that he duly accepted the allotment. Upon purchase, He told the court that he took possession of the land and replaced the fence. At the time he took possession of the land the beacons were in place although he did not have the original beacon certificate relating to the suit property. He stated that he had an authenticated survey plan at Page 61 of his bundle. He confirmed that all the properties in the survey map were surveyed.
23. He told the court that the matter was referred to the National Land Commission and the NLC called all the parties and listened to their respective positions. He testified that he engaged a surveyor who identified the school boundaries. The school wrote to him contending that they had no idea where his property was and that he needed to look for it elsewhere. It was his testimony that by the time National Land Commission went to the site, the school had already vandalized his fence. The National Land Commission stated in its report that the school was recognized and supported by the Ministry of Education.
24. PW1 stated that the Municipal Council lacked the mandate to recommend the revocation of a title that had been registered by the Ministry of Land. He further stated that the Report of the National Land Commission alluded to a double allocation and to the need for review of the grant. He told the court that he was disputing the contention that the school was allocated the suit property. He stated that he filed suit because the National Land commission had not resolved the dispute. He stated that the school structures are not very far from his property. He testified that when he purchased the land



- the school structures were not there. He disputed the contention that there was double allocation. He stated that the suit property was allocated by the Commissioner of Lands. He told the court that he Municipal council did not identify the land which it allocated to the school.
25. In re-examination, he stated that he did not have a grievance against the National Land Commission or the County Government. He said he had followed up with the National Land Commission but since there was no resolution, he decided to come to court for an expeditious resolution of the dispute. He insisted that by referring the dispute to the National Land Commission he had not waived his right to come to court.
  26. He stated that his title had not been revoked and the report of the National Land Commission merely stated that the school was on his land.
  27. He acknowledged that the District Surveyor's Report indicates that his land had been enclosed within what the school claims to be its land. He stated that the school occupied other private plots apart from his. He told the court that his land had been demarcated and he had no reason to doubt the title conveyed to him. He said that the Commissioner of Lands did not object to the transfer of the suit property to him and his title has not been challenged through the Defendant's pleadings. He insisted that the observation by the National Land Commission to the effect that there was double allocation was not factual as the land allocated to the school had never been surveyed and it could not be identified. With that evidence, the plaintiff closed his case.

### **1st Defendant's Evidence**

28. Gerald Kamau, the Head Teacher of Umoja Primary School and the Secretary to the 1st Defendant testified as DW1. He adopted his witness statement dated 11/11/2021 as his evidence in chief. In the said witness statement, he asserts that the suit property is public land allocated to Umoja Primary School which needs to be protected and preserved as an education facility for the benefit of the local community. He describes Umoja Primary School as a registered Public Primary School in Thika West Sub-County within Kiambu County. The School was established in 1999 and it offers 8-4-4 curriculum of education. It serves children from Umoja, Gachangi and Madharau slums in Thika town.
29. The statement further states that the suit property was part of an area that was designated by the then municipal Council of Thika as a settlement area. The area had initially been designated as a cemetery before it was converted into a settlement for squatters in 1996. In 2001 the Municipal Council of Thika formally converted part of the settlement area to a public school and recommended that the area be fenced.
30. It is further stated that in 2003, a committee of Umoja Settlement from the Municipal Council of Thika visited the school and resolved that efforts be made to have the Commissioner of Lands revoke allocation of the school land to developers. That in 2011 the Juja Constituency Development Fund constructed a perimeter wall around at school under the guidance of a government surveyor who identified the boundaries of the school.
31. The statement states that the Plaintiff's claim was addressed by the National Land Commission which noted that the Municipal Council of Thika had recommended the revocation of the Plaintiff's title as the suit land was part of Umoja Primary School.
32. Mr Kamau testified that the school was established in 1998 and the land occupied by the school measures about 3 acres.



33. He stated that when he was posted to the school, Mr Mohammed (Plaintiff) went to see him claiming that the school had encroached on his land. He reported the matter to the Ministry of Education and they in turn referred the matter to the National Land Commission. The NLC subsequently mediated the dispute and prepared a report after visiting the school.
34. Mr Kamau produced the following documents as the 1st Defendant's exhibits:
- i. Certificate of Registration for Basic Education Institutions
  - ii. Unsigned and undated Minutes of meeting of Municipal Council of Thika
  - iii. Undated and unsigned Minutes of meetings of Thika Municipal Council held in 2001.
  - iv. Minutes of meeting of a meeting of Umoja Primary School Board of Management held on 28th July 2017.
35. During cross-examination, he stated that he joined the school in May 2018 and he was relying on documents from the Municipal Council which he found in his file. He admitted that the minutes were not signed nor were they authenticated by the Municipal Council.
36. He stated that he believed that the school owned the land because it had been fenced by the NG-CDF in 2011. He admitted that the school did not have a survey plan or title to the suit property.
37. He stated that in its report, the NLC had observed that the school land was not surveyed although it had been fenced using NG CDF funds.
38. He stated the title of the person from whom the plaintiff purchased his land was issued in December 1992 and that means by December 1992 the plaintiff's land had already been surveyed. He admitted that by the time the council was deliberating in 1996, the school had not been established and the plaintiff's title had already been issued. He stated that according to the minutes in his file, the council converted the suit property into a school in 2001.
39. He admitted that the minutes in the school file did not specifically refer to the suit property. He further stated that the Government surveyor's report states that LR No. 4953/1959 is within the school.
40. It was his testimony that the NLC had recommended that the plaintiff's Grant be reviewed following the suggestion by the Municipal Council that it be revoked although it had not yet been revoked.
41. He told the court that his contention that the suit property is public land was based on the minutes of the council. He admitted that the school does not have a title to the land occupied by the school.
42. During re-examination, he stated that he had not seen any report challenging the exhibited minutes. He stated that he did not know when the plaintiff's parcel was surveyed. He stated that according to the NLC's report, the suit property was allocated to the plaintiff as an un-surveyed plot in 1991. That marked the close of the 1st Defendant's case.
43. The parties were then directed to file their final written submissions.

### **Plaintiff's Submissions**

44. The Plaintiff filed written submissions dated 19th December 2022 through Ms C.N. Ngugi & Associates Advocates. Counsel for the Plaintiff identified the following three issues for determination:
- (i) who is the lawful and legitimate owner of the suit property;
  - (ii) whether the Plaintiff is entitled to the reliefs sought; and



- (iii) who should pay the costs of the suit.
45. On who the lawful and legitimate owner of the suit property is, counsel submitted that it was not disputed that the Plaintiff is the registered owner of the suit property. Counsel further submitted that the Thika Municipal Council minutes relied on by the 1st Defendant to claim that the suit property was public land lacked evidentiary value given that they did not have a signature to ascertain that they were indeed made by the council. Counsel faulted the 1st Defendant for failing to produce a letter of allotment in the name of the school to prove the allocation of the land to the school.
46. Counsel further faulted the 1st Defendant for failing to demonstrate that the allocation of land to the 1st Defendant by the council, included the suit property. Counsel added that the dimensions of the alleged school are unknown given that the land occupied by the school is unsurveyed.
47. Counsel contended that the suit property was alienated to Mohammed Ali Saleh for private use in 1991 and he was issued with a grant on 17th December 1992 way before the 1st Defendant school came into existence in 1996 and before the alleged decision by the council to allocate it to the 1st Defendant. Counsel further contended that the Plaintiff had a grant in his possession hence the same should be considered as prima facie evidence of ownership in line with section 26(1) of the [Land Registration Act](#). Counsel argued that an allocation of property cannot override a duly issued title. It was Counsel's contention that the 1st Defendant had in his pleadings not challenged the Plaintiff's title as having been acquired fraudulently, unprocedurally or through a corrupt scheme. He submitted that for that reason any attempt by the 1st Defendant to lead evidence which implied that the title was obtained illegally or unprocedurally was contrary to the rule that parties are bound by their pleadings. He placed reliance on the case of *Richard Satia & Partners v Sichangi* (1997) eKLR where the Court of Appeal cited with approval the case of *Sande v Kenya Cooperative Creameries Limited* ( Civil Appel No. 154 of 1992. In the said case the Court of Appeal observed that:
- “...the only way to raise issues before a judge is through the pleadings and as far as we are aware, that has always been the legal position. We would endorse the well-established view that a judge has no power to decide an issue not raised before him ..... In our view the only way to raise issues before a judge is through pleadings and as far as we are aware that has always been the legal position”
48. Counsel further relied on the case of *Associated Electrical Industries Ltd v William Otieno* (2004) eKLR where the court upheld the position that parties are bound by their pleadings. He submitted that the Plaintiff having legally purchased the suit property and having been registered as the proprietor thereof became the absolute and indefeasible owner and he was entitled to enjoy the rights conferred to a proprietor as provided under section 24 (a) and 25(1) of the [Land Registration Act](#). It was his submission that the Plaintiff's right to the suit property had not been challenged in any forum and his rights are protected under the law. He submitted that the alleged allocation by the Municipal Council of Thika cannot override a duly issued title. He relied on the case of *Mambu Mbuvi Maingi & 15 Others v Kenya Education Management Institute & Another* (2014) eKLR where the court held that temporary letters of allocation of plots do not confer proprietary interests in a property.
49. Further in *Nairobi Permanent Markets Society & Others v Salima Enterprises & Others* (1997) eKLR the court held that:
- “The company as the registered proprietor of the suit land therefore is the absolute owner thereof. There is no allegation that the company was a party to any fraud or misrepresentation perpetrated upon the appellants in the acquisition of the suit land. There



is no averment in the plaint that the company had any knowledge or was a party to any irregularity in the transaction so the company's rights of ownership cannot be interfered with by the appellants".

50. Counsel submitted that by the time the defendant's school came into existence in 1996, and by the time the Municipal Council of Thika commenced discussion on the school in 2001, the suit property had already been alienated in 1991 and a grant issued in 1992. The land was therefore not available for allocation to any other party. He relied on *Republic v City Council of Nairobi & Another Exparte Christopher Mwangi Kioi & 3 Others* (2014) eKLR where the court held that:

"The applicants are challenging the decision of the Respondents to sub-divide a plot that was already in private hands. The Respondent had no authority to pass any resolution over the said plot and they also did not have the power to allocate the same to interested persons..."

Additionally, in *Josana Academy v David Otieno Ondeng & 4 Others* (2015) eKLR the court held that when the letter of allotment was issued to the plaintiff in 1999, the suit land was unalienated government land. Thereafter, the land could not be leased or allocated to somebody else as it was alienated land.

It was his contention that after the allocation of the suit land in 1991 and issuance of a title in 1992, any attempted allocation of the same by the Municipal Council of Thika was contrary to the law.

51. On encroachment of the suit property by the 1st Defendant, counsel contended that DW1 admitted during cross-examination that the school had built a wall around the suit property thereby enclosing the suit property within the school compound. Counsel added that the surveyor's report and the Commission's report also confirmed the same position.
52. On whether the Plaintiff is entitled to the reliefs sought, counsel submitted that the Plaintiff having demonstrated that he is the lawful and legitimate owner of the suit property and that the 1st Defendant has no proprietary right or interest over the same, was entitled to the reliefs sought against the 1st Defendant.
53. Counsel submitted that the Plaintiff stated that he had been denied use of the suit property since 2007 (sic) and that there was evidence that the 1st Defendant had been utilizing the suit property as a playground. Counsel further submitted that the Plaintiff gave evidence that prior to the encroachment, he had been utilizing the suit property to farm maize. Counsel added that the 1st Defendant had benefited from the suit property for a period of five years at the expense of the Plaintiff. He urged the court to award the Plaintiff Kshs 10,000,000 as damages for trespass and mesne profits.
54. Counsel further urged the court to award the Plaintiff punitive and exemplary damages given that the Plaintiff tried to engage the 1st Defendant before they encroached onto the suit property but the 1st Defendant ignored the plea and proceeded with the encroachment.
55. On costs, counsel relied on the principle that costs follow the event in urging the court to award costs of the suit to the Plaintiff.

### **Defendant's Submissions**

56. The 1st Defendant filed written submissions dated 17th January 2022 through Benson Njagi, Senior State Counsel at the Office of the Attorney General. Counsel identified only one issue for determination; whether the suit parcel is public land set aside for a public primary school and whether it was available for allocation for private use.



57. Counsel submitted that the minutes produced by the 1st Defendant showed that the suit property was part of the land that had initially been intended for a cemetery but was later converted to the construction of a public primary school. Counsel further submitted that the letter dated 6th September 2019 produced by the Plaintiff confirmed that the suit property was within the school. Counsel added that according to the 5th Defendant's report dated 28th November 2019, when the Municipal Council realized that the land set aside for the expansion of the school had been allocated, it recommended revocation of the said allocation.
58. Counsel relied on the case of *Norbixin Kenya Limited v The Hon. Attorney General*, HCCC No.1814 of 2002 where the court dismissed a claim for land that had been set aside for public purpose and held as follows:
- “The suit property having been set aside and planned as a police station for public use was held in trust by the Commissioner of Lands for the public and was not therefore available for further alienation or allocation. The allocation of the said property to the allottee and subsequent issuance of a title with respect to the property to the plaintiff was therefore irregular”
59. He further relied on the case of *Republic v Land Registrar Kilifi Ex-parte Daniel Ricci (2023) eKLR* where the court declined to grant the orders sought as the applicant was claiming land that had been set aside for a public utility.
60. Counsel contended that the 1st Defendant was rightfully allocated the suit property and it had been in possession of the same even before the Plaintiff purportedly acquired it from Mohamud Ali Saleh. Counsel further contended that the Plaintiff acknowledged that he had never taken possession of the suit property. Counsel added that the Plaintiff intentionally entered into a Sale Agreement with the full knowledge that the property in question was occupied by the school and that the seller was in no position to guarantee vacant possession of the suit property.
61. He relied on the case of *Benja Properties Limited v Mohammed Burhanudin Sahed & 4 Others (2015) eKLR* where the Court of Appeal observed as follows:
- “It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all can show no better right to seisin. Sesin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same against the appellant. The maxim is that possession is nine tenths ownership. As was stated by the Privy Council of Ghana in *Wuta Ofei v Danqua (1961) All EE 596 at 600*. The slightest amount of possession would be sufficient”.
62. In conclusion, counsel submitted that the suit parcel was part of the land set aside for a public purpose, specifically, the construction of a public school therefore the Plaintiff was not entitled to the reliefs sought.

### **Analysis and Determination**

63. I have considered the parties' pleadings, witness statements, the oral evidence adduced in court and the documents produced in support of their cases. The following issues are for determination:
- a. Whether the suit property is public land set aside for a public primary school and whether it was available for allocation for private use.
  - b. Whether the Defendant has trespassed on the suit property.



- c. Whether the Plaintiff is entitled to the orders sought
64. It is not in dispute that the Plaintiff is the registered proprietor of L.R No. 4953/1959. Section 26 (1) of the *Land Registration Act*, 2012 provides that:
- S.26 Certificate of title to be held as conclusive evidence of proprietorship
- (1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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 title has been acquired illegally, unprocedurally or through a corrupt scheme.
65. The above legal provisions mean that once a person is registered as the owner of a parcel of land such registration confers upon him or her absolute rights of ownership which can only be challenged if it is demonstrated that the person obtained the title fraudulently, illegally, unprocedurally, through misrepresentation or by way of a corrupt scheme. Furthermore, Article 40 of *the Constitution* protects the right to property unless the said property is shown to have been unlawfully acquired in which case Article 40(6) takes away such protection. The onus of proving that one holds a bad title lies on the person who alleges that the title is bad.
66. In the instant case, the Plaintiff produced a Grant registered under the Registration of Titles Act (repealed) for a term of 99 years from 1.1. 1991. The title was initially registered in the name of Mohamud Ali Saleh on 17th December 1992 before it was transferred to the Plaintiff on 17th June 2008. The Plaintiff produced a letter of allotment issued by the Commissioner of Lands to Mohamud Ali Saleh on 16.1.1991. He also produced a sale agreement dated 14th March 2008 between himself and the said Mohamud Ali Saleh which indicates that he bought the suit property at an agreed purchase of Kshs. 300,000.
67. The plaintiff stated that when he bought the land it was vacant and he fenced it as he planned to develop it. However, this did not happen as the Defendant school constructed a perimeter wall confining the suit property in the school compound thus making it difficult for the plaintiff to utilize it.
68. The Plaintiff testified that he lodged a complaint with the National Land Commission which carried out investigations and prepared a report. In the said report the National Land Commission acknowledged that the Plaintiff was the registered owner of the suit property having purchased the land from Mohammed Ali Saleh, the original allottee on 17.6.2008. The report further confirmed that the school was in occupation of the suit property although there was no formal allocation of the land to the school. The report noted that the Municipal Council of Thika had resolved in 2001 that the suit land be allocated to the school. The entire land on which the school sits was still unsurveyed at the time the National Land Commission prepared its report. The National Land Commission concluded that the dispute affecting Umoja Primary School was as a result of double allocation of land occasioned by the office of the Commissioner of Lands on one hand and the Municipal Council of Thika on the other hand. The Commission noted that there had been no consultation between the two offices with



regard to allocation of the land in question. It was recommended that the grant held by the Plaintiff be reviewed to establish its propriety.

69. From the evidence on record it is not in doubt that the suit property was alienated for private use in 1991 way before the defendant school came into existence in 1996. Under the provisions of the Government Lands Act (repealed) the Commissioner of Lands had the power to allocate unalienated government land to individuals. Once such land was alienated, it became private land that was not available for alienation to any other entity. Even if the court was to consider the unauthenticated minutes of the Municipal Council of Thika which purportedly proposed that the suit property be reserved for expansion of the school, could the Municipal Council allocate land that had already been allocated by the Commissioner of Lands before revoking the titled issued pursuant to the allocation by the Commissioner of Lands? The answer is in the negative.
70. In the case of Republic V City Council of Nairobi & Another ex Parte Christopher Mwangi Kioi & 3 Others (2014) eKLR where the City Council of Nairobi purported to allocate a plot which was already allocated, Justice Odunga held as follows:

“The applicants are clearly challenging the decision of the respondents to sub-divide a plot that was already in private hands. The respondent had no authority to pass any resolution over the said plot and they also did not have powers to allocate the said to the interested parties or any other person. The plot was already private land at the time the respondent purported to sub-divide it. They had not acquired the plot through compulsory acquisition as provided by the law.

..... Warsame J (as he then was) was in the case of Rukaya Ali Mohamed v David Gikonyo & Another Kisumu HCCA No 9 of 2004 confronted with a situation in which the Municipal Council of Kisumu had issued allotment letters for the same parcel of land to two people. Confirming that the first allotment was the one recognized by the law, he stated:

“It is my view that the suit plot was alienated on 27th April 1998 and the plaintiff having complied entirely with the provisions of the offer, it was not available for my subsequent allocation and no benefit could be derived from any such allocation thereafter ..... If there is no challenge to its validity then the said plot became alienated and was not subject to subsequent alienation by giving another letter of allotment. The plaintiff acquired a legal interest which could not be defeated by a subsequent alienation of the plot that was not available to the defendant and he can claim no title or interest in that illegal allotment.”

Similarly in the instant case by the time the Municipal Council of Thika purported to allocate the suit property to Umoja Primary school, it was not available for allocation.”

71. In its Defence the Defendant did not seek to nullify the Plaintiff's title although it claimed that the suit land is public land which belonged to Umoja Primary School. In support of its claim the school's head teacher produced an excerpt of what he claimed were minutes of a meeting of the Municipal Council of Thika which bear no date or signature. In the said minutes it is stated that the site that was reserved for the expansion of Umoja Primary school had been allocated to private developers for residential use. The parcel number and size of the that land that was purportedly allocated to private developers is not disclosed. More importantly, there is no mention of the suit property in the said minutes. The Defendant did not produce any letter of allotment to show that the suit property was allocated to it. Indeed, apart from the resolution in the unsigned and undated minutes of the Municipal Council of



Thika, there was no formal document produced by the defendant to prove that it was entitled to the suit property.

72. If the Defendant wanted to prove that the suit property belongs to the school, they would have at the very least produced an allotment letter or a Part Development Plan to show that the suit property was reserved for the expansion of the school. Mere allegations that the school was in occupation of the suit land and that the perimeter fence on the suit property was constructed with funds from Juja Constituency Development Fund is not proof that the land belongs to the Defendant. It is surprising that even after the National Land Commission recommended that the Plaintiff's Grant be reviewed, no follow up was made by the relevant government offices.

73. In the case of *Isaac Gathangu Wanjohi & Another v Attorney General & 6 Others (2012) eKLR* Majanja J observed as follows:

“I also hold that the finding of unlawful acquisition referred to in Article 40 of *the Constitution* must be through a legally established process and not by whim or revocation of the Gazetted notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. Thus as was held in the case of *Kuria Greens Ltd v Registrar of Titles & Another (supra)* it must follow that the purported revocation of title L.R 209/2052 by way of Gazette Notice is illegal and of no effect. In my view it does not matter that there was a Working Group which made certain recommendations regarding nullification of titles. While such a Task Force may make recommendations such recommendations do not have the force of law. And the fact that there was a consultative process cannot substitute for due process in taking away the Petitioner's title by way of Gazette Notice. *The Constitution* requires that a finding of unlawful acquisition be done through a process established by law”

74. I concur with the above decision. The resolution by the Municipal Council that the suit property be allocated to the school, followed by construction of a perimeter wall on the suit property without following due process to have it registered in the name of the defendant cannot be sanctioned by the court.

75. It will be noted that on 3.7.2023 the court on its own motion and pursuant to the provisions of Order 1 Rule 10(2) of the Civil joined the County Government of Kiambu, the Director General of Physical Planning, the Director Land Administration in the Ministry of Land and Physical Planning, the National Land Commission, the Cabinet Secretary of Education and the Attorney General as the 2nd to 7th Defendants in this suit in order to effectually and conclusively determine the issues in dispute.

76. However, in a surprising turn of events, the Attorney General's office failed to enter appearance or file a defence for the 3rd, 4th, 6th and 7th Defendants despite being given ample time to do so. The County Government of Kiambu equally failed to enter appearance. While the National Land Commission entered appearance, they did not file any documents. Granted that no reliefs were sought against the said defendants in the Amended Plaint, their participation in the proceedings would have aided the court in understanding whether indeed the suit property was reserved for public use. This case brings home the dilemma faced by courts when confronted with a situation where those charged with the responsibility of protecting public land abdicate their role. In the absence of such crucial evidence, the court is unable to arrive at the finding that the suit property is public land. On the other hand, the Plaintiff has proved that he is the registered proprietor of the suit property. Unlike the case of *Norbixin (supra)* where the Defendant adduced sufficient evidence including a development plan to demonstrate that the suit property was reserved for a public purpose, no such evidence has been placed before the court in this case.



77. I will now move on to the next issue which is whether the Defendant has trespassed onto the Plaintiff's land. It is not in doubt that the Defendant has erected a perimeter wall in the school that confines the Plaintiff's land within the school compound. In his evidence that head Teacher of Umoja Primary School stated that the wall was constructed in 2011 on what he believes is the school's property with funds from the Constituency Development Fund. An aerial photograph of the suit property taken by a surveyor instructed by the National Land Commission at page 37 of the Plaintiff's trial bundle confirms this.
78. Clerk & Lindell on Torts defines trespass as
- “An unjustifiable entry by one person upon the land in possession of another. Removing any part of the land also constitutes trespass.”
79. I must point out that even though the Plaintiff has not been able to take physical possession of the land, I have found that he is the lawful registered proprietor thereof. Consequently, it is my finding that the defendant school has trespassed onto the plaintiff's land.
80. I will now determine whether the plaintiff is entitled to the reliefs sought in his plaint. The plaintiff seeks declaratory and injunctive orders as well as general, punitive and exemplary damages. I have already found that the Plaintiff is the registered proprietor of the suit land and that the Defendant school has trespassed into the Plaintiff's land. The plaintiff's reliefs would ordinarily flow from the aforementioned findings. However, I have agonized over the implications of mechanically granting the said reliefs without bearing in mind the serious ramifications this would have on the right to education for the pupils of Umoja Primary School and the people of Thika West Sub-County at large, particularly the many families in the informal settlements whose children go to the said School.
81. I note that in his evidence the Plaintiff indicated that he was willing to settle this matter through ADR and the only reason he filed suit is because the Head teacher of the Defendant's school was reluctant to settle the matter through ADR. Given the fact that Umoja Primary School is a public school serving a large population of pupils from informal settlements, the wider interests of justice would be served if the parties were given a chance to revisit the possibility of reaching an amicable settlement. The court will therefore grant the parties a period of 12 months to engage in negotiations in good faith on how the suit school can lawfully acquire the suit property upon just compensation to the Plaintiff so that there is no disruption of education of the pupils in the said school and an eviction order and the other reliefs will only issue if no agreement is reached.
82. Regarding general damages, it is trite law that the same are payable upon proof of trespass. A successful litigant is however entitled to recover only nominal damages unless he has suffered actual loss which must be proved. I therefore award a nominal sum of Kshs. 300,000/=.
83. As no basis was laid for exemplary and punitive damages, I shall make no award in that regard.
84. In the final analysis I find that the Plaintiff has proved his case on a balance probabilities and I enter judgment for the Plaintiff and make the following final orders:
- a. A declaration is hereby issued that the Plaintiff is the lawful, absolute and indefeasible proprietor of the suit property herein known as Land Reference No. 4953/1959.
  - b. A declaration is hereby issued that the defendant, the Defendant's school, agents, servants, employees and/or anyone else claiming to act under the instructions or authority of the Defendant have no proprietary right, interest and/or valid claim over land Reference No. 4953 and the access roads serving the same.



- c. The Plaintiff is entitled to obtain vacant possession of Land Reference No. 4953/1959 from the defendant, the Defendant school, the Defendant's agents, servants employees and/or anyone else claiming to act under the instructions or authority of the Defendant within a period on 12 months should there be no amicable settlement.
- d. The Defendants shall remove the perimeter wall and any other structures erected on or encroaching on the suit property and its adjacent access roads and vacate the suit property within a period of 12 months.
- e. In default of compliance with the court order issued pursuant to prayer (d) above, the Plaintiff shall be at liberty to remove the perimeter wall and any other structures erected on or encroaching on Land Reference No. 4953/1959 as well as its adjacent access roads and evict the Defendant, the Defendant school, the Defendant' agents, servants, employees and/or anyone claiming to act under their instructions or authority from Land Reference No. 4953/1959.
- f. In the event of an eviction, a permanent injunction shall issue restraining the Defendant. the Defendant school, the Defendant' agents, servants, employees and/or anyone claiming to act under their instructions or authority from encroaching, wasting, damaging, trespassing, building, alienating, disposing of, selling or in any other way interfering with Land Reference No. 4953/1959 as well as its adjacent access roads.
- g. Kshs. 300,000 general damages for trespass.
- h. The Defendant shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF MARCH 2025.**

.....

**J. M ONYANGO**

**JUDGE**

In the presence of:

- 1. Mr Mutinda for the Plaintiff.
- 2. Miss Nyawira for the Defendant

Court Assistant: Hinga

