



REPUBLIC OF KENYA



Lanet Hill Company Limited v School Management Committee Lion Hill Primary School & another (Civil Suit 54 of 2016) [2023] KEELC 20098 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL SUIT 54 OF 2016
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

LANET HILL COMPANY LIMITED PLAINTIFF

AND

**SCHOOL MANAGEMENT COMMITTEE LION HILL PRIMARY
SCHOOL 1ST DEFENDANT**

**BOARD OF MANAGEMENT HILLCREST SECONDARY SCHOOL 2ND
DEFENDANT**

JUDGMENT

Introduction

1. The plaintiff commenced this suit *vide* a plaint dated February 24, 2016 and amended on May 30, 2018. In the amended plaint, it is its averment that it is the registered owner of all that parcel of land known as LR No 20289 (IR 65176) as per certificate of title registered on January 13, 1995 and the parcel of land is located within Nakuru County at Lanet. That as a registered owner, it is entitled to the said parcel of land to the exclusion of everybody else unless the plaintiff consents or authorizes any other person to use or occupy the said parcel of land. That the ownership of its said parcel of land is protected under article 40 of [Constitution](#). The plaintiff took possession of the said parcel of land and subdivided it and allotted plots to its members who also took possession thereof.
2. The plaintiff contends that in 1993, the Municipal Council of Nakuru illegally took possession of the said parcel of land and constructed Lion Hill Primary School thereon. That the plaintiff and some of its members instituted civil case No 90 of 1993 in the High Court at Nakuru against the Municipal Council of Nakuru and other defendants to recover the said parcel of land. The plaintiff avers that while the said suit was pending the Municipal Council of Nakuru constructed Hill Crest Secondary School upon the said parcel of land in the year 2003. The plaintiff contends that none of the defendants has ever enjoyed peaceful, uninterrupted and or exclusive of occupation of the suit land and accordingly



- none of them has or can claim any colour of right to the suit land and are accordingly trespassers thereon.
3. It's the plaintiffs averment that its claim against the defendants for recovery of its property and the plaintiff seeks an eviction order to issue against the defendants and for a permanent order of injunction restraining them from entering, remaining thereon or in any other way dealing with or interfering with the parcel of land LR No 20289 (IR 65176) in the alternative the plaintiff seeks compensation from the defendants at the current market value of the said property of Kshs 220,000,000/=. The plaintiff avers that it has incurred a fee of Kshs 200,000/= for conducting a valuation of the suit property.
 4. The plaintiff prays for judgement to be entered against the defendants for:
 - a. A declaration that the plaintiff is the bonafide and legal owner of the parcel of land known as LR No 20289 (IR 65176)
 - b. An order that the defendants vacate the parcel of land known as LR No 20289 (IR 65176). In the alternative an order that the defendants do compensate the plaintiff at the current market value of the suit property of Kshs 220,000,000/=
 - c. General damages
 - d. Special damages
 - e. Mesne profits
 - f. A permanent order of injunction restraining the defendants from entering, remaining thereon or in any other way dealing with or interfering with the parcel of land LR No 20289 (IR 65176)
 - g. Costs of this suit plus interest.
 5. The defendants filed their amended statement of defence and counter claim dated April 18, 2019. The defendants state that the 1st and 2nd defendants are the lawful owners of land parcel No LR No 20289 (IR 65176) and that the same had been set aside by Lanet Hill Company for public utility and surrendered to the government accordingly. The 1st and 2nd defendants state that it has been in occupation of the suit parcel since the year 1985 when the 1st defendant was established and that the right to protection of property envisaged under article 40 is only limited to property acquired lawfully. The defendants admit that the Municipal Council of Nakuru constructed the buildings of the 1st and 2nd defendants in the stated years but denies that it illegally took possession of the said parcel of land. The defendants further state that they are strangers to civil case No 90 of 1993.
 6. The 1st and 2nd defendants state that the plaintiff has No color of right to seek eviction since they are not the lawful owners having surrendered the suit land to the government for public utility. The defendants deny having received any notice of intention to sue from the plaintiff. In their counterclaim, the defendants state that the plaintiff's title is a sham and was not obtained legally and thus cannot confer any proprietary rights or ownership on the plaintiff.
 7. The defendants state that the suit parcel was not available for sale, allocation, alienation or registration in favor of the defendant as the same had been reserved for construction of primary school and is owned by the Government of Kenya. The defendants in their counter claim claims that the plaintiff was formed merely or the purchase and subdivision of property to its members and once it was done with that it ceased trading in 1981.
 8. The defendants in their counterclaim further state that if the plaintiff owns any title of the property then the same was acquired irregularly, illegally, fraudulently and unlawfully and thus avers that such



irregular title should be recalled by the chief land registrar and cancelled without any compensation to the plaintiff. The defendants aver that the plaintiff acquired the title irregularly aware that it was public property and was not meant for private development or use having surrendered the same to the government for public utility. The defendant lists the particulars of fraud, illegality, bad faith on the part of the defendant as;

- a. Fraudulently acquiring title documents in respect of the suit property without due regard of the law;
 - b. Misrepresenting facts that it is a purchaser for value;
 - c. Misrepresenting facts to the registrar of titles that they were lawful owners of the suit parcel;
 - d. Obtaining a title of land parcel No LR No 20289 (IR 65176) knowing very well that the same had been set aside for public utility.
9. The defendants also aver that it is in the interest of the public that the parcel of land meant and was set aside for the construction, expansion and use for the schools be left as such and the school continue enjoying quiet possession of the parcel of land. The defendants pray for judgement against the plaintiff's in the counterclaim for;
- a. An order of permanent injunction against the plaintiff from possession and/or ownership of any part of the suit parcel that was set aside for public utility;
 - b. A declaration that land parcel LR No 20289 (IR 65176) belongs to the government of Kenya and was set aside for the construction of a school;
 - c. An order that the plaintiff do surrender the title deed issued to the defendant in respect to LR No 20289 (IR 65176) to the chief land registrar immediately for cancellation.
 - d. Costs of the suit
 - e. Any other relief the court deems fit to grant.

Factual Background

10. The suit came up for hearing on March 15, 2023 with the legal counsels for the plaintiff and defendant both being present.

Rival Submissions

11. The plaintiff filed submissions on March 22, 2023. The plaintiff identifies the following issues for determination:
- a. Whether or not the plaintiff surrendered the land occupied and developed by the defendants for public purposes;
 - b. Whether the registration and issue of the title to the plaintiff was illegal, irregular and fraudulent and therefore liable to be cancelled;
 - c. Whether the plaintiff has proved its case on a balance of probabilities and
 - d. Whether the defendants have proved their counterclaim
12. It is the plaintiff's submission that on whether the suit is res judicata, the parties are bound by their pleadings. They submit that the defendants having withdrawn the notice of preliminary objection dated August 3, 2017 and having failed to raise the issue of res judicata in their pleadings, the defendants



- are estopped from raising the issue at the submissions stage. It is the plaintiffs submission that the defendants pleaded that they are strangers to civil suit No 90 of 1993. The plaintiff relies on judicial decision of *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] Eklr to submit that the court only determines issues which have been pleaded and ours is an adversarial system and the court should only make a finding on issues pleaded by the parties.
13. The plaintiffs submit that the suit is not *res judicata* and rely on section 7 of the *Civil Procedure Act* and submit that the doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
 14. The plaintiffs submit that a party raising res-judicata must satisfy the doctrines five essential elements which are stipulated in conjunctive as opposed to disjunctive terms.
 15. It is the plaintiff's submission that the doctrine will apply if it is proved that;
 - i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim
 - iii. That those parties were litigating under the same title
 - iv. That the issue in question was heard and finally determined in the former suit
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
 16. The plaintiff submits that its understanding of suit No 90 of 1993 is that that suit was filed by the members of the plaintiff against its former directors and the Municipal Council of Nakuru claiming compensation for unlawful eviction from their land. It is their submission that the defendants herein were not a party to that suit.
 17. It is the plaintiff's submission that the issues raised therein are not directly in issue in the instant suit as the former case involved the members and their directors over the allocation of their properties which are not in issue in this case and the parties in the formers suits and in the current suit are different. It is the plaintiffs submission that the doctrine of *res judicata* is not applicable to this case.
 18. On whether or not the plaintiff surrendered the land occupied and developed by the defendants for public purposes, the plaintiff submits that it is the defendants case that the suit property was surrendered by the plaintiff to the government as public utility. The plaintiff submits that it is adamant that the suit property belongs to it and that it was never surrendered as a public utility. The plaintiff submits that it produced a title to the property and further a letter dated January 9, 2014 by the former Lands Cabinet Secretary that the land belongs to the plaintiff. The plaintiff relies on section 107, 108 and 109 of the *Evidence Act*.
 19. The plaintiff submits that the burden of proof befalls upon the defendants to prove that the land was surrendered. The plaintiff also submits that going through the evidence of the defendants, they have not demonstrated how the suit property was surrendered and the only documents produced are the allotment letter issued to the 2nd defendant and a letter dated January 1, 1990 written by the plaintiff.
 20. The plaintiff submits that the only document close to a deed of surrender is the letter dated January 1, 1990. It is the plaintiffs submission that however this letter does not show the addressee and it does not make reference to either any of the defendants or the Municipal Council of Nakuru or any government



entity. It is the plaintiffs submission that this letter does not amount to a deed of surrender and there is no evidence of the surrender of the suit property by the plaintiff to the defendant.

21. The plaintiff submits that it indeed in fact surrendered part of its property as per the *Physical Planning Act*, to the government for purposes of construction of Madaraka Primary School. It is its submission that as confirmed by the defendant's witness, this school is in fact in operation and is only 300m- 500m away from where the defendants institutions are situated.
22. The plaintiff further submits that the 2nd defendant relied on the allotment letter issued by the Commissioner of Lands in the year 1998 and question how was the allotment letter issued in the year 1998 when a title had been issued in the name of the plaintiff in the year 1995. It is their submission that the land was not available for allocation since it was already a registered land and a title issued.
23. It is the plaintiffs submission that it will be seen from the letter of allotment that the land allocated to the 2nd defendant is unsurveyed plot, yet the land is already demarcated. The plaintiff also submit that no allotment letter was produced in respect to the 1st defendant. It also submits that no deed of surrender was produced and there is no evidence at all that the 1st defendant was allocated the land in which it is occupying. The plaintiffs submit that the suit property was never surrendered as a public utility.
24. On whether the registration and issue of the title to the plaintiff was illegal, irregular and fraudulent and therefore liable to be cancelled, the plaintiff relies on the Court of Appeal case *Embakasi Properties Limited & another v Commissioner of Lands & another* [2019] Eklr
25. The plaintiff submits that the pertinent issue that court must address is whether there was proof of the allegations made by the defendants that the title of the plaintiff was obtained fraudulently or by misrepresentation thereby tainting the plaintiff's title. It is the plaintiffs submission that the court in doing so should bear in mind that the standard of proof of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt but something more than a mere balance of probabilities. The plaintiff relies on the Court of Appeal case of *Pankajkumar Hemraj Shah & another v Abbas Lali Ahmed & 5 others* [2019] Eklr.
26. The plaintiff submits the question is whether as at January 1, 1995 when the title was issued to the plaintiff, the land was available for allocation and the onus was on the defendants to provide proof that the land had already been allocated. It is the plaintiffs submission that the defendants did not produce any green card, white card or the register of the suit property to show the history of the land. The plaintiffs submit that the land had not been surrendered to the defendants as no deed of surrender was produced.
27. The plaintiff submits that the defendants enumerated 4 particulars of fraud and none of the particulars have been proved by the defendants. The plaintiff submit that the defendants have failed to show how the plaintiff disregarded the law in acquiring the title.
28. The plaintiff submits that the defendants have not shown and/or demonstrated how the plaintiff participated in any fraud or illegality.
29. On whether the plaintiff has proved its case on a balance of probabilities, the plaintiffs sought for judgment against various orders. The plaintiffs submit that from the evidence tendered, it is clear that the plaintiff is the registered owner of the land and the allegation of fraud, illegality and/or misrepresentation have not been proved. It is its submission that there was no evidence of deed of surrender of the suit property to the government.



30. The plaintiff submits that section 24 and 25 of the *Land Registration Act* confer a registered owner of a property all rights and privileges belonging or appurtenant thereto and those rights cannot be defeated except as provided in law and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever and the rights should be enjoyed by the plaintiff herein.
31. The plaintiff submits that the title produced by the plaintiff has not been challenged, neither has it been proved that the plaintiff obtained it by fraud or misrepresentation to it was a party or that the certificate of title was acquired illegally, un procedurally or through a corrupt scheme. It is its submission that prayers a, b, and e of the amended plaint have thus been proved by the plaintiff.
32. The plaintiff submits that the defendant's institutions are operational and the plaintiff has proved that it is the registered owner of the suit property and the court may order that the plaintiff be compensated.
33. The plaintiff submits that it filed a valuation report dated May 11, 2017 and in the report, the valuer valued the suit property at Kshs 220,000,000/= . It is its submission that the value is on the 11.366 acres only and not the developments thereon. The plaintiff submits that this valuation report has not been challenged by the defendants and it was produced by consent. The plaintiff asks the court to adopt the report and base its assessment of the value on the report.
34. The plaintiff submits that on special damages of Kshs 200,000/= paid to the professional valuer, it is trite law that special damages must be pleaded and specifically proved. It is its submission that this was pleaded under paragraph 9 (a) of the amended plaint and the same was proved by way of a receipt produced in court and which was not challenged by the defendants.
35. On general damages and mesne profits, the defendants submit that when trespass has been proved then it is actionable per se and the court is therefore under a duty to assess the damages that can be awarded. The plaintiff relies on the case of *David Kimugun v Benjamin Tuwei & another* [2019] Eklr and urges the court to award a sum of Kshs 5,000,000/= as general damages for trespass.
36. On whether the defendants have proved their counterclaim the plaintiff submits that the defendants did not give any evidence as against the plaintiff to warrant cancellation of title. It is its submission that the case by the defendants is basically hinged on the surrender of land by the plaintiff to wit they did not provide any evidence and fraud which they have not provided any evidence either.
37. The plaintiff submits that the defendants counterclaim has not been proved and thus should be dismissed.
38. The defendants filed submissions dated April 11, 2023 and identified the following issue for determination:
 - a. Whether the suit is time barred?
 - b. Whether the plaintiff acquired their title procedurally and whether the suit property is public land?
 - c. Whether there was proper authority to institute the suit?
 - d. Whether the plaintiff is entitled to the reliefs sought; and
 - e. Whether the defendants (plaintiff in the counterclaim) have proved their case on a balance of probabilities?



39. On whether the suit is time barred, the defendants submit that it is trite law that all actions for recovery of land ought to be brought before the end of twelve (12) years from when the cause of action arose and this has clearly been stipulated by the *Limitation of Actions Act* under section 7. The defendants submit that the plaintiffs suit against the 1st and 2nd defendants is time barred and that the entire suit against them should therefore be dismissed.
40. The defendants submit that these arguments are based on the alleged illegality that was carried out in 1993 by the defunct Municipal Council of Nakuru when it took possession of the parcel of land known as LR No 20289 (IR 65176) and constructed Lion Hill Primary School and later Hill Crest Secondary School; schools represented by the 1st and 2nd defendants respectively. The plaintiff stated that it was the registered owner of the said parcel as per the certificate of title registered on January 13, 1995 and this is approximately two (2) years from the time the 1st defendant was allocated the land.
41. The defendants submit that the plaintiff filed this suit through a plaint dated February 24, 2016 which was later amended on May 30, 2018 and going by the plaint, the suit was time barred since it was instituted twenty-three (23) years after the alleged cause of action arose.
42. The defendants rely on the cases of *Justus Tureti Obara v Peter Koipetai* (2014) Eklr and *Njeri Muranja & John Muranja Mabinda v Virginia Ndiba & Kajiado County Government* (2014) eKLR
43. The defendants submit that it is not difficult to determine when the operation of limitation came into play. They submit that it is clear that the cause of action against the 1st and 2nd defendants arose in the year 1993 and 2003 when their respective schools were constructed and thus that it is when the time for the recovery of the suit parcel started running.
44. The defendants submit that there is no doubt that the period of over 12 years has lapsed since the 1st and 2nd defendant's schools were constructed on the suit parcel of land hence making this suit time barred and no leave to file suit out of time outside the 12 year period has been exhibited before this honourable court neither does this suit fall within the ambit of section 26 of the *Limitation of Actions Act*, cap 22 Laws of Kenya where a suit can be brought outside the 12 years period to recover land as there is no fraud alluded to by the plaintiff.
45. The defendants urge this court to dismiss this suit. The defendants submit that the ruling by Justice Mutungi on September 23, 2021 on the PO filed in this matter (ELC 54/2016) at paragraph 8 explains why the PO has been rejected. The issue had to go to trial and formal evidence adduced and the same having taken place, the defendants urge the court to find that the PO is merited and that the suit is time barred.
46. On whether the plaintiff acquired their title procedurally and whether the suit property is public land, the defendants rely on the judgement of Nakuru HC civil case 90 of 1993 at pages 9 and 10 and also 12 (para 2) and 13 (para 1) which concluded that the suit property was willfully surrendered to the defunct Municipal Council of Nakuru and subsequently Lanet Hill Primary School was constructed and the plaintiff never appealed on the same.
47. The defendants submit it is therefore res-judicata to litigate on the same issues that were dealt with by a court of competent jurisdiction.
48. The defendants also submit that the judgement in Nakuru HC civil case 90 of 1993 was delivered on May 9, 2008 and regardless of the plaintiff (Lanet Hill Co) having the title issued in 1995 as alleged, the court held that the suit property had been willfully surrendered to the defunct Municipal Council of Nakuru still till date the plaintiff has never appealed (15 years later). Additionally, the plaintiff has not



claimed that the Municipal Council of Nakuru failed to compensate the plaintiffs whose properties had been destroyed as per the orders in Nakuru HC civil case 90 of 1993.

49. The defendants submit that it is important to note that two current directors (Charles Wachiuri and Philip Maina) were plaintiffs in Nakuru HC civil case 90 of 1993 thus if aggrieved they would have appealed. It is the defendants submission that the court stated that the law on fraud and indefeasibility of title has been settled and that the court specifically referred to the law as stated in the case of *Dr Joseph Arap Ngok v Justice Moijo Ole Keiwua & 5 others* Nai civil appeal No 60 of 1997. The defendants submit that according to the information contained at the land registry, the subject land LR No 20289 was part of a private land belonging to the Lanet Hill Company. However, the defendants stand by the fact that it was surrendered to MCN.
50. The defendants submit that Lion Hill Park Primary School was established on the parcel of land LR No 20289 which was done through a surrender by the Managing Director and later affirmed by the shareholders in a meeting cited to have occurred on November 11, 1982 as upheld by court on May 9, 2008.
51. It is the defendants submission that they have produced a letter of allotment dated the January 1, 1990 and hence the plaintiff is estopped from claiming that the defendants are trespassers and hence the only logical conclusion is that they acquired their title to the suit property through fraudulent means.
52. The defendants submit that the directors of the plaintiff in the main suit are not the ones who allocated land for the school (1st defendant). They are just misinformed and have come to court in bad faith, disregarding the noble cause that their predecessors had envisioned and actualized.
53. It is the defendants submission that PW1 claims that the intention behind seeking to have the defendants evicted is to give remaining shareholders their parcels of land. However, no names were given of the shareholders they claim did not get their parcels of land and also none of the alleged shareholders testified to support those assertions.
54. The defendants submit that PW1 is the current chairman of the plaintiff (as per his testimony) and the consenting directors are only following up for selfish gain. The defendants also submit that PW1 in exam- in chief indicated that he was just a member of the plaintiff but in cross-exam he indicated that he was the chairman which makes it difficult to establish if he was telling the truth.
55. It is the defendant's submission that nevertheless, it was PW1's admission that the plaintiff has concluded its objectives. The defendant's refer to page 2 of the May 9, 2008 judgment and paragraph 1 indicates that the members who were left landless constructed their houses on the land set aside for public utility and therefore it is not true that there are still members who have not received their shares.
56. The defendants submit that the plaintiff acquired the title irregularly aware that it was public property thus not meant for private development or use having surrendered the same to the government for public utility. It is the defendants submission that the plaintiff has not denied being aware of the orders granted in civil case No 93 of 1993. They submit public schools in the past were not being issued with title deeds/certificate of lease until recently that the same is being done with the assistance of NLC. It is the defendant's submission that the plaintiff knowing the situation acquired title to this land knowing well that they omitted material facts from the Chief Land Registrar and it is not in contention that the suit property initially belonged to the plaintiff (Lanet Hill Company) and what is in contention is whether the plaintiff surrendered land to the Municipal Council of Nakuru for construction of the 1st defendant. However, the defendants rely on this court to protect the institutions from sheer greed by the plaintiff.



57. The defendants submit that at page 7 of the judgment in Nakuru HC civil case 90 of 1993, the issue of Madaraka Primary School was raised but still, the court held that the Lions Primary School was constructed on land willfully surrendered to MCN.
58. The defendants reiterate the particulars of fraud in the counterclaim and submit that the plaintiff holds title from land that is already public land and as such it holds a bad title and therefore any subsequent transactions to that land were null and void. The defendants rely on the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) Eklr and submit that the plaintiff's title over the suit property was unlawful *ab initio* and that under article 40 (6) of *Constitution*, the plaintiff cannot enjoy property rights over the same as was indicated in the case of *Republic v District Land Registrar, Mombasa & 5 others Ex-Parte Super Nove Properties Ltd* [2016] Eklr.
59. The defendants submit that public interest is in favour of the cancellation of the title held by the plaintiff since the suit property was surrendered for public purposes. The defendants implore this honourable court to find that the defendants have proved their case that the plaintiff's title of the suit property was illegal, fraudulent, null and void and conferred no interest in the plaintiff and that in any event it is in the interest of justice and public policy that the remedies sought by the defendants be granted as prayed.
60. On whether there was proper authority to institute the suit, the defendants rely on order 4 rule 1 (4) of the *Civil Procedure Rules 2010* to the extent that the resolution filed authorizing Peter Njunge Waweru to swear the verifying affidavit is not signed by the directors.
61. The defendants quote the provision of order 4 rule 1 (4) and further rely on the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] Eklr.
62. The defendants submit that during cross-examination, Mr John Mathew Mugo who was the plaintiff's witness alluded to the fact that only five directors consented and produced no evidence to back his allegation that the 6th director doesn't attend meetings hence imputing doubt on the authority to institute this suit by the company which is a legal personality on its own.
63. The Defendants submit that as per PExb 8, the Directors are five (5) but as per Pexb 2- letter from the Registrar of Companies, the directors are six (6) and no logical explanation was included in the resolution as to why Philip Ndegwa Njoroge was never part of the meeting that made the resolution to institute and defend this suit which was filed less than a year after the current directors assumed office.
64. The defendants also submit that no evidence was adduced to show that the MEMARTS of the plaintiff provided that the 6th director could be disregarded in terms of consenting to the suit being instituted. Notably, the suit was instituted less than a year after the current directors took office.
65. The defendants submit that it is shocking that PW1 could tell the court that he is not aware of when the company elections were held. They submit it is difficult to believe this and seems like PW1 did not want to disclose to the court that they had not had elections for over five (5) years since they took over in 2015 and it is now 2023 and this puts the integrity of PW1 to question on whether they are legally in office.
66. The defendants submit that the plaintiff has not adduced any evidence to support the prayer on special damages. They submit the valuation report produced in support of the alternative prayer in para 9 of the amended plaint on compensation at market value, the valuation has been set at Kshs 220,000,000. They submit, page 3 of the report indicates that the inspection date was May 9, 2017 and the suit property is situated on the outskirts of Nakuru Town. They submit it further states that the property was improved with two schools but the valuers disregarded the improvements for purposes of the



report but indicates that the market value of this unencumbered leasehold title interest was Kshs 220,000,000

67. The defendants submit if at all the plaintiff would be entitled to compensation, which is denied, the suit property cannot in any way be valued at Kshs 220,000,000/=. The defendants submit this valuation is extreme noting that it does not include improvements as at 2017. They also submit that nowhere in the amended plaint has the plaintiff indicated that Kshs 220,000,000 is for land, general and special damages. This figure comes in at the valuation report only so whatever math they have done is incorrect.
68. In whether the defendants (plaintiffs in the counterclaim) have proved their case on a balance of probabilities, the defendants submit that they have proven their case on a balance of probabilities in fact way beyond the minimum threshold.
69. The defendants submit that they have been able to show this court that the suit property was willfully surrendered to the then Municipal Council of Nakuru leading to the construction of the 1st and 2nd defendant and the two schools being fully operational to the benefit of the local community and that no member of Lanet Hill Company is still landless. The company never stopped the construction of either of the two schools and additionally, the suit property in No 90 of 1993 is LR No 20289 thus para 1 of the ruling dated June 3, 1998 has a typing error for referring to the suit property as LR 12249 and the court in this ruling dismissed the application to stop the construction as argued in page 2 para 2 of the said ruling.
70. The defendants rely on the case of *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] Eklr where Justice Odeny quoted *Republic v Minister For Transport & Communication & 5 others Ex Parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No 617 of 20023 [2006] 1 KLR (E&L) 563
71. The defendants submit that the acquisition of title cannot be construed only in the end result: the process of acquisition is material and therefore the defendants urge this honourable court to grant the defendants (plaintiffs in the counterclaim) the prayers sought in the counter-claim.

Analysis and Determination

72. After considering the pleadings, submissions and the testimony of the plaintiff and the defendants; the following issues arise for determination:
 - a. Whether there was proper authority to institute the suit?
 - b. Whether the suit property is public land?
 - c. Whether the defendants have proved their counterclaim

A. Whether there was proper authority to institute the suit?

73. The defendants rely on order 4 rule 1(4) which states that:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

74. The court notes that the verifying affidavit dated May 30, 2018 attached to the amended plaint dated May 30, 2018 is sworn by Peter Njunge Waweru.
75. It falls upon this court to determine from the evidence adduced whether Peter Njunge Waweru is an officer of the plaintiff company and if he was duly authorized under the company seal to do so.



76. At paragraph 2 of the verifying affidavit, he swears that he has been duly authorized by a resolution to swear this affidavit.

77. Section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

78. The defendants claim in their submissions that the plaintiff did not annex the authority as provided in order 4 rule 1 (4) of the *Civil Procedure Rules*.

79. In the judicial decision of *Republic v Registrar General and 13 others* Misc application No 67 of 2005 [2005] Eklr the court espoused”

That such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. its absence is, therefore, not fatal to the suit. accordingly, it is my finding that there is indeed on record credible evidence that the deponent, Pramit Verma, was duly authorized by the plaintiffs to swear affidavits on their behalf.”

80. This court has gone through the pleadings filed by the plaintiff in an effort to find the authority that Peter Njunge Waweru is indeed an officer of the plaintiff’s company and is authorized to swear the verifying affidavit.

81. This court notes that in the plaintiff’s further list of documents dated June 28, 2018; there is a letter from the registrar of companies dated March 27, 2015 which indicated that Peter Njunge Waweru is an officer of the plaintiff’s company. There is also on record a resolution by the plaintiff company with its seal where clause 3 states that “the following directors either individually or jointly are hereby authorized to sign and execute the verifying affidavit, other affidavits and any other documents necessary in order to commence and sustain the intended suit: (a) John Mathai Mugo (b) Peter Njunge Waweru.

82. This court therefore finds that there was proper authority to institute the suit.

B. Whether the suit property is public land?

83. The plaintiff in his further list of documents dated June 28, 2018 has produced a letter from the then Cabinet Secretary Ministry of Lands dated January 9, 2014 which indicates that the records in the lands office show that the suit parcel is registered in the name of the plaintiff.

84. The 1st and 2nd defendants on the other hand in their amended statement of defence which was received by the court on July 8, 2019 claim that the plaintiff has no color of right to seek eviction since they are not the lawful owners having surrendered the suit land to the government for public utility.

85. The defendants in their submissions rely on the judgment of Nakuru HC civil case 90 of 1993 at pages 9 and 10 and also 12 (para 2) and 13 (para 1) which concluded that the suit property was willfully surrendered to the defunct Municipal Council of Nakuru and subsequently Lanet Hill Primary school was constructed.

86. This court has looked at the referenced judgment in Nakuru HC civil case 90 of 1993 and what was in contention as regards to the said surrender was if the procedural requirements were met and if the directors acted beyond their mandate.



87. This court is convinced from the import of the judgment in Nakuru HC civil case 90 of 1993 that the suit land was set aside for public utility. In the said judgment, the court noted that it does not see any particular clause in the memo and articles where the directors were supposed to seek the mandate of the shareholders in order to dispose of the company properties. Further the court noted that at page 12 and 13: “however in this case the directors of the company who were in office confirmed that they surrendered the land in dispute for public utility. They even produced a copy of the surrender which was registered in the lands office.”
88. Given the foregoing, this court finds that the suit property is public land.

C. Whether the defendants have proved their counterclaim?

89. The defendants in their counterclaim dated April 18, 2019 have claimed particulars of fraud, illegality and bad faith on the part of the defendant. It is their averment that the plaintiff acquired title documents in respect of the suit property without due regard of the law.
90. Fraud has been defined in *Black’s Law Dictionary* 11th Edition as

A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.

91. In the judicial decision of *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

When fraud is alleged by the plaintiffs the onus is on the plaintiffs to discharge the burden of proof. allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

The onus is therefore on the defendants to proof that indeed there was any fraud on the part of the defendants.

92. This court notes that in Nakuru HC civil case 90 of 1993, the court noted that the plaintiff company had a certificate of registration in its name and there was willful surrender. The court is therefore convinced that the title in respect of the suit property was not acquired fraudulently and that the registration after the surrender did not take place.

Disposition

93. The upshot of the foregoing is that:
- a. The amended plaint dated May 30, 2018 lacks merit and is hereby dismissed.
 - b. An order of permanent injunction is hereby issued against the plaintiff from possession and/or ownership of any part of the suit parcel that was set aside for public utility;
 - c. A declaration that land parcel LR No 20289 (IR 65176) belongs to the government of Kenya and was set aside for the construction of a school;
 - d. An order that the plaintiff do surrender the title deed issued to the defendant in respect to LR No 20289 (IR 65176) to the chief land registrar immediately for cancellation.



e. Costs of the suit and counterclaim are awarded to the defendants.

It is so ordered.

**JUDGMENT, DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND
SEPTEMBER 2023.**

A O OMBWAYO

JUDGE

