REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO 70 OF 2016

MAVOKO LAND DEVELOPMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

MLOLONGO CATHOLIC CHURCH.....1st DEFENDANT

FRANCIS OF ASISI HEALTH CENTRE.....2nd DEFENDANT

FRANCIS OF ASISI SECONDARY SCHOOL.....3rd DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 27th of July 2016 seeking for the following orders:

> ***i. Demolition and eviction orders of all structures erected on the Plaintiff's land measuring 10 acres, a sub-division of leasehold land L.R No 25062 specifically described as Mlolongo Ngwata plot No.97 & 98. In the alternative the Defendants to pay the current purchase price of the said 10 acres property as it may be assessed by the valuer.***
>
> ***ii. Payment of rent for the use of the said property since 2006 as it may assess.***
>
> ***iii. Costs and interest of this suit.***

2. It is the Plaintiff's case that it is the registered owner of all that property known as L.R No 25026 (*herein the suit property*) which it divided into several plots, including Plots 97 & 98 phase II (*the impugned plots herein*); that the Plaintiff and the 1st Defendant entered into an agreement where the Plaintiff agreed to sell and the 1st Defendant agreed to purchase 10 acres of land from the suit property comprising of Plots 97 & 98 phase II; that it was agreed that the 1st Defendant would pay survey fees, stamp duty fees and all other conveyancing fees and that pursuant to the agreement aforesaid, the Plaintiff let the 1st Defendant take possession of the plots.

3. The Plaintiff averred that the 1st Defendant has since taking possession of the property and despite issuance of several demand notices, refused to pay the purchase price and incidental costs; that the 1st Defendant constructed a hospital and a school on the impugned plots and the same are profit making entities; that the Plaintiff shall seek to have all the structures on plots No 97 and 98 demolished and the Defendants evicted therefrom and that in the alternative, the properties should be valued at the current market paid and be paid for by the Defendants.

4. The Defendants filed a joint a statement of Defence and Counter-claim. On 15th of August 2019, the Defendants amended their Defence and abandoned the counter-claim. In their amended Defence, the Defendants contend that they are not legal persons capable of being sued; that the Plaintiff is the registered owner of the suit property; that the said registration was effected in the year 2014 and that the suit property was lawfully allocated to the trustees of the missionaries of St Francis of Assisi by the defunct Mavoko Municipal Council on 24th of June 2002.

5. The Defendant averred in the amended Defence that they have been in occupation of the suit property since then and have been dutifully paying annual rates to the county government of Machakos and that consequently, the Plaintiff's subsequent registration in the year 2014 as the owner of suit property where plots no 97 and 98 are situate is still subject to the prescriptive rights acquired by the Defendants since the year 2002 when the Defendants took possession of the property.

6. The Defendants contend that the Plaintiff company was incorporated in the year 2006 to among others things sub divide and regularize

the acquisition of title documents to the parties who were already in occupation of the land, including the Defendants; that they have developed Plot Nos. 97 and 98; that they are at an advanced stage of obtaining titles for the suit properties and that they have been in possession of the land for over 15 years and have developed charitable institutions thereon offering health and educational services to the poor residents of Mlolongo and the surrounding areas.

7. The Defendants aver that even before the Plaintiff became the registered owner of the suit property, plots No 97 and 98 had long been reserved for the purposes of building public utilities for public purposes and that the proposed sub-division of the suit property was approved subject to the surrender of public roads and utilities to the County Government of Machakos.

8. It was averred by the Defendants that the Machakos County Government and the National Land Commission were actively involved in the surrender process of plots No 97 and 98 and that the Plaintiff's actions of demanding from the Defendants payments of a token of Kshs 21,920,000 for the suit property and subsequently seeking orders in the present suit is an attempt to unjustly enrich themselves.

9. In response to the amended Defence, the Plaintiff filed a reply in which they stated that they purchased the suit property from Veljijadwa Varsani, Manubhai Velji Varsanii and Bhimji Veljiversani all trading as Patel Concrete company; that the suit property was not at any time a public utility to warrant the District Development Committee to allocate the same to the Defendants and that Mavoko Municipal Council was not a trustee of the Plaintiff nor a registered owner of the suit property and could not purport to allocate the property to the Defendants.

The Plaintiff's Case

10. The Plaintiff's Director, PW1, informed the court that sometimes in the year 2000, the Plaintiff, then a self- help group known as *Mavoko Quarry Site Self-Help group* entered into negotiations with the owners of the land L.R No 25062 measuring 17.58 Ha; that the owners of the land allowed the self-help group to take possession of the property as they worked towards purchasing it and that due to the meager earnings of its members, the Plaintiff was unable to out rightly purchase the property and decided to instead sub-divide the property and allocate the sub divisions to its members who would then purchase the same.

11. According to PW1, sometime in the year 2002, the 1st Defendant approached the Plaintiff seeking to purchase some of the sub divisions of L.R No 25062 in order to put up a health centre and a secondary school; that the Plaintiff agreed to the same and allowed the Defendants to take possession of the 10 acres of the suit property; that it was understood that the 1st Defendant would pay the sum of Kshs 30,000,000 for the land and that the Defendants have since taking possession of the land refused to pay the purchase price.

12. It was the evidence of PW1 that sometime in 2006, the self-help group wound up and formed the Plaintiff's company taking over all the liabilities and assets of the self-help group hence the Defendants cannot claim that the Plaintiff was not in existence at the time of giving them the suit property; that the Judgment of the court in Machakos ELC suit No 366 of 2009 declared the Plaintiff as the owner of the suit property and that having not paid the purchase price, the constructions on the suit property by the Defendants are illegal and ought to be demolished.

13. PW1 informed the court that the Defendants' allegations that the impugned properties are public utilities is false because the Plaintiff has donated 4 acres of land as a market place; that in any event, the 1st and 2nd Defendants are not public utilities but private businesses run by the church and that although the Defendants took possession of the land in 2002, they put up permanent structures on the land in 2010.

14. PW1 stated that the Plaintiff presented its documents to Mavoko in 2015, including the sub-division scheme, after finalizing payment of the purchase price; that the Plaintiff surrendered the market and roads only to the Council; that the Plaintiff did not comply with some conditions of the sub-division scheme; that they did not formally object to the conditions in the sub-division plan and never varied the plan and that there was no written sale agreement between the Plaintiff and the 1st Defendant.

15. PW1 stated that the school and the health center belong to the church; that the two institutions are private business enterprises and not public utilities as alleged; that the Plaintiff and the church agreed to pay the Plaintiff Kshs 21,000,000 as the purchase price in 2002; that the said sum was later reviewed to Kshs 30,000,000 and that the current price of the suit land is Kshs 30,000,000 per acre. The evidence of PW2 was similar to the evidence of PW1 which I have already summarised.

The Defence Case

16. DW1 informed the court that sometimes in 2015, the church received a demand letter dated 4th June 2015 from the Plaintiff demanding for Kshs 21,920,000 for the suit property; that the 1st Defendant, being unaware of the reason for the demand wrote a letter dated 11th July 2016 to the National Land Commission for intervention; that vide the letter dated 28th July 2016, the NLC confirmed receipt of the same and undertook to conduct investigations; that vide the letter dated 30th January 2018, the NLC wrote to the 1st Defendant requesting the 1st Defendant to avail ownership documents of the suit property and that the NLC also requested the Machakos County coordinator to prepare a ground report.

17. According to DW1, the County coordinator aforesaid visited the suit property on 22nd February 2018 and prepared a report dated 14th June 2018; that on the basis of the report, the National Land Commission (NLC) did a letter dated 27th June 2016 to the 1st Defendant indicating, *inter alia "..that the plots being public utilities are contained in the approved sub-division scheme of L.R No 25062 hence have been surrendered to the County.."* and that the 1st Defendant was informed to apply for the allocation of the plots to the County Government of Machakos.

18. It was the evidence of DW1 that vide a letter dated 28th of June 2018, the 1st Defendant applied for the allocation of the suit plots; that the County Government informed the National Land Commission that the plots had been allocated to the church in June 2002 by the Mavoko

Municipal Council and that there was need to formalize the allocation of the land to the church to enable it acquire title documents.

19. It was the evidence of DW1 that vide a letter dated 9th April 2019, he sought for copies of the sub-division plan and approval for development of the suit property from the office of the Physical Planning Director, Machakos County which he received on 6th August 2019 showing that the Plaintiff received permission to sub-divide the suit property with conditions that all public roads and public utilities should be surrendered to the county government.

20. According to DW1, before the Plaintiff became the registered owner of the suit property, plots No 97 & 98 had long been reserved for purposes of building public utilities; that the Plaintiff submitted to Machakos County Government its proposed sub-division plan which was approved subject to certain conditions, including the surrender of all public roads and public utilities to the county government and that plots numbers 97 and 98 are among the public utilities which were and/or have been reserved in the proposed sub-division for formal surrender to the County Government of Machakos.

21. On cross-examination, DW 1 stated that the Defendants had not paid any amount for the land to the Plaintiff; that they were allocated the property vide a letter of allotment and paid the requisite Kshs. 500 for registration; that they pay the council the land rates; that the 1st Defendant was allocated the land for free for purposes of assisting the community and not for private purposes and that there is no other person who has title for the land other than the Plaintiff. According to DW1, the token sought by the Plaintiff was a bribe.

22. DW2 was an employee of the National Land Commission working as the County Coordinator, Machakos County. DW2 confirmed that the documents filed by the Defendants with respect to their correspondence with the National Land Commission originated from their offices.

23. DW2 stated that they never received any letter from the Plaintiff and that they act on behalf of the county government; that they were informed by the CEC Machakos County that the land in question had been allotted to the church and that they have a ground report on the same. The evidence of DW3 was similar to the evidence adduced by DW1 which I have already summarised.

The Submissions

24. The Plaintiff's counsel submitted that sometime in the year 2000, the Plaintiff, then a self-help group known as Mavoko Quarry site Self Help, negotiated with Asian owners of L.R No 25062 measuring 17.52 hectares situate at Mlolongo Market, Athi-River District, Machakos County with a view of purchasing the land to settle its members.

25. Counsel submitted that the presiding priest of the 1st Defendant approached the Plaintiff seeking to purchase a portion of the property measuring 10 acres to establish a secondary school and a health centre; that in good faith, the Plaintiff partitioned L.R No 25062 to create plots number 97 and 98, Mlolongo Phase II for the 1st Defendant and that it was anticipated that upon occupation of the same, the 1st Defendant was to negotiate the purchase price, enter into an agreement and duly pay the purchase price.

26. According to counsel, after entering the property and taking possession thereof, the 1st Defendant refused to purchase the property leading to the filing of the present suit and that sometime in 2006, the Plaintiff transformed itself into a duly incorporated company taking over all the assets of the self-help group and continued pursuing the Defendants for payment of the purchase price.

27. On whether the Defendants are trespassers, it was submitted on behalf of the Plaintiff that the Defendants are indeed trespassers on private land as defined by **Section 3** of the **Trespass Act Cap 294** thus;

> ***"Any person who without reasonable exercise enters, is or remains upon, or erects any structure on or cultivates or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.***
>
> ***Where any person is charged with offence under subsection (1) of the Section, the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.***

28. In conclusion, counsel submitted that the Defendants have deprived the Plaintiff of the benefits of the suit property measuring 10 acres since 2002 and that the Plaintiffs are entitled to pay rent at Kshs 1,000,000 per annum from the date of occupation until they vacate the property. Reliance was placed on the case of ***Rhoda S Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR*** where in an action for trespass, the court ordered the Defendants to pay special damages of Kshs 84,244,500 and general damages of Kshs 10,000,000.

29. The Defendants' counsel submitted that the 1st Defendant in this case is described as Mlolongo Catholic Church, which entity does not exist, as the Catholic Church situated at Mlolongo is known as St Joseph's Catholic Church, Mlolongo and that the said organization, being a religious organization registered under the Societies Act, can only be sued through its registered trustees. Reliance was placed on the case of ***African Orthodox Church of Kenya vs Charles Omuruka & Anor [2014]eKLR*,** where Justice E.C Mwita held that ;-

> ***"Obviously, churches are societies registered under the Societies Act. Societies do not have capacity to sue or be sued in their own names…I agree with the decision of Onyancha, J. in Eritrea Orthodox Church vs Wariwax Generation Ltd [2007] eKLR where he held that the plaintiff in that suit was a religious un incorporated organization registered under the Societies Act and that the institution of proceedings by the persons who form the society without complying with rules governing representative suits renders the suit null and void…"***

30. Counsel also relied on the case of ***Kibera Blessed Academy vs World Missionary Evengelism of Kenya Registered Trustees & 4 others***

[2016] eKLR where the court quoted with approval the case of ***Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank (HCCC No. 5116 of 1992 (OS)*** where it was held follows:-

> ***"In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which then meant it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name."***

31. With respect to the 2nd Defendant, Francis of Assisi Health Centre, counsel submitted that the same has been described by the Plaintiff as "a health center duly established and managed by the 1st Defendant providing health services and that the purported 2nd defendant is not a legal entity with capacity to sue or to be sued. Reliance was placed on the case of ***Maurice Ooko Otieno vs Mater Misericcordiae Hospital [2004] eKLR*** where the court noted that;-

> ***"The law requires that a suit be brought against a legal entity. This is an individual, a Limited Liability Company, the Attorney General – on behalf of government department, certain parastatals and or co-operations. Mater Misericodiae Hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued. The plaintiff is required to find out what the status of the said hospital is. If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into."***

32. Regarding the 3rd Defendant, Francis of Assisi Secondary School, counsel submitted that the Plaintiff has described it as a secondary school established and managed by the 1st Defendant and providing education services and that a school is not a corporate body and is not a legal body capable of suing or being sued in its own name. In support of this contention, counsel relied on the case of ***Kibera Blessed Academy vs World Missionary Evangelism of Kenya Registered Trustees and 4 others (2016) e KLR*** where the court noted *inter alia* that;

> ***"Equally in this matter, the Plaintiff Kibera Blessed Academy is not a corporate body, but a private school registered under the management of the 1st Defendant and it lacks capacity to institute proceedings in its own name."***

33. Counsel further relied on the case of ***St Mary School Nairobi vs Josephat Gitonga Kabigi [2004] eKLR*** where F**.** Azangalala J (as he was then) held as follows:

> ***"Registration under the Education Act is meant for the regulation of the schools by the Ministry of Education in respect of physical facilities, professional standards, management methods etc. It is clear therefore that registration of a body under the Education Act does not give the body legal existence at all. It follows therefore that if all that the Plaintiff school has is the Certificate of Registration under the Education Act, in Law it has no legal existence and has therefore no capacity to sue or be sued. Counsel for the Plaintiff school at the end of his submission submitted that the want of capacity to sue is curable under Order 10 Rule (1). It may very well be so. But at this stage there is no application for amendment, oral or by Chamber Summons as provided for under Order 10 Rule 22 of the Civil Procedure Rules. Which other person or persons would substitute the Plaintiff school anyway? Is it the Board of Governors if there is one? If there is one who are its officials? Is the Plaintiff run by a management team? If so who are the managers?"***

34. In summing up, counsel submitted that the purported Defendants are non-existent entities in the eyes of the law and thus have no locus standi to sue or to be sued. Counsel relied on the case of ***Kibera Blessed Academy vs World Missionary*(*supra*)** where the court held as follows:

> ***"It is therefore evident that Locus Standi is the right to appear and be heard in Court or other proceedings and literally, it means a place of standing. Therefore if a party is found to have no locus standi, it means he/she cannot be heard even on whether or not he has a case worth listening to. It is therefore evident that if this Court was to find that the Plaintiff has no Locus Standi, then the Plaintiff cannot be heard and that point alone may dispose of the suit."***

35. According to counsel for the Defendant, the evidence adduced in court confirms the existence of parcel of land known as L.R No 25062 measuring 17.58 Ha where plots 97 and 98 phase II measuring 10 acres are situate; that the Defendants led evidence and produced documents to confirm how they acquired and entered into possession of the suit property through allotment; that there is no sale agreement between the Plaintiff and the Defendants and that the Plaintiff company was not in existence in 2002.

36. Counsel for the Defendants submitted that the Defendants have fully demonstrated that the church duly made its application to the County Government of Machakos and that the evidence adduced shows that the Plaintiff received permission to sub-divide the suit property pursuant to **Section 41(1) (5) & (6)** of the **Physical Planning Act** which states as follows:

> ***"41(1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.***
>
> ***41 (5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1).***
>
> ***41 (6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee."***

37. Counsel for the Defendants submitted that the 2nd and 3rd Defendants herein form part of the public utilities surrendered to the county

government; that the Plaintiff having not objected to or appealed to the conditions given and having proceeded to carry out the sub-division of the entire land is bound by the same and that the Plaintiff was required to surrender the utilities, which include the suit property. Reliance was placed on the case of ***Dorice Atieno Rajoru & 145 Ors vs Mjahid Suo-chairman Harambee Maweni Committee self help group & 2 Ors [2016]eKLR*** where the Court stated;

> ***"Indeed, it is trite that plots for public utilities and open spaces are usually surrendered to either the Council, the County Government or the National Government. Â It is either the County Government or the National Government that is required to hold plots meant for public utilities on behalf of residents of the place where such plots are situated. 67. In fact, in the normal course of things, the Council, or the County Government, cannot approve a subdivision scheme exceeding a particular acreage unless and until the scheme provides for open spaces and plots for public utilities which are usually surrendered to the Council (or the County Government). That is what must have happened in this case."***

Analysis and Findings

38. Having considered the pleadings, the evidence and submissions, the following issues arise for determination;

> *i. Whether the Defendants are legal entities capable of being sued; and*
>
> *ii. Whether the Plaintiff has proved its case in respect to the ownership of plots numbers 97 and 98.*

39. In the Plaint dated 27th July, 2016, the Plaintiff has described the 1st Defendant as a "Catholic Church" while the 2nd and 3rd Defendants have been described as "a health center duly established and managed by the 1st Defendant and a secondary school established and managed by the 1st Defendant and providing education services" respectively.

40. The Defendants contend that they have no requisite legal capacity to be sued. It is trite that the presence of proper parties before the court is *sine quo non* to the exercise of jurisdiction of the court. This position was reiterated by the court in ***Apex Finance International Limited & another vs Kenya Anti-Corruption Commission [2012] eKLR*** citing with approval the Nigerian Supreme Court case of ***Goodwill & Trust Investment Ltd & Anor vs Will & Bush Ltd*** where the court held as follows:

> ***"it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."***

41. Despite the obvious weight of the issue of the *locus standi* of the Defendants, the Plaintiff did not deem this question worthy of a response. In the case of ***Alfred Njau vs City Council of Nairobi [1983] eKLR 625*** the Court of Appeal while discussing the concept of *locus standi* stated thus;

> ***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

42. It was submitted by the Defendants' counsel that Mlolongo Catholic Church, as described in the Plaint, is an entity that does not exist; that the Catholic Church situate at Mlolongo is known as St Joseph's Catholic Church, Mlolongo and further that the said organization, being a religious organization registered under the **Societies Act**, can only be sued through its registered trustees or officials.

43. Indeed, it is trite that a society registered under the Societies Act, including a religious organisation, can only sue or be sued through its officials. The court in the case of ***Living Water International vs City Council of Nairobi [2008] eKLR***, while interpreting section 3 of the Societies Act stated thus:-

> ***"A reading of section 3 of the Societies Act Cap 108 Laws of Kenya as well as the case law on the subject goes to show, that a religious society has no legal capacity to sue, and to be sued. This being the case, the plaintiff/applicant had no capacity to not only present the interim application, but the main suit as well. Both processes are therefore a nullity and proper candidates for striking out and are accordingly struck out."***

44. Further in the case of ***Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others [2011] eKLR*** it was held as follows:

> ***"It is trite law that a society under the Societies Act is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its officers. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity."***

45. In the instant matter, the suit was filed against a religious organization. The 1st Defendant is not a body corporate and has no legal personality. That being so it lacks the capacity to be sued in its own name and the suit against it is a non-starter, null and void *ab initio.*

46. With respect to the 2nd Defendant, Francis of Assisi Health Centre, the same has been described by the Plaintiff as "a health center duly established and managed by the 1st Defendant providing health services." It is clear from the description of the 2nd Defendant that the

Plaintiff was alive to the fact that the 2nd Defendant was established and managed by the 1st Defendant, and that the 2nd Defendant is a health center.

47. The 2nd Defendant having denied legal capacity to be sued, it behooved the Plaintiff to lead evidence on the legal capacity of the 2nd Defendant to be sued in its name. The Plaintiff did not do so. In ***Janto Construction Company Ltd vs Enock Sikolia & 2 others [2020] eKLR*** it was stated thus;

> ***"the claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which are either natural or legal persons which can successfully sue or be sued. Instituting legal proceedings against a non-legal entity renders the suit a non-starter."***

48. This Court agrees with the sentiments in ***Maurice Ooko Otieno vs Mater Misericcordiae Hospital*** (*supra*) relied on by the Defendant which in the court's opinion rightly captured the inescapable legal position by stating thus:

> ***" The law requires that a suit be brought against a legal entity. This is an individual, a Limited Liability Company, the Attorney General – on behalf of government department, certain parastatals and or co-operations. Mater Misericcordiae Hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued. The plaintiff required to find out what the status of the said hospital is. If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into."***

49. There is no evidence before this court to show that the 2nd Defendant is a legal entity capable of suing or being sued. That being so, it is the finding of this court that the suit against the 2nd Defendant is bad in law and incompetent. The same position applies to the 3rd Defendant.

50. Notwithstanding the finding of this court that the Defendants are incapable of being sued, and in the event the court is wrong on the legal capacity of the Defendants, the court will proceed to determine the merits of the case.

51. It is not in dispute that the Plaintiff is the registered proprietor of all that property known as L.R No 25062 in which the disputed Plots numbers 97 and 98 lie. According to the evidence adduced by the Plaintiff, the Plaintiff was registered as the proprietor of LR No. 25062 on 18th August, 2014.

52. It Was the evidence of PW1 that before the Plaintiff purchased the said land, the Plaintiff's members were already in occupation of the land and that they the Plaintiff agreed to sell to the Defendants a portion of the land measuring 10 acres. According to the Plaintiff, the Defendant took occupation of the said land and developed a health center and a secondary school pending the payment of the purchase price. The Plaintiff's case is that despite taking possession of the land, the Defendants have refused to pay the agreed sums and should be evicted from the land.

53. On their part, the Defendants' case is that the suit property was lawfully allocated to them by the defunct Mavoko Municipal Council on 24th of June 2002 and that they have been in occupation of the land since then and that they constitute public utilities which the Plaintiff was required to surrender to the County Government of Machakos during the sub division of LR No. 25062.

54. The Plaintiff has averred that it let the 1st Defendant onto the suit plots pursuant to an agreement for sale, which agreement the 1st Defendant breached by failing to pay the agreed purchase price. The Defendants content that there was no such agreement. It is trite law that he who alleges must prove. **Sections 107 and 109** of the **Evidence Act** provide thus;-

> ***"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.***
>
> ***109. 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."***

55. The Plaintiff has not provided any evidence with respect to the sale agreement it alleges it entered into with the Defendants. **Section 3(3) of the Law of Contract Act** provides that a suit cannot be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. Having failed to adduce a written agreement of sale as required by law, the claim by the Plaintiff that it sold the suit properties to the Defendants fails.

56. The Defendants claim to the suit plots is predicated on the letter of allotment issued to them by the Mavoko Municipal Council on 24th of June 2002. According to the Defendants, the suit property was allocated to them after the same was surrendered to the Council by the Plaintiff for public utilities.

57. On its part, the Plaintiff contends that it did not surrender the two plots to the council; that pursuant to the sub-division scheme; it only surrendered a market and a road being 10% of the entire property and that in any event, the 1st Defendant is a private entity running the 2nd and 3rd Defendants as private entities.

58. This court is alive to the fact that there are circumstances under which portions of private land can be surrendered to the government as a condition precedent to the sub-division of the land. The relevant law as at the time of the sub-division of LR No 25062 was **section 41** of the **Physical Planning Act** (repealed) which provided as follows;

> ***"(1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.***
>
> ***(2) The subdivision and land use plans in relation to any private land shall be prepared by a registered physical planner and such plans shall be subject to the approval of the Director."***

59. Rule 5 (2) (c) in the **2nd Schedule** of the Act aforesaid under the heading **Conditions of Approval** states as follows;

> ***"When considering applications for subdivisions the local authority or liaison committee may impose conditions of approval in respect of the matter enumerated below, and after implementation of such approval the conditions shall be binding upon the owner, successors and assigns:—***
>
> ***1. The type and form of development to be carried out or permitted and the size, form and situation of holding and the conditions on which such holdings may be transferred.***
>
> ***2. The reservation of land for roads and public purpose or for other purposes referred to in the Act for which land may be reserved.***
>
> ***3. ……..."***

60. It is undisputed that the Plaintiff submitted an application to the Machakos County Government on 18th July 2015 for permission to sub-divide the LR No 25062 measuring 17.58 Ha (approximately 46 acres). Upon receipt of the application, the Council wrote back to the Plaintiff vide its letter dated 19th July 2016 stating thus;

> ***"Notification of Approval of Development permission***
>
> ***Your application submitted on 18/06/15 for permission to SUB-DIVIDE (316 NO. SUBPLOTS) ON L.R NO 25062 situated in MLOLONGO has been approved subject to the following/appended conditions***
>
> ***a. Completing the sub-divisions within 24 Months.***
>
> ***b. Land not constituting part of the disputed public utility.***
>
> ***c. Abiding with all other legal requirements of your application.***
>
> ***d. Surrender of all public roads and public utilities to the County Government of Machakos.***

61. The Defendants produced in evidence a letter dated 6th August 2019, written by the County Government of Machakos to the 1st Defendant stating as follows:

> ***"Ref: Confirmation of public land for surrender after sub-division of L.R No 25062 which stated inter-alia……***
>
> ***……This is to inform you that among the approval conditions, the developer is required to surrender all public roads and public utility to the county government of Machakos for public use. The public utilities to be surrendered include All the road reserves, Market, Francis of Assisi Secondary school and Francis of Assis Health centre."***

62. During cross-examination, it was admitted by the Plaintiff that they did not object to the conditions given to them by the County Government of Machakos in respect of the proposed sub-division plan as contained in the letter of 6th August 2019 and that they never varied the sub division plan. That being the case, once the sub division scheme was approved, the Plaintiff had to surrender the road reserves, Market, Francis of Assisi Secondary school and Francis of Assis Health Centre as shown in the plan.

63. Indeed, the surrendered portions of land, which include Francis of Assisi Health Center and Francis of Assisi Secondary School are shown in the sub division scheme that was produced in evidence by the Plaintiff. The Plaintiff therefore ceded its right over the said portions of land as a condition precedent to the sub division of the entire land.

64. Having surrendered the land in favour of the 2nd and 3rd Defendants as per the sub division scheme, the issue of whether the Defendants are public utilities in the strict sense of the word is moot. In any event, the status of whether the Defendants are public utilities should have been raised by the Plaintiff as at the time the proposed sub division plan was being approved and not after the approval of the same.

65. That being so, it is the finding of this court that the Plaintiff has not proved on a balance of probabilities that it is entitled to plot numbers

96 and 97 which are currently occupied and utilized by the Defendants, the said land having been surrendered by the Plaintiff and allocated to the Defendants.

66. For those reasons, the Plaintiff's suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 20TH DAY OF JANUARY, 2022.

O. A. Angote

Judge

In the presence of:

Mr. Babu for the Plaintiff

Mr. Kyalo for the Defendants