



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 107 OF 2014**

THE BOARD OF GOVERNERS, KAMKUNJI SECONDARY SCHOOL.....1<sup>ST</sup> PLAINTIFF

MIKE GEDION MBUVI SONKO.....2<sup>ND</sup> PLAINTIFF

**-VERSUS-**

INTER COUNTRIES IMPORTERS & EXPORTERS LTD.....1<sup>ST</sup> DEFENDANT

NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT

ATTORNEY GENERAL

(ON BEHALF OF THE CABINET SECRETARY).....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

1. Vide Plaintiff dated the 6<sup>th</sup> February 2014, the Plaintiffs herein have sought for the following Reliefs;

*a. Declaration that the 1<sup>st</sup> Plaintiff is entitled to exclusive to an unimpeded Right of Possession and Occupation of all that piece of Land known as Land Reference Number R/209/12623 (the Suit Property) and that the 1<sup>st</sup> Defendant is accordingly a trespasser on the same.*

*b. An order Revoking the Lease/grant issued to the 1<sup>st</sup> Defendant and vesting the registration of Title in the 1<sup>st</sup> Plaintiff.*

*c. Permanent Injunction against the Defendants whether by themselves, their servants, agents and/or otherwise, howsoever from wrongfully alienating, entering, remaining or continuing on the suit property.*

*d. An order of Eviction of the 1<sup>st</sup> Defendant from the suit property.*

*e. General Damages for Trespass and Illegal construction.*

*f. Costs of this suit.*

2. Upon being served with the Plaintiff and summons to enter appearance, the 1<sup>st</sup> Defendant duly entered appearance and thereafter filed a Statement of Defense, the latter which was filed on the 23<sup>rd</sup> March 2014, and in respect of which the 1<sup>st</sup> Defendant has denied and/or contested the Plaintiffs' claim to and/or in respect of L.R No. R/209/12623, whatsoever and/or howsoever.

3. On the other hand, the 2<sup>nd</sup> Defendant also entered appearance and filed a Statement of Defense. However, the 2<sup>nd</sup> Defendant reiterated that the suit property was leased to and in favor of the 1<sup>st</sup> Defendant and the lease was duly registered.

4. On her part, the 3<sup>rd</sup> Defendant herein entered appearance on the 8<sup>th</sup> April 2014, but same did not file any Statement of Defense and/or any bundle of documents, whatsoever.

5. Be that as it may, it is imperative to note and/or observe that the 3<sup>rd</sup> Defendant herein filed a Replying affidavit sworn on the 10<sup>th</sup> October 2014, but which was in response to the Plaintiffs Application dated the 6<sup>th</sup> February 2014. For clarity, this was the Application for temporary injunction, which was heard and disposed of vide the ruling rendered on the 12<sup>th</sup> June 2015, whereby the Application for Injunction was Dismissed.

### **EVIDENCE BY THE PARTIES**

6. The Plaintiffs' case was premised and/or predicated on the evidence of two witnesses namely, Mark Njagi Kariuki, the Principal of the 1<sup>st</sup> Plaintiff school and Mike Gideon Mbuvi Sonko, (formerly, the Governor, Nairobi City County), respectively.

7. According to PW1, same indicated that he was the Principal of the 1<sup>st</sup> Plaintiff school and that he took over the management and the affairs of the 1<sup>st</sup> Plaintiffs school from one Patrick Waweru Gakungu, who was the previous Principal of the school.

8. The witness further testified that upon taking over the management and the affairs of the 1<sup>st</sup> Plaintiffs school, same appraised himself of the various issues affecting the school and in particular the dispute pertaining to and/or concerning the suit property.

9. Further, the witness testified that in the course of perusing the school file relating to the suit property, same came across the witness statement that was recorded by the former Principal and in this regard, same became aware of the rights and interests of the school over the suit property.

10. Based on the fact that PW1 had taken over the management and the affairs of the 1<sup>st</sup> Plaintiff's school, the witness herein sought to rely on and/or adopt the witness statement dated the 6<sup>th</sup> February 2014, recorded by the previous principal

11. On the other hand, the witness herein also adopted the bundle of documents which had been filed by and/or on behalf of the 1<sup>st</sup> Plaintiff and in this regard, the Documents were duly produced and admitted as Plaintiffs exhibits P1 to 5, respectively.

12. Having adopted the witness statement that was recorded by Mr. Patrick Waweru, the witness herein further testified that the suit property, was duly allocated to the 1<sup>st</sup> Plaintiff and the same constitute the school play-ground.

13. Further, the witness testified that despite the fact that the suit property form the school playing ground, the 1<sup>st</sup> Plaintiff discovered and/or established that the suit property had been illegally alienated and the leased to the 1<sup>st</sup> Defendant, even though the suit property was under the occupation and use of the 1<sup>st</sup> Plaintiff.

14. The witness further testified that upon the discovery that the suit property had been illegally alienated and leased to the 1<sup>st</sup> defendant, same raised an issue of the illegal alienation with the 2<sup>nd</sup> Plaintiff, who was then the senator for Nairobi county.

15. It was the witness's further testimony that other than the complaint which was made to the 2<sup>nd</sup> Plaintiff, the school also raised the complaint pertaining to the illegal allocation with Ministry education, the Ministry of land, the Nairobi City County Government and the Ethics and Anti-Corruption Commission, with a view to ensuring that the illegal lease in favor of the 1<sup>st</sup> Defendant, was revoked.

16. Be that as it may, the witness further testified that though various correspondence were exchanged between the Ministry of land and the Nairobi county, the lease in favor of the 1<sup>st</sup> Defendant has not been revoked.

17. Nevertheless, the witness further testified that since the year 2012, the 1<sup>st</sup> Defendant has since entered upon the suit property and commenced excavation thereof and as a result of the activities by the 1<sup>st</sup> Defendant, the ground that was used as a playing field, has now been interfered with, insofar as the 1<sup>st</sup> Defendant has created valleys and holes which have thus endangered the life and welfare of the students.

18. The witness further testified that the 1<sup>st</sup> Plaintiff is a Public secondary school, and that same ought to benefit from the suit property, which was registered in the name of the 2<sup>nd</sup> Defendant, albeit to hold in trust for the school.

19. On cross examination, the witness conceded that the school has never procured and/or obtained any letter of allotment, either from the Nairobi City County Government or the National Land commission, in respect of the suit property.

20. Besides, the witness also admitted that despite the protestations and the various correspondence, at the instance of the Plaintiffs, the suit property remains leased to and registered in the names of the 1<sup>st</sup> Defendant,

21. On the other hand, the witness also conceded that even though the school had made a Complaint to the Ethic and Anti-Corruption Commission, same has no evidence of the outcome of the investigation, if any, that have been undertaken by the Ethics and Anti-Corruption Commission.

22. On the issue that the suit property has been designated as a school playing ground, that same had no evidence to avail and/or offer to the court.

23. As concerns the current ownership of the suit property, the witness confirmed that same was indeed registered in favor of the 1<sup>st</sup> Defendant and that the lease in question was registered on the 25<sup>th</sup> June 1996.

24. The other witness, was Mike Gideon Mbuvi Sonko, who testified as PW2. According to PW2, he was the Senator of Nairobi County and by virtue of being the senator, the school, that is, the 1<sup>st</sup> Plaintiff, fell within his jurisdiction and/or political mandate.

25. It was the witness further testimony that the 1<sup>st</sup> Plaintiff herein, raised a complaint with his office, pertaining to and/or concerning the suit property and that upon receipt of the complaint, he took up the matter and addressed the issue with several offices.

26. Further, the witness also testified that after receipt of the Complaint of the 1<sup>st</sup> Plaintiff, same addressed a letter to the County Governor of Nairobi, vide letter dated 18<sup>th</sup> July 2013 and another letter to the Permanent Secretary, Ministry of Education, in respect of which same sought the cancelation of the title over and in respect of the suit property.

27. On cross examination, the witness stated that the suit property was public land and that same was allocated to the 2<sup>nd</sup> Defendant for use for Slaughtering purposes and that same was not to be alienated for Private purpose.

28. As to whether the suit property had been allocated to the 1<sup>st</sup> Plaintiff, the witness was unable to confirm whether there existed any Letter of allotment or otherwise. Nevertheless, the Witness confirmed that he had not seen any such Letter of Allotment in Court.

29. Upon being cross examined on whether the lease in favor of the 1<sup>st</sup> Defendant had been revoked, the witness replied that same had not been revoked, despite his efforts and various correspondence, wherein he had requested for the revocation of the same.

## **EVIDENCE BY THE DEFENSE**

### **1<sup>st</sup> DEFENDANTS EVIDENCE**

30. The 1<sup>st</sup> Defendant herein called witness, namely, Naushad Abid who testified for and on behalf of the 1<sup>ST</sup> Defendant and same indicated that he is the General Manager of the 1<sup>st</sup> Defendant Company.

31. On the other hand, the witness also confirmed that same also recorded a witness statement dated the 24<sup>th</sup> March 2014, which he signed and caused to be filed in Court. In this regard, the witness identified the witness statement and thereafter adopted same as his Evidence in chief.

32. Besides, the witness also confirmed that the 1<sup>st</sup> Defendant had also filed a Bundle of Documents and in this regard, the witness referred the court to the list and Bundle of Documents dated the 24<sup>th</sup> March 2014, in respect of which the witness pointed out that they were 28 documents, which same sought to rely on.

33. Premised on the foregoing, the witness proceeded to and adopted the contents of the Documents and sought to have same admitted in evidence. In this regard, the documents at the foot of the List dated the 24<sup>th</sup> March 2014, were produced and marked as exhibits D1 to D28, respectively.

34. Other than the witness statement and the Bundle of Documents, which the witness adopted and relied upon, the witness further stated that the suit property was leased to and in favor of the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant herein.

35. It was the further evidence of the witness that the lease in favor of the 1<sup>st</sup> Defendant was duly registered at the central registry on the 25<sup>th</sup> June 1996. In this regard, the Witness pointed to the Certificate of Lease that was issued to and in favour of the 1<sup>ST</sup> Defendant over and in respect of the Suit Property.

36. On the other hand, the witness has further stated that on the 4<sup>th</sup> October 1997, a Deed of Rectification was executed and registered as pertains to the suit property. For clarity the witness pointed out that the Deed of rectification was only meant to correct the name of the 1<sup>st</sup> Defendant as the Lessee, which was duly and effectively done.

37. Other than the foregoing, the witness testified that upon being registered as the lease holder over and in respect of the suit property, the 1<sup>st</sup> Defendant sought for and procured various approvals from the relevant authorities, including Nairobi city county government, as well as the National Environment Management Authority, for purposes of erecting a perimeter wall to secure the Suit property.

38. It was the witness further testimony that upon obtaining the requisite approvals, the 1<sup>st</sup> Defendant proceeded to and constructed a perimeter wall over a section of the suit property and that the perimeter wall costed the sum over of Kes.40, 000, 000/= Only or thereabouts.

39. Besides, the witness also testified that as soon as the suit property/lease was registered in favor of the 1<sup>st</sup> Defendant, same caused the lease to be charged to and in favor of Barclays Bank, who provided a Banking facility to the 1<sup>st</sup> Defendant.

40. In conclusion, the witness testified that the 1<sup>st</sup> Defendant has been in occupation and possession of the suit property from the year 1996 and that the allegations that the 1<sup>st</sup> Defendant entered onto the suit property in the year 2012, was misleading and/or otherwise false.

41. On cross examination, the witness reiterated that the Suit property was a sub-division curved out of the original title, namely L.R No. 209/2531.

42. Besides, the witness testified that even though the suit property is a sub-division of the original title, same did not have any evidence to show that the original title was subdivided for purposes of creating the Suit property.

43. On the issue as to the purpose which was indicated against the original title, the witness testified that the original purpose was Slaughter. However, the witness further testified that upon the lease of the suit property to and in favor of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant applied for and obtained change of user, which was duly granted. In this regard, the Witness stated that the Change of User authority, has never been challenged in any manner, or at all.

44. As concerns the claim of ownership, the witness reiterated that the suit property belongs to and is registered in the name of the 1<sup>st</sup> Defendant. For clarity, the witness added that at the time of the lease of the land, the property was vacant and was not being used by anyone.

### **2<sup>ND</sup> DEFENDANTS EVIDENCE**

45. Upon the close of the 1<sup>ST</sup> Defendant's case, the 2<sup>nd</sup> Defendants through her counsel Ms Saina indicated to the court that same was not calling any witness. In this regard, counsel for the 2<sup>nd</sup> Defendant then applied that the 2<sup>nd</sup> Defendant's case be closed without any evidence.

46. Premised on the Application by counsel, the 2<sup>nd</sup> Defendant's case was thereafter closed, albeit with no evidence tendered.

### **3<sup>RD</sup> DEFENDANTS EVIDENCE**

47. As was pointed out herein before, the 3<sup>rd</sup> Defendant duly entered appearance, but same did not file any Statement of Defense or such other accompany Documents or at all.

48. Nevertheless, the 3<sup>rd</sup> Defendant had procured and filed a Replying Affidavit which was sworn on the 10<sup>th</sup> October 2014, in respect of the Plaintiff's Application dated the 6<sup>th</sup> February 2014, same being Application for temporary injunction, which was dismissed vide Ruling rendered on the 12<sup>th</sup> June 2015.

49. When the time came for the 3<sup>rd</sup> Defendant to offer evidence, counsel for the 1<sup>st</sup> Defendant raised an objection on account that having not filed any Statement of Defense, List of witnesses, and Bundle of Documents, the 3<sup>rd</sup> Defendant herein, could not be allowed to tender any evidence.

50. Based on the objection raised by the 1<sup>st</sup> Defendant and which was supported by the 2<sup>nd</sup> Defendant, the court proceeded to and rendered a ruling which stipulated that a party who has not filed a Statement of Defense cannot be allowed to call and/or tender evidence, whatsoever.

51. Premised on the Ruling by the court, the 3<sup>rd</sup> Defendant's case was closed, without any Evidence being laid and/or adduced on behalf of the 3<sup>rd</sup> Defendant. In any event, No Evidence can be adduced in the absence of a Pleading, in this case, a Statement of Defence.

### **SUBMISSIONS:**

52. At the close of the Hearing, the Parties herein sought for and obtained liberty to file and exchange written submissions. Consequently, the court directed that the Parties do file and exchange their written submissions and that the matter be mention on the 10<sup>th</sup> February 2022, to ascertain compliance and thereafter to fix a date for judgment.

53. On the return date, that is the 10<sup>th</sup> February 2022, the Plaintiff, the 1<sup>st</sup> & 2<sup>nd</sup> Defendants, indicated to the court that same had duly filed and exchanged the written submissions. In this regard, the said Parties therefore sought for a date for judgment.

54. On the other hand, counsel Mr. Menge, the litigation counsel on behalf of the Honourable Attorney General indicated that despite the time which was granted to file the submissions, same had not filed the written submissions on behalf of the 3<sup>rd</sup> Defendant.

55. Owing to the failure by the 3<sup>rd</sup> Defendant to file written submissions, counsel sought further latitude to file the written submissions, but, the request by the counsel was declined because no plausible reason had been availed and/or supplied.

56. It is imperative to observe that the three sets of written submissions filed by and/or on behalf of the Plaintiff, the 1<sup>st</sup> & 2<sup>nd</sup> Defendants, form part and parcel of the Record and that same have been taken into account, duly considered and appreciated.

### **ISSUES FOR DETERMINATION**

57. Having reviewed the Pleadings filed by the Parties, the witness statements, the Bundle of Documents and the Oral evidence, tendered by the Plaintiffs on one hand, and the 1<sup>st</sup> Defendant on the other hand and having considered the written submissions on record, the following issues are germane for determination;

***I. Whether the 1<sup>st</sup> Plaintiff is an authorized legal entity pursuant to and under the Provision of the Basic Education Act 2013.***

***II. Whether the 2<sup>nd</sup> Plaintiff has the requisite locus standi to originate, mount and/or maintain the suit as against the Defendants and in particular the 1<sup>st</sup> Defendant.***

***III. Whether the 1<sup>st</sup> Plaintiff has any lawful and/or legitimate title to and/or in respect of the Suit property.***

***IV. Whether the lease in respect of the Suit property was illegally issued to and registered of the 1<sup>st</sup> Defendant.***

***V. Whether the Plaintiff is entitled to the Reliefs sought at the foot of the Plaintiff***

## **ANALYSIS AND DETERMINATION**

### **ISSUE NUMBER 1**

***Whether the 2<sup>nd</sup> Plaintiff has the requisite locus standi to originate, mount and/or maintain the suit as against the Defendants and in particular the 1<sup>st</sup> Defendant.***

58. It is common ground that at the time when the subject suit was filed, the 2<sup>nd</sup> Plaintiff herein was the Senator for Nairobi county up to and including the year 2017, when the 2<sup>nd</sup> election under the Constitution 2010, were held.

59. Nevertheless, despite being the Senator for Nairobi City County, the issue before hand, does not touch and/or concern the political affairs of Nairobi county. For clarity, the issues before hand, touched on and/or concerned the ownership rights and/or title to the suit property, which currently inheres in the 1<sup>st</sup> Defendant.

60. From the body of the Plaintiff, what has played out is a claim by the 1<sup>st</sup> Plaintiff, which is a body Corporate, that the Suit property was duly allocated to the school and therefore same belongs to the 1<sup>st</sup> Plaintiff.

61. On the other hand, though the name of the 2<sup>nd</sup> Plaintiff is contained in the Plaintiff, there is no single paragraph in the body of the Plaintiff that speaks to whatever right, claim and/or interests, that the 2<sup>nd</sup> Plaintiff purports to have over and in respect of the suit property.

62. At any rate, even looking at the Reliefs being sought, it is worth to note that none relates to the 2<sup>nd</sup> Plaintiff herein or at all. Simply put, the 2<sup>nd</sup> Plaintiff has not impleaded a personal claim to and in respect of the Property.

63. Be that as it may, under the Basic Education Act, 2013, the only legal entity that is created and established under the law for purposes of running and/or managing the affairs of a Public secondary school is the Board of management, which is conferred with the right to undertake various activities for and on behalf of the school, including, but not limited to filing of suits.

64. For the avoidance of doubt, the Board of Management of a basic institution is provided for under the Forth Schedule as hereunder;

***1. The Board of Management shall be a body corporate with perpetual succession and a common seal, and shall in their corporate names, be capable of-***

***(a) suing and being sued;***

***(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;***

***(c) borrowing, lending and granting money;***

***(d) entering into contracts; and***

***(e) doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.***

***2. There shall be an executive Board of Management for each Board of Management consisting of—***

***(a) the chairperson of the Board;***

***(b) the secretary of the Board;***

***(c) the chairperson of a Parents Teachers Association; and (d) two other Board members.***

65. During the hearing and testimony by the 2<sup>nd</sup> Plaintiff, same did not tender any evidence that he is a member of the Board of management

of the 1<sup>st</sup> Plaintiffs school or at all.

66. In any event, even assuming that such evidence was tendered by the 2<sup>nd</sup> Defendant, (which is not the case), it is still important to note that even a Member of the Board of management cannot file suit for an/or on behalf of the concerned school, in (sic) his/her individual name.

67. Based on the foregoing, I am unable to discern and/or decipher, the capacity in which the 2<sup>nd</sup> Plaintiff has commenced and/or originated the subject suit, whereas the it is evident and/or apparent that same is not laying any legal or equitable claim to and in respect of the suit property.

68. In my humble view, the 2<sup>nd</sup> Plaintiff herein has no locus standi to jump into and/or seek to propagate a private claim pitting the 1<sup>st</sup> Plaintiffs school versus the 1<sup>st</sup> Defendant, in respect on a claim touching on the allocation, alienation and/or registration of the suit property.

69. Suffice it to say, that litigation under private law, as opposed to public law, can only be commenced by persons and/or Bodies that claim to have legal or equitable interests over and in respect of the disputed property and not otherwise.

70. In short, I find and hold that the 2<sup>nd</sup> Plaintiff was not seized and/or possessed of the requisite locus standi and in this regard, the suit that was mounted by and or on behalf of the 2<sup>nd</sup> Plaintiff, was incompetent and otherwise legally untenable.

71. In support of the foregoing observation, I rely on and adopt the decision in the case of **Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229**, where the court held as hereunder:-

***“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

72. On the other hand, it is imperative to note that absence of locus standi, denies and/or deprives a person of the Right to be heard and once a Court of law finds and holds that a person is not seized of such locus standi, the court is obliged to terminate such a case and/or claim summarily.

73. To fortify the foregoing observation, I beg to adopt and reiterate the holding in the case of **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR**, where the honourable court observed;

*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, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.*

74. From the foregoing, the suit by and/or on behalf of the 2<sup>nd</sup> Plaintiff was/is stillborn and therefore same Courts Striking out. Consequently, same be and is hereby struck out.

## **ISSUE NUMBER 2**

### **Whether the 1<sup>st</sup> Plaintiff is an authorized Legal entity pursuant to and under the Provisions of the Basic Education Act, 2013.**

75. The suit herein was commenced vide Plaint dated the 6<sup>th</sup> February 2014, and by the time when same was filed and/or lodged before the court, the Education Act, Chapter 211, Laws of Kenya, had been repealed and replaced by the Basic Education Act, 2013. For clarity, the Legal Regime that was obtaining at the time of the filing of the Subject Suit, was the Basic Education Act, 2013.

76. Nevertheless, before venturing into the issues, it is worthy to recall that under the Education Act, Chapter 211 Laws of Kenya, now repealed, the legal entity that was created and/or established thereunder for running and/or managing the affairs of a Public secondary school was known as the chairman, Board of Governors of the designated school.

77. However, following the enactment of the Basic Education Act,2013, the entire legal regime, hitherto contained in the repealed Act, was repealed and replaced and a new legal entity known as the Board of Management, was birthed.

78. Owing to the foregoing, I must observe that by the time the subject suit was being filed and/or lodged, the operative Act was the Basic Education Act 2013, and hence the only authorized legal entity that could commence, originate and/or otherwise maintain the suit was the Board of Management and not the purported and amorphous entity that has been alluded to in the Plaint.

79. For the avoidance of doubt, the legal entity that was enacted under the Basic Education Act, 2013, is well amplified in the Fourth Schedule of the said Act and in this regard, it is worthy to reproduce the relevant Section as hereunder;

***1. The Board of Management shall be a body corporate with perpetual succession and a common seal, and shall in their corporate names, be capable of-***

***(a) suing and being sued;***

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

(c) borrowing, lending and granting money;

(d) entering into contracts; and

(e) doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

2. There shall be an executive Board of Management for each Board of Management consisting of—

(a) the chairperson of the Board;

(b) the secretary of the Board;

(c) the chairperson of a Parents Teachers Association; and (d) two other Board members

80. Based on the foregoing, I am afraid that I must find and hold that the 1<sup>st</sup> Plaintiff herein is an unknown Legal Entity, devoid and bereft of the requisite legal capacity, to originate and/or maintain any civil proceedings before a court of law.

81. In my humble view, the Plaintiffs' advocates ought to have considered the issue of amendment of the Plaint, before the commencement of the hearing or at any time before any close of the hearing.

82. Nevertheless, the issue as to whether a Suit filed by a Non-existent legal entity, can be Amended, would have been an issue to be addressed and/or dealt with if such an Application for amendment was ever filed. However, to the extent that none was filed, I must proffer no legal opinion in that respect.

83. Suffice it to say, that I would similarly be constrained to find and hold that the 1<sup>st</sup> Plaintiff, did not possess and/or have the capacity to commence the subject proceedings, whatsoever and/or howsoever.

### **ISSUE NUMBER 3.**

#### **Whether the 1<sup>st</sup> Plaintiff has any Lawful and/or Legitimate title to and/or in respect of the Suit property.**

84. The 1<sup>st</sup> Plaintiff herein contended vide paragraph 8 of the Plaint that the two parcels of land were allocated to her and in particular L.R No. 209/2531/12 was allocated for the construction of class rooms, whilst L.R No. 209/12623, namely the suit property, was allocated as the only school playing ground.

85. Despite having averred that the suit property was allocated unto her, the 1<sup>st</sup> Plaintiff further goes on to state at paragraph 9 of the Plaint, that despite several pleas to the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant has failed to issue allotment documents to the school and thus the Ministry of land could thus not prepare title deeds for the school.

86. For clarity, the 1<sup>st</sup> Plaintiff affirms that as a result of the failure by the 2<sup>nd</sup> Defendant to issue Letter of allotments, the School has no ownership documents in respect of the two Parcels of land.

87. From the 1<sup>st</sup> Plaintiff's point of view, same has not been able to accrue and/or obtain any Letter of allotment. In this regard and there be no letters of allotment, the 1<sup>st</sup> Plaintiff herein has therefore no Legal Documents, whatsoever and/or howsoever, to even show that same commenced the process towards acquisition over the suit property.

88. Nevertheless, I must also point out that even if the 1<sup>st</sup> Plaintiff had been issued with a letter of allotment, which is not the case, it must be realized that a letter of allotment without complying with the conditions thereunder and without procuring the requisite title arising therefrom, cannot therefore accrue any right and/or claim to land.

89. In support of the foregoing observation, I adopt and reiterate the decision in the case of **John Mukora Wachihi v Minister For Lands & 2 others [2010] eKLR**, where the court observed as hereunder;

***“... the court observed that the distinction is based on the fact that the right to property under the law and Constitution is afforded to the registered owners of land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land.”***

90. Perhaps, if emphasis was required to confirm that even if the 1<sup>st</sup> Plaintiff had acquired letters of allotment, which is not the case, such letter of allotment, if any, would still not had conferred any title to an in favor of the Plaintiff, then the decision in the case of **Joseph Arap Ngok v Justice Moiwo Ole Keiwua, Civil Application No. 60 of 1997**, would suffice. For clarity, the court of appeal observed as follows;

***“It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held.”***

91. In the absence of a letter of allotment, which would ordinarily be the starting point towards the acquisition of title and ownership to the suit property, it is difficult to appreciate the foundation of the 1<sup>st</sup> Plaintiff’s claim to and in respect of the suit property.

92. Simply put, the 1<sup>st</sup> Plaintiff herein has no legitimate and/or lawful claim to and/or in respect of the suit property and therefore same cannot seek declaration of entitlement to exclusive to unimpeded right to possession and occupation of the suit property, whatsoever and/or howsoever.

#### **ISSUE NUMBER 4**

##### **Whether the Lease in respect of the Suit property was illegally issued to and registered of the 1<sup>st</sup> Defendant.**

93. On or about the 8<sup>th</sup> March 1996, the City Council of Nairobi, (now defunct) executed a lease over and in respect of the suit property, which was a sub-division of the original L.R No. 209/2531 and upon the execution of the lease, same was duly lodged for registration and was ultimately registered on the 25<sup>th</sup> June 1996.

94. Pursuant to and upon the execution of the lease, the lessor, now Nairobi city county government vested in the 1<sup>st</sup> Defendant the leasehold interest, over and in respect of the suit property. For clarity, the lease namely, the 1<sup>st</sup> Defendant therefore acquired rights over and in respect of the property for the remainder of the term of the Lease.

95. It is also important to note that long after the execution and registration of the lease, the Ministry of lands, who is the 3<sup>rd</sup> Defendant herein, wrote and issued two letters namely, the letter dated 2<sup>nd</sup> March 2010, and 5<sup>th</sup> March 2010, respectively, whereby the Ministry of land, reiterated that the suit property lawfully belongs to and is registered in the name of the 1<sup>st</sup> Defendant.

96. Suffice it to note, that the said letters, were produced as exhibits D4 and D5, respectively and no one, let alone the 3<sup>rd</sup> Defendant challenged and/or disputed the contents of the said Letters.

97. Based on the fact that the 1<sup>st</sup> Defendant herein holds a legitimate lease, duly executed by the precursor of the 2<sup>nd</sup> defendant, it is safe to find and hold that the 1<sup>st</sup> Defendant is entitled to absolute and exclusive ownership over and in respect of the suit property.

98. In my humble view, the 1<sup>st</sup> Defendant is entitled to the legal benefit and protection arising and ensuing from the provisions of **Section 24 of the Land Registration Act, 2012** which provides as hereunder;

*24. Interest conferred by registration Subject to this Act—*

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and*

*(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

99. In short, I find and hold that 1<sup>st</sup> Defendant herein, is entitled to exclusive and absolute rights over and in respect of the Suit Property, including but not limited to occupation, possession and use.

#### **ISSUE NUMBER 5**

##### **Whether the Plaintiff is entitled to the Reliefs sought at the foot of the Plaintiff**

100. The plaintiffs’ have sought for various Reliefs and it is therefore important to address each and every relief and to authenticate whether the plaintiffs are entitled to any of the said Reliefs.

101. First and foremost, the 1<sup>st</sup> Plaintiff have sought for a Declaration that same is entitled to exclusive and unimpeded right to possession and occupation to the Suit property and that the 1<sup>st</sup> Defendant is accordingly a trespasser on same.

102. However, it is common ground that despite seeking for the said declaration, the 1<sup>st</sup> Plaintiff conceded that same has never been issued with the requisite Letters of allotment to and in respect to the suit property.

103. In the absence of letter of allotment which is a peremptory document towards and in respect of acquisition of leasehold to Public land, I must say that the claim herein has been made in vacuum.

104. Secondly, the 1<sup>st</sup> Plaintiff has also sought for the revocation of lease/grant issued to the 1<sup>st</sup> Defendant and vesting the registration of title in favor of the 1<sup>st</sup> Plaintiff. Despite this relief, the 1<sup>st</sup> Plaintiff has not provided any basis, to warrant the revocation of the 1<sup>st</sup> Defendants title to and in respect of the suit property.

105. It is imperative to note that the 1<sup>st</sup> Plaintiff had averred that the alienation of the suit property in favor of the 1<sup>st</sup> Defendant was illegal, but other than making that passing statement, the 1<sup>st</sup> Plaintiff did not provide and/or supply particulars of illegalities alluded to or at all.

106. On the other hand, the 1<sup>st</sup> Plaintiff did not tender any evidence to show the illegality, if any, that informed the execution of the lease to and in favor of the 1<sup>st</sup> Defendant.

107. As pertains to the order vesting registration of title in the 1<sup>st</sup> Plaintiff, it is important to observe that the allocation, alienation and thus conferment of title to public land in favor of particular person or legal entity is the exclusive preserve of the national land commission and not this court.

108. For clarity, **Article 67 of the Constitution 2010** is imperative and same provides as hereunder;

*67. National Land Commission*

*1. There is established the National Land Commission.*

*2. The functions of the National Land Commission area:*

*a) to manage public land on behalf of the national and county governments;*

*b) to recommend a national land policy to the national government*

*c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;*

*c) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;*

*d) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*

*f) to encourage the application of traditional dispute resolution mechanisms in land conflicts; g) to assess tax on land and premiums on immovable property in any area designated by law; and*

*h) to monitor and have oversight responsibilities over land use planning throughout the country.*

*3. The National Land Commission may perform any other functions prescribed by national legislation.*

109. The other Relief sought relates to an order of Permanent injunction to restrain the Defendants and more particularly the 1<sup>st</sup> Defendant, from entry upon, occupation of and use of the suit property.

110. However, the question that I must ask myself is whether the registered owner of a particularly property, in this case the 1<sup>st</sup> Defendant can be enjoined from using, entering upon land which are undeniably hers.

111. I will not belabor this point, but suffice it to refer to and restate the position of the Law as amplified in the decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the court observed as hereunder;

***It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1<sup>st</sup> respondent's 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US \$ 1,917,333 alleged advanced to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and US \$ 14 million allegedly used in the management and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial.***

112. Other than the foregoing, the 1<sup>st</sup> Plaintiff has also sought for an order to evict the 1<sup>st</sup> Defendant from the suit property and to be awarded the General Damages for trespass. To my mind, the prayer herein exemplifies a scenario where a stranger seeks to oust the registered proprietor of the land. Quite, curious.

113. I am afraid that in the absence of any lawful or legitimate title to the suit property, the Plaintiffs herein cannot accrue or attract any favorable reliefs unto her, let alone evicting the registered owner of the land.

114. As concerns the limb for General damages for trespass, allow me to state that no such damages can be awarded in favor of a person who has no legal title and/or ownership rights to the suit property. Contrarily, the award for Damages for trespass would have accrued to and in

favor of the 1<sup>st</sup> Defendant and not otherwise.

115. However, the 1<sup>st</sup> Defendant herein did not raise a Counter-claim for any such compensation and in this regard, the point is moot.

116. Suffice it to say, that the Reliefs claimed by the 1<sup>st</sup> Plaintiff at the foot of the Plaint dated the 6<sup>th</sup> February 2014, are misconceived, legally untenable and thus incapable of being awarded.

#### **FINAL DISPOSITION**

117. Having addressed all the issues that were enumerated herein before, I am now disposed to make the final orders and same are as hereunder;

***I. The 1<sup>st</sup> Plaintiff herein is an amorphous entity, which is unknown under the Basic Education Act 2013 and, in this regard the suit by the 1<sup>st</sup> Plaintiff is a nullity.***

***II. The 2<sup>nd</sup> Plaintiff is devoid and/or bereft of the requisite locus standi, to commence, mount and/or maintain the subject suit.***

***III. Consequent to the foregoing, the suit herein be and is hereby struck out.***

118. In the alternative and without prejudice to the foregoing, the 1<sup>st</sup> Plaintiff's suit, is similarly Devoid of merits. Consequently, I would still have been inclined to Dismiss same.

119. The issues which have been raised and/or addressed and which form the basis of the striking out of the subject suit, were neither raised nor ventilated by any of the Defendants. For clarity, the issues have been generated suo-moto by the court.

120. Owing to the foregoing, I have agonized over the issue of costs and in particular, as to whether same should be awarded in favor of the 1<sup>st</sup> Defendant.

121. However, I have come to the conclusion that based on the peculiar circumstances surrounding the matter and based on the fact that the 1<sup>st</sup> Plaintiff is a Public institution, I direct that Either party shall bear own costs.

122. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

#### **JUDGE**

In the Presence of;

**June Nafula      Court Assistant**

**Mr. Nderitu h/b for Mr. Mbichire for the Plaintiff.**

**Ms Saina for the 2<sup>ND</sup> Defendant.**

**Mr. Mathesa h/b for Ms Kethi Kilonzo for the 1<sup>ST</sup> Defendant.**

**N/A for the 3<sup>RD</sup> Defendant.**