



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 3000 OF 1993

THE PUBLIC SERVICE CLUB (REGISTERED TRUSTEES)...PLAINTIFF
VERSUS

MARY WANGECI KETHI KARIITHI1ST DEFENDANT

MARGARET NJOKI KARANJA.....2ND DEFENDANT

NGARI KARIITHI.....3RD DEFENDANT

KIBUGA KINYUA KARIITHI.....4TH DEFENDANT

(All four duly appointed executors and holders of a grant of probate of the will of GEOFFREY KAREKIA KARIITHI)

JUDGMENT

The Plaintiff's case

The Plaintiff filed this suit against the original Defendant, Geoffrey Karekia Kariithi (since deceased), by way of a Plaint dated 16th June 1993 which was amended on 9th July 1997. The Plaintiff's claim is that it is the registered owner of all that piece of land known as L.R 209/1408 situated in Nairobi together with the developments there on (hereinafter referred to as the said property). The Plaintiff has averred that the Defendant was one of its registered trustees since July 1974. It is alleged that on or about 1st June 1975, in breach of his duties as a trustee of the Plaintiff, the Defendant fraudulently caused alienation of 1.404 hectares or thereabouts from the suit property and had it registered in his name as L.R No. 209/9629.

The particulars of fraud alleged to have been committed by the Defendant are as follows:-

- a. Fraudulently and knowingly accepting the suit property and registering it in his name.
- b. Fraudulently refusing to disclose to other trustees that he had an interest in the said property when he knew that it was held in trust on behalf of the Public Service Club and all its members.
- c. Fraudulently omitting to inform his co-trustees that the suit property had been alienated and registered in his name.
- d. Fraudulently breaching his duties as a trustee in alienating the suit property.
- e. Fraudulently acting in connivance with other persons to deprive the Public Services Club of its land.

The Plaintiff therefore prays for the following orders in its Amended Plaintiff:-

- a. A declaration that it is the owner and entitled to possession of the property known as L.R. 209/9629.
- b. An order directing the Registrar of Titles to rectify the register of the said parcel of land.
- c. An injunction to restrain the Defendant by himself or his agents from alienating disposing or in any manner however interfering with the land owner as L.R 209/9629.
- d. Exemplary damages for breach of trust.
- e. General damages.
- f. Costs of this suit.
- g. Interest on (d), (e) and (f) above at court rates.
- h. Any other or further relief as the court deems just and fit in the circumstances.

The hearing of the Plaintiff's suit commenced on 24th March 1999, and the Plaintiff called five witnesses to testify on its behalf. The first witness was William Kimutai Martin (PW1) who testified that he served as a chairman of the Public Service Club prior to being a trustee thereof, where he served together with the late Geoffrey Kariithi and Gordon Mburu (also deceased). PW1 referred the court to a notification dated 2nd July 1974 where he together with Geoffrey Kariithi (deceased) and Gordon Mburu (deceased) were endorsed as trustees of the Public Service Club.

PW1 stated that the main duty of the trustees was to look after the property of the club which owned land known as LR no. 209/1408 measuring approximately 18.95 acres. His evidence was that the suit property had never been subdivided since its title was issued, and that the only changes evident in the title were entry no. 327 of 8th June 1974 which was a name change from Civil Service Club to the Public Service Club.

PW1's further testimony was that he learnt that part of the Club's land had been alienated and registered in the name of a co-trustee. He stated that the excised parcel number LR 209/9629 measuring 1.404 hectares was granted to Geoffrey Kareka Kariithi(deceased). This witness further averred that another parcel of land, namely LR No. 209/9627 was also excised from the main title and granted to Andrew W. Njenga. According to PW1, there was neither a memoranda entered to register the changes nor was there a resolution by the club to alienate those lands. It was the evidence of PW1 that the non di-closure of the acquisition to the Club by Mr. Kariithi constituted as breach of his duty as a trustee.

PW1 further stated that in 1993, he saw an advertisement to sell a portion of their land in a billboard and further, that the portion which was being advertised was the one excised by the Defendant. Further, that the Defendant was at the time the head of Civil Service in Kenya. According to the witness, the Club still uses the excised land initially temporarily by the police as a police dog section and later as a running track. He also stated that the land has never been surrendered to the government or anyone else. PW1 informed the court that although allocation of the excised portions took place in 1975, they came to know about it in 1993 since the government had not recalled their lease.

During cross examination, PW1 stated that although he knew the Defendant, he never heard of him being regarded as fraudulent. He confirmed that at the time of appointment as trustee, he was never given a title or a letter showing the items owned by the club. While stating the Club's constitution did not mention trustees, PW1 contended that they derive their mandate from the Trustees Act.

In further testimony, PW1 stated that the title was for a period of 99 years which had not expired. While making reference to the title deed for LR No. 209/9627, PW1 stated that the club had not taken any step against Mr. Njenga and had also not placed a caveat against the said plot. PW1 referred the court to a letter dated 12th November 1973 and stated that the letter allowed the Commissioner of Lands to excise the Kenya police dog section area. While referring to a letter dated 6th November 1978, PW1 informed the court that he was not notified that a survey of the suit property was being undertaken. PW1 was referred to a memorandum of association of Kilimani Arcade Ltd which was incorporated on 19th September 1972 and he averred that although Mr. Mbela and Dr. Itotia were members of the club, the

Defendant was the one acquiring the land since the others had no responsibility over the land.

In re-examination, PW1 stated that the letter of allotment which was part of the Defendant's exhibits was addressed to G. K. Kariithi and further, that a payment receipt dated 27th March 1975 for Kshs 110,505/- shows that only G. K. Kariithi paid. This witness maintained that title was in the name of G. K. Kariithi. PW1 reiterated that Mr. Kariithi never consulted his fellow trustees. While referring to an undated resolution in the Defendant's exhibits, PW1 denied knowledge of the alleged meeting and maintained that a Committee cannot transact business on behalf of the trustees. PW1 asserted that the constitution governs matters of the club's general administration and did not mention property.

Abel Murutu (PW2) was the Plaintiff's second witness, and he testified that he was a lands surveyor and was appointed to survey and identify the beacons of LR 1408 at the Public Service Club in 1993. He informed the court that he went, located the beacon and found that two other surveys in respect to LR No. 209/9629 measuring 1.404 hectares and LR 209/9627 measuring 0.04489 had been carried out. He stated that the original survey plan indicated that the original plot was 18.95 acres and that the 2 subdivisions were part of the original plot. He asserted that the plans for subdivision of LR No. 209/9629 and LR No. 209/9627 were received at the survey of Kenya on 11th May 1981 and 29th January 1981 respectively.

PW2 produced survey maps for LR No. 209/1408, LR No. 209/9627 and LR No. 209/9629 as Plaintiff Exhibits 3, 4 and 5 respectively. While referring to the survey plan for LR No. 209/9629, PW2 stated that the plan did not show when the survey was conducted. During cross examination, PW2 stated that the survey maps produced were genuine and were from the Survey of Kenya. According to this witness, although the survey date for LR No. 209/9629 ought to have been shown on the map, failure to show the same was not fatal.

The third Plaintiff's witness was Dr. Willis Awuor Lea Gondi (PW3). He stated that he was a medical practitioner and had been the chairman of the Public Service Club from 1972. He informed the court that the structure of the club is that the head of Civil Service was the chairman as well as the patron of the Club and further, that this post was not elective. He informed the court that he was familiar with the club's properties which included LR no. 209/1408 whose title deed formed part of Plaintiff Exhibit 1. PW3 informed the court that the Certificate of Incorporation produced shows that the land belonged to three trustees and further, that on 2nd February 1974, G. Kariithi, John Goohard and William Kimutai became the new trustees. According to this witness, Mr. Kariithi was the Patron, Chairman and trustee of the club as well as the head of Civil Service.

PW3 informed the court that he became aware of the case of the allocation of the suit property in 1993 when he was the vice chairman. It is the evidence of PW3 that they saw people erecting beacons thereon, whereupon they inspected the title at the Lands Registry. PW3 stated that there was no allocation shown on the title and that the land belonging to the Public Service Club had never been surrendered. According to PW3, the police dog section was part of the club land and that there was an arrangement between the club and police department to train their dogs there.

While referring to a title issued in the name of Nyoro Njenga in respect to LR. No 209/9627, PW3 stated that they are waiting to finalize this suit before pursuing Mr. Nyoro Njenga who was not one of their trustees. This witness averred that the original title deed did not indicate the changes made by the allocations. Further, he denied knowledge of the authorship of an undated resolution of the Public Service Club recommending that title be surrendered to the Commissioner of Lands, and stated that the resolution had no club logo and was not in the minutes of the club. In cross examination, PW3 stated that it was doubtful that a letter dated 12th November 1973 came from the club. According to this witness, the club never appointed any architects as alluded to in the said letter.

Elizabeth Gicheha (PW4) testified as the fourth Plaintiff witness. She stated that she was an advocate of the High Court of Kenya and was a Registrar of Titles for 11 years. Her evidence was that she was familiar with the Public Service Club title which fell under the Central Registry where she worked. While referring to the title deed for LR 209/1408, PW4 stated that the term of its lease was for 25 years from 1st

March 1922 to 1st March 1947 and further, that extension was given for 99 years from 1st March 1922 to 2021.

PW4 informed the court that entry no. 3 on the title of LR 209/1408 of 8th June 1974 showed a change of name from Civil Service Registered Trustees to the Public Service Commission Registered Trustees. According to this witness, any change on the title including excisions would be reflected on the title. She confirmed that no changes had been registered in the original title which was intact and measured 18.9 acres. Further, PW4 contended that the user of the ground which was provided for under condition 1 was specific and that the same was for a sport's ground. It was the testimony of PW4 that any change of user must be registered and further, that there had been no such change.

In further testimony, PW4 averred that if land was to be excised, a certificate of division must have been registered against the title and that the excised part would bear a different number. This witness testified that the land in question was not government land since it had been granted to registered owners and was therefore not available for allocation.

While referring to a title deed issued in the name of G. K. Kariithi as proprietor of LR No. 209/9629 for a period of 99 years, PW4 contended that although the title was a genuine document, it was not possible to have two titles for the same land. She averred that if LR No. 209/9629 was to be an excision of 209/1408, there ought to have been surrender by the Public Service Commission Registered Trustees to the government to enable the government allocate it, and further, that the surrender would have been registered against the head title.

During cross examination, PW4 averred that the title deed issued to Mr. Kariithi was genuine in the sense that that it was issued by the Commissioner of Lands and an innocent person inspecting it would not find anything wrong with it. PW4 could however not tell whether a title deed issued in respect of 209/9627 which was a grant to Andrew Washington Nyoro Njenga had been excised from 209/1408. In respect to the letter of allotment issued to Mr. Kariithi, PW4 reiterated that the government could only allocate land which belongs to it and further, that the government had no title deed. This witness however, averred that allottees have no business trying to find out where the land came from.

While stating that there was nothing fraudulent about the title deed issued to G. K. Kariithi, PW4 informed the court that the only problem was that registration and surrender were not done. She averred that if the allottee had knowledge that it was private land, the onus would be upon him to show that the transfer was registered. This witness contended that the Commissioner was not free to allocate this land until 2041. According to PW4, there were irregularities in issuance of the title since the government issued land to Mr. Kariithi which was not government land.

The last Plaintiff's witness was Prof. Japheth Kimanzi Mati (PW5) who testified that he was a professor of Obstetrics and Gynecology, and had been a member of the Public Service Club since 1970. He informed the court that he was secretary to the club at one time. He made reference to an undated resolution of the club's executive committee meeting and stated that he attended the meeting in his capacity as secretary. He confirmed that it was in the Committee's minutes and identified his signature and stated that the chairman then was J. G. Kiereini.

PW5 averred that the resolution was reached because it was felt that the property should be in the government's name and not the trustees names. PW5 asserted that their understanding was that the land would remain as it was and only the title would change to read the Permanent Secretary, Office of the President. According to PW5, there was no discussion about the land being excised and further, the issue whether Mr. Kariithi had been approached by the Commissioner of Lands did not feature at the said meeting. This witness informed the court that he later came to understand that part of the land had been excised much later after he ceased being secretary to the club.

During cross examination, PW5 stated that he joined the club in about 1966-67 and ceased being a secretary in early 1980. He averred that developments which constituted new buildings, swimming pools, additional tennis courts, squash area, parking and tree planting took place in the late seventies. PW5

identified a letter dated 12th November 1973 as having been from the club, and stated that when developments were going on, no construction was taking place at the dog section. PW5 stated that no rent was received from the dog section and further, that no licence had been issued in respect of the dog section which was later moved. In re-examination, PW5 stated that the club had a large running track which is still in use and occupies part of the dog section. Lastly, this witness stated that the dog section existed before he joined the club.

The Defendants' Case

The Defendants filed a Defence dated 5th October 1993 as amended on 20th September 1994, further amended on 18th July 1997 and by a second further amendment on 22nd March 2013. The Defendants state that they are the duly appointed executors of the will and holders of a grant of probate of the estate of Geoffrey Karekia Kariithi (deceased) who was sued prior to his demise as the sole Defendant. The Defendants have averred that at all material times, Geoffrey Karekia Kariithi (deceased) was the registered owner of L.R. No. 209/9629.

The Defendants have contended that the Plaintiff is not duly incorporated under the provision of the Trustees (Perpetual Succession) Act and therefore, that the purported trustees ought to have instituted the suit in their individual names. It is the Defendants' contention that this suit is incompetent and bad in law and ought to be struck out. The Defendants have also averred that the Plaintiff does not conform with the mandatory provisions of Order VI Rule 8 of the Civil Procedure Rules for failing to disclose any particulars of the alleged fraud committed by Geoffrey Karekia Kariithi's (deceased) and therefore, that the Plaintiff does not disclose any/or reasonable cause of action, and is liable for striking out.

In addition, the Defendant's denied the Plaintiff's claim and in particular that the late Geoffrey Karekia Kariithi caused alienation of 1.404 hectares of the suit property and subsequent registration in his name as L.R No. 209/9629. The Defendants alleged that the late Geoffrey Karekia Kariithi lawfully and legally acquired L.R. No. 209/9629 when the same was lawfully allocated and granted to him and Mr. D. Mbela and Dr. J. N. Itotia (Deceased) by the President through the Commissioner of Lands vide Grant No. I.R 35641.

It is the Defendant's case that Mr. D. Mbela and Dr. J. N. Itotia (deceased) were then shareholders of Kilimani Arcade Limited in whose name L.R No. 209/9629 was to be registered and further, that two other plots namely L.R Nos. 209/9626 and 209/9627 were also excised from the suit property and allocated to other parties who were not enjoined in this suit.

While stating that the suit is statute barred pursuant to the provisions of section 7 of the Limitations of Actions Act, the Defendant stated that if the late Geoffrey Karekia Kariithi had perpetrated any fraud, it was inconceivable that his co-trustees would have failed to find out such fraud for a period of 18 years. According to the Defendants, the Plaintiff having been aware that three parcels of land being L.R. Nos. 209/9629, 209/9626 and 209/9627 had been allocated and transferred to third parties including the Geoffrey Karekia Kariithi (deceased), and having represented such parties as true owners pursuant to which the Defendant developed and expended monies on the property, the Plaintiff is now estopped from bringing this action.

The hearing of the defence case commenced on 25th October 2001 when the Defendant called 2 witnesses. Kibugo Kinyua Kariithi (DW1) testified that Geoffrey Kareka Kariithi was his father. At the time of giving evidence, DW1 stated that his father was ailing and unable to move. DW1 informed the court that Geoffrey Kareka Kariithi was suffering from Parkinson's disease which limited the use of his muscles and caused difficulties in his speech. DW1 averred that Geoffrey Kareka Kariithi donated a power of attorney to him and Ngari Kariithi dated 4th December 2008, which was part of the Defendant's further bundle of documents. It was the evidence of DW1 that Geoffrey Kareka Kariithi briefed him on his defence and expressed his position through an undated statement in the Defendant's further bundle of documents.

DW1 averred that LR. No. 209/9629 over which the Plaintiff was seeking declaratory orders was opposite Kenyatta Hospital next to the Public Service Club on Hospital Road. He stated that his father had title and was in possession of the said parcel of land. He made reference to a letter of allotment dated 15th March 1975 addressed to Mr. G. K. Kariithi and stated that under clause 5, the land was to be used for building shops and flats including a petrol station. It was the evidence of DW1 that the Defendant paid the required Kshs 105,000/- and a receipt no. 065997 dated 17th March 1975 was exhibited. DW1 admitted that his father was the Head of the Civil Service and Secretary to the Cabinet as well as a member of the Plaintiff's board of trustees from 1974.

In further testimony, DW1 averred that his father was approached by a Dr. Itotia who informed him that there were discussions about moving the police dogs to new premises as they had outgrown the premises on Hospital Road. This witness informed the court that owing to under development in the area, the City Council had a plan to allot the land to investors willing to put up shops and flats, and that Dr. Itotia requested the Defendant and Dalius Mbela to make a request for allotment.

DW1 stated that his father agreed and proceeded to form a company called Kilimani Arcade Ltd where the three were shareholders in equal shares. He contended that a letter of allotment was issued in his father's name on the understanding that he would transfer the land to Kilimani Arcade Ltd. He further stated that the police dogs section eventually moved out in 1980 when survey for the plot was also completed.

It was the further evidence of DW1 that his father was in possession of the land from 1981-1993 when the instant suit was filed. He asserted that his father became a Member of Parliament in 1988 under the KANU government and defected to the opposition prior to the 1992 elections. According to DW1, his father had told the family to expect to lose assets owing to his defection. This witness informed the court that prior to receiving the Plaint, his father had commenced a process of subdivision into 5 plots and had also commissioned architectural plans for building of shops on the suit property.

DW1 asserted that the suit property was vacant with an intact fence and that there was no running tract thereon being used by the Plaintiff's members. It was the averment of DW1 that his father ceased being chairman of the Public Service Club in 1974 when Mr. Kiereini became the Head of the Civil Service. Further, DW1 informed the court that the position of trustee held by the head of public service was a matter of normal procedure. In further evidence, DW1 alleged that his father was made a trustee in order to assist the Public Service Club obtain a title of 18.29 acres which was then to be surrendered for subdivision to those who had been allotted the land.

According to DW1, the Plaintiff failed to surrender the title to the Commissioner of Lands as agreed. He averred that the claim of fraud was an attempt to reverse events that took place between 1975 -1981 which led to the issuance of his father's title. He referred the court to the resolution of the executive committee of the Public Service Club and stated that surrender of the title to the government was resolved by Mr. Kiereini the chairman, J. Mati the secretary and Mr. Wainaina the treasurer. According to DW1, the members of the club surrendered the title to the government.

DW1 made reference to grant no. I. R. 36440 issued for 99 years from 1st August 1999 in favour of Andrew Washington Njenga and averred that the Plaintiff also laid claims of ownership over the land. DW1 referred to a declaration of trust in the Defendant's bundle of documents, made between his father and Loise Nduta Itotia in respect to LR. No. 209/9629 stating that it recorded and protected the interest of Loise Nduta and Dr. Itotia (deceased).

While stating that PW2 confirmed that his father's property was properly surveyed by the survey department in 1991, DW1 averred that there was no allegation of fraud. Further, DW1 asserted that the evidence of PW4 confirmed that his father and Mr. Nyoro were genuine plot owners. It is the evidence of DW1 that his father was not to blame for the failure to surrender the title for issuance of new titles. According to this witness, his father had been denied the right to enjoy his land for 17 years and that despite plans to develop his land, had instead been defending the instant suit. DW1 contended that his father had never been involved in a public scandal and further, that after being enjoined from dealing

with the land in 1993, his father obeyed that court order.

According to DW1, there was no good reason why the Plaintiff failed to file their claim from 1981 when the title was issued and the matter was fresh with all records available. DW1 informed the court that in October 1984, his father bought a share of the suit property from Dr. Mbela who was a co-shareholder at a price of Kshs 400,000/- and the court was referred to an acknowledgement to this effect dated 19th October 1994 in the Defendant's bundle of documents.

DW1 stated that the Defendant's land is 3.3 acres. DW1 informed the court that several civil service houses built on the Plaintiff's land have since been purchased by other parties and despite everybody having title, the club has not surrendered the original title. DW1 produced the Defendant's bundle of documents and the further bundle of documents dated 24th October 2011 as Defendant's Exhibits 1 and 2 respectively.

The last defence witness was Judith Wanjiru Njenga (DW2). She informed the court that she was a business woman who knew the Defendant as they shared a problem regarding a parcel of land where she has 1 acre of land while the Defendant has 3.3 acres. She stated that her late husband had been issued with title number 209/9627 whose copy was part of Defendant Exhibits.

DW2 averred that she had been blocked by the manager of the Public Service Club from accessing her plot. This witness informed the court that she followed up on the issue with the Director of Survey, who confirmed that there was no fraud as far as her plot was concerned. According to DW2, a committee at the lands office wrote a letter in 2007 explaining that 2 plots belonging to G. K. Kariithi and her husband had been approved for shops and nursery school respectively. DW2 averred that upon following the matter, the Commissioner of Lands wrote to her stating that the Plaintiff failed to surrender the land.

The Submissions

Parties were directed to file written submissions and the Plaintiff filed submissions dated 25th November 2013 where it argued that the Defendant did not deny the fact that the Plaintiff was the registered owner of the suit premises. Counsel for the Plaintiff relied on Order Rule 9(1) of the 1998 Civil Procedure Rules for the submission that that which is not denied is deemed to have been admitted.

It is the Plaintiff's submission that it had proved that it was the registered owner of the suit premises through title No. IR 2077 produced in Plaintiff's Exhibit 1. It was argued that the Certificate of Incorporation was evidence that Geoffrey Karekia Kariithi, John Gohard Mburu and William Kimutai Martin were trustees of the Public Service Club and was also evidence of the Plaintiff's ownership of the suit premises. In addition, Counsel argued that the testimony of Plaintiff's witnesses in respect to the Plaintiff's ownership of the suit property was never challenged.

Further, it was submitted that evidence had been adduced to prove that title no. LR 209/1408 registered in the Plaintiff's name was intact and in the Plaintiff's custody and therefore, that the allegations of subdivision of the suit premises and issuance of two titles does not arise, is immaterial, illegal and a nullity.

It was further submitted that the Plaintiff has always been in possession of the suit premises since 24th June, 1927 when Title No. I.R 2077 was issued by the Colonial Government to the then Civil Service Athletic Association, which is the predecessor of the Plaintiff Club. It was also contended that the Defendant had never been in possession/occupation of I.R. No. 209/9629, as no allegations of possession and/or occupation had been made in the Defendant's documents before the court.

The Plaintiff stated that the late Geoffrey Karekia Kariithi who was a Chief Secretary in the Kenyan Government had knowledge that the land he was getting was being excised from the suit premises known as L.R No. 209/1408 whose user was strictly limited to a sports club. Counsel for the Plaintiff urged that the Defendant was aware that LR No. 209/1408 was not available for allocation to an individual for

personal use and therefore, that his conduct was in breach of the trust bestowed to him. It is the Plaintiff's submission that fraud and breach of trust have been proved beyond any reasonable doubt against the Defendant.

While submitting that the alleged subdivision of LR No. 209/1408 was illegal, null and void, it was argued for the Plaintiff that the suit premises had already been alienated and allocated to the predecessor of the Plaintiff club and therefore, that the same was not available as government land for alienation and/or allocation to any other person. Counsel urged that the government can only alienate and /or allocate land that is available to it under the provisions of the repealed Government Land Act. It is the Plaintiff's submission that the Defendant's title in respect of LR No. 209/9629 is a nullity as it forms part of the suit premises known as LR.209/1408.

Further, that since the Plaintiff's title to LR No. 209/1408 was registered under the provisions of the repealed Registration of Titles Act, the cause of action and the suit was filed when the Registration of Titles Act was in force and therefore, that the provisions of the said Act should be invoked in the determination of this suit. It is the Plaintiff's contention that any dealing or transaction must strictly comply with the provisions of the Act and therefore, that there was no room for letters of allotment by the Commissioner of Lands so as to affect land already registered under the Act. Counsel submitted that the process of interfering with the suit property which is a registered property was null and void and of no effect for violating section 20 of the Registration of Titles Act which is couched in mandatory terms.

The Plaintiff's counsel referred to section 20, 34, 35, 36, 37 and 38 of the Registration of Titles Act, and argued that if the property LR No. 209/1408 was to be alienated, the only legal way was by way of a transfer. Counsel argued that under section 70, it is only the registered proprietor who can make an application for subdivision and issuance of new certificates for respective portions and therefore, that since there was no such application by the registered proprietor, the Commissioner of Lands had no authority to purport to subdivide LR No. 209/1408 so as to give the Defendant the portion known as LR No. 209/9629. Reliance was also placed on section 64 of the Act for the proposition that there was no power of court directing the Commissioner of Lands to interfere with title to registered property.

While submitting that the only avenue through which the government and the Commissioner of Lands can interfere with registered land is through compulsory acquisition under the provisions of the Land Acquisition Act (since repealed), the Plaintiff argued that elaborate procedures for compensation of the person affected by the acquisition was not followed. Reliance was placed in this regard on section 75 of the repealed Constitution, and the Plaintiff's Counsel contended that the said Constitution which was in force when the cause of action arose provided protection against deprivation of property unless there was compulsory acquisition for public utility.

Lastly, it was argued by the Plaintiff that since there can only be one title to any titled property, it is still the registered property of LR No. 209/1408 since the surveying carried out to get the two portions from the said premises was never completed and is of no effect. The Plaintiff also contended that no counter claim was sought by the Defendant to confer jurisdiction upon the court to make an order for the Plaintiff to submit its title so that the transfer attempted by the Commissioner of Lands can be completed.

The Defendant's counsel filed submissions dated 11th November 2013 wherein he summarized the evidence adduced during trial. It was submitted that 4 witnesses namely PW1, PW2, PW4 and PW5 admitted that the Defendant's property was excised from the Plaintiff's property. It was also argued for the Defendant that the Plaintiff was aware and approved the subdivision, and the counsel made reference to letters dated 12th November 1973, 5th April 2007 and 21st June 2007 in the Defendant's further bundle of documents in this regard.

The Defendant's counsel further submitted that under the independence Constitution all land was at the disposal of the President who delegated his powers to the Commissioner of Lands, and that under section 3 of the then Government Lands Act, the President had unlimited power to alienate government land. It was the Defendant's submission that the special conditions in the Plaintiff's title allowed for alienation of its land which was done by the Commissioner of Lands in the instant case, and who caused a resurvey of

the same. Further, counsel contended that the letter dated 12th November 1973 amounted to affirmation of receipt of a notice pursuant to the said special conditions. Counsel contended that the use of the land allocated to the deceased Defendant fits within the requirement to create room for town planning.

The Defendant argued that there was no irregularity in the process leading up to excision of the Plaintiff's title and eventual subdivision into 3 titles namely LR No. 209/1408, LR No. 209/9627 and LR. No. 209/9629. It is the Defendant's submission that no evidence was led by the Plaintiff to demonstrate that the Defendant violated any law or circumvented any process and further, that no suspicion was cast upon G. K. Kariithi (deceased) regarding the alleged fraud or breach of trust.

It was also argued that no evidence was led to show that the Defendant knew that there was any irregularity in issuance of a title in his favour. The Defendant contended that the letter dated 12th November 1973 was not authored by G. K. Kariithi (deceased) and further, that there was no proof that the deceased had direct or constructive and proven knowledge of its authorship. It is the Defendant's argument that the resolution produced in court shows that the Defendant was not an executive committee member of the club since he did not sign the resolution.

Counsel for the Defendant contended that the excision of the suit property by the Commissioner of Lands was regular and contended that the evidence of PW 5 confirmed that the resolution and letter dated 12/11/1973 produced by the Defendant were valid and legitimate documents of the Public Service Club. It was submitted that under the constitution of the club, the executive committee could bind the club.

In further submission, it was argued that the mere lack of a certificate of subdivision and prior notice to the club, do not vitiate the validity of the 2 titles issued out of the Plaintiff's title. Counsel contended that under section 23 and 24 of the Registration of Titles Act (now repealed), the Defendant's title, is indefeasible and further, that the sanctity of the title is protected by law and by the pre-2010 constitution.

While submitting that fraud is a very serious allegation which requires proof on a standard higher than that of a balance of probability, the Defendant contended that the Plaintiff had completely failed to prove the existence of fraud on the part of G. K. Kariithi and breach by him of his duty as Trustee. Counsel submitted that PW I absolved the Defendant from any accusations of fraud by stating that the deceased had never acted fraudulently. It was also argued that the evidence of PW2 was that the land was properly surveyed and subdivided into 3 sub plots that the survey maps and deeds plans for all 3 subplots were valid. Counsel argued that PW4 testified that there was nothing fraudulent about the title deed issued to G. K. Kariithi and further, that the only problem was that it was not registered and surrender was not done.

In further submission, it was argued that that the Defendant received an allotment of LR no. 209/9626, paid a substantial sum of Kshs.110,505/= for the same and awaited surveying and issuance of a title in July 1981, a process which took place between 1975 to 1981. Counsel submitted that the deceased purchased the interest Hon. Darius Mbela at a substantial cost of Kshs.400,000/= and also declared a trust in favour of the widow of Dr. Itotia, Mrs. Loise N. Itotia. Further, it was contended that G. K. Kariithi (deceased) continued to pay rates and land rent of the property promptly.

Counsel relied on the treatise **Keeton on Law of Trusts, 4th Edition** for the submission that allegations of fraud against a trustee require proof through direct and clearest evidence. The court was also referred to the case of **Ratilal Gordhanbhai Patel –vs- Laiji Mankanji,(1957) E.A. 314** for the submission that allegations of fraud must be strictly proved on a standard of proof that is below reasonable doubt but more than a mere balance of probabilities.

Counsel for the Defendant also submitted that the Plaintiff's suit is time barred, and that the letter of 12th November 1973 included in their exhibits showed that the Plaintiff was aware of the intended alienation of her property. It was submitted for the Defendant that the evidence of DW1 that G. K. Kariithi had been in possession of the property between 1981-1992 when the suit was filed was not challenged. Counsel submitted that under section 4(1) of the Limitations of Actions Act, a claim for equitable relief for breach of trust cannot be brought after 6 years and further, that a claim for recovery of land cannot be brought

under section 7 of the Limitations of Actions Act.

Lastly, it was submitted that since the Plaintiff and the deceased Defendant both obtained a grant from the Commissioner of Lands, both titles are protected by the Registration of Titles Act (since repealed) and reliance was placed on the case of **Njilux Motors Ltd -vs- Kenya Power and Lighting Company & Another Nairobi Civil Appeal No. 206 of 1998** in this regard.

The Issues and Determination

It is not disputed that the Plaintiff is the registered owner of the property known as LR 209/ 1408 and that the Defendant is the registered owner of the property known as LR 209/ 9269. It is also conceded by the parties that LR 209/ 9269 was excised out of LR 209/ 1408. There are thus three outstanding issues remaining to be determined arising from the evidence and submissions presented by the parties:

1. Whether the Plaintiff's suit is time barred under the provisions of the Limitation of Actions Act.
2. If the answer to the first issue is in the negative, whether LR 209/ 9269 was acquired by the Defendant fraudulently and in breach of trust .
3. Whether the Plaintiff is entitled to the remedies sought

Whether the Plaintiff's suit is time barred under the provisions of the Limitation of Actions Act

The Plaintiff in its Amended Plaint dated 9th July 1997 seeks orders of ownership and possession of LR 209/9269 and consequential orders therefrom. The Plaintiff in their Plaint state that the defendant on or about 1st June 1975 fraudulently and in breach of his duties as a trustee of the Plaintiff caused to be alienated from LR 209/1408 a portion measuring 1.404 hectares and had it subsequently registered in his name in L.R 209/9629. The Defendant has in this regard raised the defence of limitation of time, on the ground that the suit herein was filed in 1993, 18 years after the cause of action arise, and is therefore time barred.

The Plaintiff's case hinges on the Defendant's actions being in breach of his duties as trustee, and the evidence brought by the Plaintiff is that the Defendant was appointed trustee of the Plaintiff on 2nd July 1974 according to the notification in the Register of Documents that it produced as an exhibit. The Plaintiff also brought evidence of title of the Plaintiff to LR 209/ 1408 from which as LR 209/ 9269 is excised.

This court therefore first has to determine what the applicable law is as regards limitation of time. Under section 20 of the Limitation of Actions Act it is specifically provided as follows with regard to actions to recover trust property:

“(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.

3) A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.”

The provisions of section 20 apply to actions brought by a beneficiary to a trust. The action herein has been brought by the Plaintiff as registered trustees, initially registered under Land (Perpetual Succession) Act, which has since been repealed and is the predecessor of the Trustees (Perpetual Succession) Act. Under section 3(1) of the Trustees (Perpetual Succession) Act, trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body. The main objective of the Trustees (Perpetual Succession) Act is for the incorporation of trustees for the purpose of perpetual succession to property.

The Plaintiff produced evidence of the certificate of incorporation initially issued to the Civil Service Club Registered Trustees under the Land (Perpetual Succession) Ordinance in July 1959, and of the order by the Minister of Lands and Settlement changing of name of the Trustees under the Land (Perpetual Succession) Act from the Civil Service Club Registered Trustees to Public Service Club Registered Trustees which order was dated 14th May 1974.

The effect of such incorporation is provided under section 3(3) of the Trustees (Perpetual Succession) Act as follows:

“The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

Therefore the action herein is brought by the Plaintiff as a corporate body of trustees that is subject to certain statutory and equitable duties and responsibilities which they were seeking to enforce, and not as beneficiaries. I therefore find that section 20 of the Limitation of Actions Act is therefore inapplicable to the circumstances of this suit as it only applies to actions brought by a beneficiary to a trust.

The applicable section with regard to whether this suit is time barred is therefore the general provisions of the Limitation of Actions Act on actions for recovery of land, namely sections 7 and 9 of the Limitation of Action Act. Under these provisions actions to recover land by a person are subject to a 12-year limitation period, running from the date of accrual. Section 7 of the Limitation of Actions Act provides as follows in this regard:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

As regards accrual of a cause of action with regard to present interests in land, section 9 (1) of the Limitation Act provides as follows:

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”

It is not disputed that the letter of allotment to the Defendant with respect to LR 209/9269 that is relied

upon by both the Plaintiff and Defendants is dated 15th March 1975. The title to the Defendant was registered on 10th July 1981 and the suit herein was first filed by a Plaintiff dated 16th June 1993 and filed in court on 18th June 1993. The Plaintiff pleaded that it did not discover the Defendant's alleged fraud until 1993 notwithstanding all reasonable diligence. PW1 and PW3 testified that although allocation of the excised portions took place in 1975, they came to know about it in 1993. Section 26 of the Limitation of Actions Act provides for the extension of the periods of limitation in instances when fraud, mistake and ignorance of material facts is pleaded as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either -

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which -

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

The question therefore to be addressed is whether the Plaintiff could have discovered the allocation of the Defendants with reasonable diligence. The Defendant in this respect rely on a letter from the Secretary of the Public Service Club dated 12/11/1973 as evidence that the Plaintiff were aware of the excision of L.R 209/9629. The contents of the said letter are as follows:

“Public Service Club,

P. O. Box 41185,

Nairobi.

12/11/73

Commissioner of Lands,

Department of Lands,

NAIROBI.

Dear Sir,

RE: NAIROBI – I.R. NO. 209/1408

HOSPITAL ROAD (FORMERLY GYMKHANA ROAD)

PUBLIC SERVICE CLUB

Thank you for your letter reference 16939/89 dated 11th October, 1973.

I enclose two plans showing (bordered in purple) what the revised boundaries of the Club area would be having taken out.

- a. **The area occupied by the Kenya Police Dog Section and**
- b. **The land required by the Nairobi City Council for the re-alignment of Hospital Road – both hatched in orange. (This is based on information obtained from the Council by our Architects.)**

You will see that the revised boundaries include two very small portions of former Road Reserve which are coloured in blue; one adjoining the existing club House, and the other opposite the tennis courts being a truncation of the former extension of Montgomery Road. In view of the extent of the land being excised. I hope the inclusion of these small area in acceptable.

The plan has been prepared by superimposing the present surveyed boundaries as shown on the Survey plan obtained from the Director of Surveys onto our Architects block plan and I hope that this is sufficient for your requirements.

Yours faithfully,

HON. SECRETARY

C.C. Peter Shiyukah Eso.,

Executive Chairman,

P. O. Box 30260,

NAIROBI

PW5, who was at one time the secretary of the Public Service Club, confirmed upon cross-examination that the said letter did indeed emanate from the secretary of the Public Service Club. The position of Secretary of the Public Service Club is created by the Public Service Club Constitution which was produced in evidence by the Plaintiff, and the trustees hold the property for the benefit of the said club according to the terms of the said constitution and the grant for LR 209/1408.

The Plaintiff as trustees ought to have exercised the requisite standard of care and skill in monitoring the dealings by the officials of the Public Service Club that were likely affect LR 209/1408, and in exercising the necessary diligence and follow-up on the transactions being undertaken in relation to the said land. In addition any dealings affecting affect LR 209/1408 by the officials of the Public Service Club also bind the Plaintiff, as the Plaintiff held LR 209/1408 in trust for the Public Service Club and the officials of the club were therefore there ostensible agents.

It is thus my finding that the Plaintiffs are not only deemed to have been aware of the letter dated 12/11/1973, but could also have discovered the excision and allocation of L.R 209/9629 to the Defendant had they exercised reasonable care and diligence and maintained interest in the dealings affecting LR 209/1408. These dealings have been shown to have been shown to have been within the knowledge of the officials of the Public Service Club, who were the Plaintiff's agents.

Arising from the above-stated reasons, it is also my finding that the Plaintiff's suit is as a result time-

barred and statute-barred pursuant to the provisions of the Law of Limitations Act section 7, for the reason that the suit was filed on 18th June 1993, 18 years after the cause of action arose in March 1975. I will accordingly not proceed with a consideration of the outstanding issues, and hereby dismisses the Plaintiff's suit. However, as the suit involves land that had initially been allocated to the Plaintiff for social and public purposes, each party is hereby ordered to meet their own costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of June, 2014.

P. NYAMWEYA

JUDGE