



**Kaimosi Friends University College v East Africa Yearly Meeting of Friends (Quakers) (Sued through Nicholas Anyanje, Joseph Mahasi and Lucas Mudoga- Registered Trustees) & 2 others (Environment & Land Case 15 of 2021) [2022] KEELC 2527 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 15 OF 2021  
E ASATI, J  
MAY 31, 2022  
FORMERLY KAKAMEGA ELCC NO. 61 OF 2019**

**BETWEEN**

**KAIMOSI FRIENDS UNIVERSITY COLLEGE ..... PLAINTIFF**

**AND**

**EAST AFRICA YEARLY MEETING OF FRIENDS (QUAKERS) (SUED THROUGH NICHOLAS ANYANJE, JOSEPH MAHASI AND LUCAS MUDOGA-REGISTERED TRUSTEES) ..... 1<sup>ST</sup> DEFENDANT**

**EPHRAHIM KONZOLO ..... 2<sup>ND</sup> DEFENDANT**

**KAIMOSI TEACHERS' TRAINING COLLEGE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, Kaimosi Friends University College(KAFUCO) commenced the action herein against the Defendants vide an Originating Summons dated 17<sup>th</sup> May 2019 and filed in court on May 21, 2019. The Originating summons was stated to be brought pursuant to the provisions of Article 40 of the *Constitution* of Kenya 2010, Sections 26(1), 28, 68, 79(2), 80(1), of the *Land Registration Act* of 2012, Section 7 of the *Limitation of Actions Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 37 Rule 3 of the *Civil Procedure Rules* 2010. It is supported by Supporting Affidavit sworn by Ogodo M. J. Nandi and the annexures thereto.
2. The Plaintiff seeks for the following orders: -
  - i) Pending the hearing and determination of the suit, the court be pleased to restrain the Defendants whether by themselves, their servants, agents or otherwise from encroaching upon, trespassing onto, remaining on, selling, leasing, renting out, cultivating, planting or harvesting



trees, or in any way interfering with the suit property or the developments thereon, or otherwise dealing with L.R No. 1087/3 and L.R No.1087/2.

- ii) A declaration that land parcels L.R No.1087/3 extends to include houses and Tea plantation established by government funds and previously owned by the Kaimosi Teachers Training College and that if the registry index map does not reflect that then it is an error on the face of the record.
  - iii) The Chief Land Registrar in custody of the subject registers do forthwith proceed and rectify the registers by cancelling titles to land parcels L.R No.1087/4 which resulted from the subdivision of L.R No.1087.
  - iv) Cancellation and rectification of registers to reflect the true position on the ground of land parcels No. 1087/3 and 1087/4 and errors on the face of the record be rectified.
  - v) Chief Land Registrar and District Land Surveyor Vihiga to rectify the boundaries between the parcels L.R No 1087/3 and L.R 1087/4.
  - vi) The Chief Land Registrar revokes the title for L.R NO. 1087/4 forthwith to restore the register of the Land parcel No. 1087/3 name and re-establish the beacons thereof.
  - vii) Costs of the suit be provided for.
3. The Plaintiff's case is that it is the registered owner of Land parcels No.L.R 1087/2 and L.R NO.1087/3 that lie in Vihiga County, Kaimosi. That the Defendants by themselves, their servants, agents or otherwise are encroaching upon, trespassing onto, remaining on, selling, leasing, renting out, cultivating, planting or harvesting trees and are interfering with the suit property L.R NO. 1087/3. That in perpetuating fraud, on L.R NO. 1087/3, the 1<sup>st</sup> Defendant commissioned a survey on the land possessed by the 3<sup>rd</sup> Defendant since 1940s and developed with government funds thereby creating an inaccuracy of the boundaries of L.R NO. 1087/3 and alienated assets of the University College that once belonged to the 3<sup>rd</sup> Defendant, a government institution.

That this was un-procedural, fraudulent or by way of a corrupt scheme.

That when the 3<sup>rd</sup> Defendant in or about September 2018 relocated to its new site, it failed to hand over to Plaintiff some of the houses to wit: the Principal's house (four bedroom), fuel pump, 8 other houses and the Tea plantation of about 5092 bushes registered as No. MDO39028 at Mudete's Tea Factory in Kaimosi Teachers' Training College's name (PIN NO. P051099770Q) as per the assessment report was illegal and unlawful.

The Plaintiff contends further that it is the successor to the Kaimosi Teachers' Training College and as per the Gazette Notice, it is entitled to succeed all the interests in the land formerly occupied by the third Defendant. That the University College gazettelement was on the strength and adequacy of both parcels of land and alienation or reversal of any of its properties will be undermining the efforts made towards attaining the University College. That the 1<sup>st</sup> Defendant currently sponsors many schools and if the trend of alienation is not rectified by the Honourable Court, it will take root and likely affect some if not all schools that the 1<sup>st</sup> Defendant co-partners with the government. That Government stands to suffer irreparable harm which cannot be compensated by an award of damages in event the court does not grant the orders sought.

4. The Plaintiff's case is contained in the Originating Summons, the Supporting Affidavit sworn by Ogodo M. J. Nandi on 17<sup>th</sup> may 2019, and annexures thereto and Further Supporting Affidavit sworn by Ogodo M. J. Nandi on 11<sup>th</sup> November 2021 and the annexures thereto.



5. The Defendants denied the Plaintiff's claim and vide the Answer to Originating Summons, counter claimed for transfer of LR NO.1087/2 to the 1<sup>st</sup> Defendant and payment of kshs.49 Million to the 3<sup>rd</sup> Defendant. Their case is contained in the Answer to Originating Summons dated 12<sup>th</sup> July 2019 and the annexures thereto. The Defendants contend that land parcels known as L.R NO. 1087 and 1088 at Kaimosi were acquired by early Missionaries of the 1<sup>st</sup> Defendant under the management of American Board of Missions and registered in the Church's name. That after Kenya gained independence the Friends African Mission handed over the church properties including the two parcels of land to East Africa Yearly Meeting of Friends -Quakers (herein called the Church) Board of Trustees in February 1964. That Kaimosi is presently home to a complex of institutions which stand on the two parcels of land including Kaimosi Special School, Kaimosi Boarding Primary School, Kaimosi Boys High School, Kaimosi Jumua Hospital, Kaimosi Girls High School, Kaimosi Teachers' Training College, Kaimosi Friends University College and Friends College of Research and Technology.
6. That in the year 1990 the Church carved out of its land a portion measuring 100 acres for putting up a Private University to be known as Friends University in Kaimosi. That Friends University Kaimosi (FUKA) was established on the piece of land but could not take off due to logistical and funding challenges.
7. That with the onset of devolution, the Church in partnership with the County Governor Vihiga County submitted a proposal to the Minister and Commission on University Education for the establishment of a government sponsored university at Kaimosi hence leading to the establishment of Kaimosi Friends University College (KAFUCO) in the year 2014. That at first, the Church surrendered the 100-acre piece of land on which Friends University Kaimosi had been established but the Commission turned down the offer and preferred the ground occupied by the 3<sup>rd</sup> Defendant. That the parcel on which FUKA had been established had become L.R NO. 1087/2 while the ground occupied by KTTC became L.R NO. 1087/3 – as a result of sub-division of the Church land NO. L.R 1087.
8. The Defendants further contend that their anticipation was that the Plaintiff could return the land rejected by the Commission and remain with parcel No. 1087/3 only.
9. The Defendants pray that the Plaintiff's claims be dismissed with costs and that judgement be entered in favour of the Defendants on the Counterclaim for retransfer of land parcel known as L.R NO. 1087/2 to East African Yearly Meeting (Quakers) and for payment to KTTC of the sum quantified as liabilities and taken over by the University plus costs of the suit.
10. When the matter came up for hearing on 27<sup>th</sup> October 2021, parties elected and directions were given that the matter to proceed by way of Affidavit evidence and thereafter parties file Written Submissions. Consequently, the Plaintiff filed Further Supporting Affidavit sworn by Ogodo M. J. Nandi the Principal Accounting Officer of the Plaintiff on 11<sup>th</sup> November 2021 and Submissions dated 18<sup>th</sup> November 2021 filed by the firm of Oloo & Oloo Advocates for the Plaintiff.

### **Submissions.**

11. The parties filed written submissions and highlighted the same orally in court. Written submissions dated 18<sup>th</sup> November 2021 were filed on behalf of the Plaintiff by Dr. Oloo, Advocate for the Plaintiff. Referring the court to the pleadings filed by the Plaintiff, Counsel submitted that the Plaintiff has valid legal documents over the land parcel NO. L.R 1087/2 having received and registered it as a donation.
12. Counsel submitted that the question that arise for the court's determination are



- a) Whether the 1<sup>st</sup> Defendant transferred L.R No. 1087/2 to the Plaintiff by error
  - b) Whether the 1<sup>st</sup> Defendant deliberately, fraudulently and with bad faith interfered with L.R NO. 1087/1/1 to create NO. 1087/3
  - c) Whether the court should order the cancellation of title L.R NO. 1087/1/1 on which the TTC was located.
  - d) Whether the 1<sup>st</sup> Defendant has a right to appropriate, for private use, assets and through public resources.
13. On issue number 1, counsel submitted that the 1<sup>st</sup> Defendant is the one to prove that L.R NO.1087/2 was transferred to the Plaintiff in error. That the 1<sup>st</sup> Defendant has tried to prove this in various courts but failed for lack of evidence. That the Defendants relinquished their proprietary rights over L.R NO.11087/2 when they gave the suit property to the Plaintiff as a donation and further went ahead to transfer the land in favour of the Plaintiff. That the Defendants have not demonstrated a reason for reversion of the certificate of title. Relying on the provisions of Sections 26 and 29 of the [Land Registration Act](#), Counsel submitted that the Plaintiff is the absolute and indefeasible owner of the suit property by virtue of being in possession of the certificate of title. That registration of the suit property marked the passing of property from the Defendants to the Plaintiff conclusively. That as such an attempt by the Defendants to claim reversal of the ownership over the suit property is a violation of the Plaintiff proprietary rights as protected by Article 40 of the [Constitution](#) of Kenya 2010.
  14. Counsel submitted that the effect of the Defendants' actions of sub-dividing land No.1087/1 is illegal and unlawful and calls for rectification of register under Section 80 of the [Land Registration Act](#). That the alteration by the 1<sup>st</sup> Defendant of the boundaries of L.R NO. 1087/1/1 to create L.R NO. 1087/3 was obtained, made or omitted by fraud or mistake. Counsel relies on the decisions in [Mary Ruguni Njoroge v Samutel Gachur Mbugua & 4 others](#) [2014] eKLR, [Francis Nyauma Obare & 3 others v Maina Maruanga Omwamire & another](#) [2017] eKLR and [Pius Nyamboga Mochoge v Ntinini Tauta](#). Counsel urged the Court to direct that the boundaries of L.R NO. 1087/3 be rectified to bring them into tandem with L.R 1087/1/1 as originally held by the Kaimosi Teacher's Training College.
  15. He prayed that the court cancels L.R NO.1087/3 and reinstate L.R NO. 1087/1/1, and to make a declaration that the 1<sup>st</sup> Defendant cannot appropriate government houses and government tea bushes for private benefit and that the Plaintiff's claim be allowed.
  16. Written submissions dated 20/12/2021 were filed on behalf of the Defendants by the law firm of A. B. L Musiega & Company Advocates. As background, Counsel submitted that the 1<sup>st</sup> Defendant is a religion organization founded by missionaries who settled in Kaimosi area of Hamisi sub-county Vihiga County in the years of early 1900. That though their core mission was the spread of the gospel, they got involved in other social welfare activities including establishment and maintenance of schools, hospitals and technical training institutions. That one of such institution was Kaimosi Teachers Training College dedicated to training Primary School teachers which is the 3<sup>rd</sup> Defendant herein.
  17. That in order deliver on this social welfare responsibilities, the 1<sup>st</sup> Defendant acquired several hundreds of acres of land in the area which were registered in the name of the church as L.R 1087 and L.R 1088. That courtesy of the 1<sup>st</sup> Defendant, Kaimosi area is now a complex and home of multiple institutions.
  18. On the present claim by KAFUCO Counsel submitted that the University was never a successor of Kaimosi Teachers Training College. That the Kaimosi Teachers Training College never had any land /property or houses in its name to transfer to KAFUCO. That the houses being claimed by the



University were never built by government. That the Plaintiff failed to tender evidence on this point while the Defendants explained how the houses came to be. That it was not the responsibility of the Church to provide all the requirements for establishment of the University. That the Church already gave land and buildings for the university to start off and still had to provide alternative site for the Kaimosi Teachers Training College.

19. Counsel submitted further that the purpose of the assessment report relied on by the Plaintiff was to provide for the sharing of facilities between the TTC and the University during transition and was not an audit conducted to establish the properties owned by the college for transfer to the University. That the report was not accurate and that the University never honoured it as explained in the Affidavit of Benson Mudangale Onzere Counsel submitted further that the Plaintiff did not prove the allegation of fraud. That the law requires that fraud be specifically pleaded and proved. That although the Plaintiff claimed that the Defendants committed the fraud during the survey, it did not enjoin the surveyor who conducted the survey exercise. That it is not true that the church has lost claims to the suit land parcel because Case NO. ELC case NO. 169 OF 2018 before the Principal Magistrate Court Vihiga was struck out for lack of jurisdiction.
20. On why KAFUCO should be ordered to transfer back to the Friends Church L.R NO.1087/2, Counsel submitted that there was no intention on the part of both parties to transfer this parcel to the University. That in any event, the Ministry rejected the portion for purposes of establishing a University which was the reason the Ministry and the Commission on University Education wanted the land. Counsel relied on the case of Margaret Apiyo = VS = Jotham Chemwa Matayo (1992) eKLR to submit that since the Plaintiff did not purchase the land, it should be reverted to the church. That the University holds land parcel NO. L.R 1087/2 in trust for the Church. That the land parcel NO. L.R 1087/2 should be returned to the church since the church is sponsoring more development activities. He prayed that the Plaintiff's suit be dismissed and Judgement be entered in favour of the Defendant for re-transfer back of L.R NO. 1087/2 to the church.

#### **Issues for determination.**

21. Having read all the pleadings filed by the parties, the annexures to the Affidavits and the submissions, the court identifies the following as the issues that emerge for determination:
  - i. Whether or not the Plaintiff is entitled to retain land NO. L.R 1087/2 or the same should be transferred back to the 1<sup>st</sup> Defendant.
  - ii. Whether the 1<sup>st</sup> Defendant deliberately, fraudulently and with bad faith interfered with L.R 1087/1/1 to create L.R NO. 1087/3.
  - iii. Whether the court should order cancellation of L.R 1087/3 and reinstate L.R 1087/1/1.
  - iv. Whether the Plaintiff is entitled to the houses and other utilities claimed in the Originating Summons.
  - v. Whether the Plaintiff should be ordered to pay the 3<sup>rd</sup> Defendant (Kaimosi Teachers Training College) the sum of Kshs. 49 million as liabilities taken over by the University.
  - vi. Who pays the costs.



### **Analysis and determination.**

22. This court is enjoined by the provisions of Order 21 Rule 4 [Civil Procedure Rules](#), 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.

### **Whether the Plaintiff is entitled to retain land L.R NO.M1087/2 or the same should be transferred back to the 1<sup>st</sup> Defendant.**

23. One of the grounds upon which the Originating Summons is based is that the Plaintiff is the registered owner of parcel No. L.R 1087/2 and 1087/3. That it was on the basis of the University's ownership of these parcels of land that the Commission for University Education (CUE) recommended gazettelement of the University. That plans to award a Charter to the University College are at an advanced stage and that one of the strengths of the University noted by the CUE is that it has adequate land for University development. That the demand for reversion of land L.R NO. 1087/2 by the 1<sup>st</sup> Defendant is an afterthought whose effect will be to negate the strides made so far even in CUE's assessment for award of Charter.
24. In his submissions, Dr. Oloo Advocate for the Plaintiff submitted that having relinquished their proprietary rights over L.R NO. 1087/2 when they willingly gave the suit property to the Plaintiff as a donation and transferred the land into the Plaintiff's name, the Defendants have not demonstrated reasons for the reversion of the Certificate of title and have not shown that registration of the same in the Plaintiff's name was obtained by fraud or coercion. That the Plaintiff has a good title that deserves protection under the law to wit; Article 40 of the [Constitution](#) of Kenya 2010 and Section 24 of the [Land Registration Act](#).
25. The Defendants vide the counter-claimed *inter alia* for transfer to the 1<sup>st</sup> Defendant of land parcel NO. L.R 1087/2. Their case is that since the parcel was registered by CUE it ought to be returned to the 1<sup>st</sup> Defendant. That the church was acting in good faith and legitimately expected that the University once established would have no problem in re-transferring the portion earlier allocated and which was rejected by the CUE back to the church for use by other bodies designated in the area.
26. In his submissions, Mr. A. B. L. Musiega Advocate for the Defendants urged the court to find that the transfer of L.R NO. 1087/2 was to the Plaintiff to hold it in trust for the guarantor (the Church) and retransfer it back because what the University required was only 100 acres. That the additional land should be returned to the church for more development activities for Vihiga County which shall require land. That it is not fair to alienate such huge land to the national government University denying the counties the potential for investment through shortage of land. Counsel relied on the case of [Margaret Apiyo =VS= Jotham Chemwa Matayo](#) (1992) eKLR to submit that where a party who gets registered as the owner without paying for the land, title should be cancelled and reversed to the original owner.
27. It is common ground that the land parcel L.R NO.1087/2 originally belonged to the 1<sup>st</sup> Defendant and was part of land known as L.R NO. 1087. It is also not contested that the 1<sup>st</sup> Defendant voluntarily subdivided the larger parcel of land to create L.R NO. 1087/2 which the 1<sup>st</sup> Defendant again voluntarily caused to be registered in the name of the Plaintiff for purposes of establishment of the Plaintiff University. The point of departure is that while the Plaintiff contends that the donation of the land was absolute and had no conditions for return/retransfer of the land to the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant contends that once that donation was rejected by CUE and a replacement namely parcel L.R NO.



- 1087/3 (orig. NO. 1087/1/1) provided, the rejected land NO. L.R 1087/2 ought to have reverted to the 1<sup>st</sup> Defendant.
28. A copy of Certificate of Postal Search in respect of LR NO. 1087/2 was attached to the Supporting Affidavit. The same shows that on 14/8/2014 the land parcel number 1087/2 whose area is 40.69 Ha of register H 29 folio 140 file 29826 held in fee simple was registered in the name of Kaimosi Friends University College(KAFUCO).
29. Annexure OMJN-9 to the Supporting Affidavit is a Conveyance dated 17/6/2014 made in respect of L.R NO.1087/2. The Conveyance is the instrument that conveyed L.R NO. 1087/2 from the 1<sup>st</sup> Defendant to the Plaintiff. The consideration is stated to be by way of gift and the tenure is fee simple. The Conveyance was executed on the one hand by the Trustees of the 1<sup>st</sup> Defendant namely; Lucas Mudoga, ID NO.2806431, Japheth Muhasi ID NO. 4179391 and Nicholas Anyanje ID NO.0694647 on behalf of the Church (1<sup>st</sup> Defendant) and on the other hand by Professor Nandi O. J. Manyasa ID NO 4773325 on behalf of the Plaintiff. According to the conveyance instrument, the transfer was subject only to the provisions of the *Government Lands Act* one thousand nine hundred and two (Repeated) and to the Rules for the time being in force thereunder. I have read the Conveyance Instrument keenly. I find no provision for reversion of the gift therein.
30. To the Answer to Originating Summons, the Defendants annexed a copy of Plaintiff as annexure E. K. 8 in respect of VIHIGA SRMC ELCCaseNO.169 OF 2018. The parties are the 1<sup>st</sup> Defendant herein as Plaintiff and the Plaintiff herein as the Defendant. It sought for orders, inter alia, of eviction of the Defendant (University) from disputed suit land and an order compelling the Defendant to pay compensation to the interested party. The interested party in the suit was Kaimosi Teachers' Training College, the 3<sup>rd</sup> Defendant herein. The suit lands were L.R NO.1087/2 and L.R NO. 1087/3. Both parties agree that the suit was struck out for lack of jurisdiction. In paragraph 5 of the Plaintiff (1<sup>st</sup> Defendant herein) stated that transfer of one of the suit lands to the University was by error as this was a portion reserved for another deserving facility to be established. Was the transfer effected as a gift from the church to the University for development of a University or it was an error as the land was reserved for some other purpose? The conveyance instrument was absolute and on the basis of a gift by the Church to the University.
31. It is evident that both land parcel NO. L.R 1087/2 and 1087/3 were registered in the name of the Plaintiff on the same day namely; on 14/8/2014. If indeed one parcel was a replacement of the other why register the one that had already been rejected as well? Why not stop the process for registration of the rejected parcel?
32. Counsel for the Defendants submitted that since there was no payment of purchase price, the land should revert to the 1<sup>st</sup> Defendant. However Section 27 of the *Land Registration Act* makes provision for transfer of land without valuable consideration. It provides:
- “(1) a proprietor who has without valuable consideration, acquired land, lease or a charge by transfer holds it subject to-a) any unregistered rights or interests subject to which the transfer the transferor held it; and b) the provisions of the *Insolvency Act*, 2015, so far as they are applicable in the circumstances.



It was not pleaded or proved that the land was transferred subject to any unregistered rights or interests or that the provisions of the *Insolvency Act* are applicable in the instant case. Subsection (2) provides that:-

“When registered, such a transfer has the same effect as a transfer for valuable consideration.”

33. In discussing whether the donor of a gift can recall the gift, *Snell's Equity* 29<sup>th</sup> edition, at page 122 paragraph (3) the author states “... “Where however the donor has done all in his power according to the nature of the property to vest legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some other person. Thus in *Re Rose, Midland Bank Executor & Trustee Co. Ltd vs Rose* [1949]Cha. 78 the donor executed a transfer of shares in a private Company and handed it with share certificate to the donee who died before it was registered. Although the donee's legal title would not be perfected until the Company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even if the donee has not yet been registered as proprietor.”
34. Also noteworthy is the fact that soon after execution of the conveyance in respect of LR NO. 1087/2, the 1<sup>st</sup> Defendant and the Plaintiff executed another conveyance dated 18<sup>th</sup> July 2014 in respect of LR NO. 1087/3. In my view if indeed LR NO 1987/3 was a replacement for NO. 1087/2, then that ought to have been indicated in the Conveyance instrument for No. LR 1087/3. On the contrary there is no clause in the second conveyance revoking the earlier conveyance or indicating that LR NO, 1087/3 was a replacement or alternative for LR NO. 1087/2.
35. My finding on this issue is that no sufficient grounds have been demonstrated for an order for transfer of land parcel NO. LR NO. 1087/2 back to the 1<sup>st</sup> Defendant. There is no evidence that the transfer was conditional or erroneous. The conveyance shows an absolute transaction. The Plaintiff is entitled to retain land parcel L.R 1087/2.

**Whether the 1<sup>st</sup> Defendant deliberately, fraudulently and with bad faith interfered with L.R NO.1087/1/1 to create L.R 1087/3**

36. The Plaintiff contends that the Defendant hived off parts of L.R NO. 1087/3 or what ought to have been part of L.R NO.1087/3 before transferring the said parcel of land to the Plaintiff. In the Further Supporting Affidavit, it was deposed on behalf of the Plaintiff that KAFUCO commissioned the Ministry of Land and Physical planning to conduct a valuation of the property L.R NO.1087/3 (orig L.R NO. 1087/1/1) with a view to establishing the boundary, acreage and value of the hived off land. That the valuation report confirmed that the Defendants had in conducting a survey hived off from the original 1087/1/1 a total of 3.9 hectares on which the following public facilities and assets stood; the Principal's house worth Kshs.17,780,000/=, petrol station worth Kshs.3,000,000/= and Tea farm assets worth Kshs.17,720,000/=. That these ere facilities built through use of public resources to the benefit of the first Defendant and the hiving off of the same was an act of fraud and bad faith.
37. It was submitted on behalf of the Plaintiff that the Defendant was expected to hand over L.R NO. 1087/1/1 with all building and fixtures at the point of handing over to Kaimosi Friends University College. That the reason for the suit is the deliberate omissions, errors and fraudulent actions on the part of the 1<sup>st</sup> Defendant who not only altered the boundaries of L. NO 1087/1/1 but also hived off 9 houses and tea bushes registered under the previous Kaimosi Teachers' Training College. That the first Defendant has converted the said assets to private use.



38. The Defendants on their part stated that Kaimosi Teachers Training College never owned any land of its own at Kaimosi which it could transfer to the University and that contrary to the Plaintiff's claim, the government of Kenya never constructed any building for use by Kaimosi Teachers' Training College. That the buildings were constructed by the Church and parents through fee payment and other fundraising ventures.
39. That by the time the gazette notice establishing the Plaintiff University was published, boundaries between the land allocated to the University and the church land had been marked and the houses in dispute defined outside the university and within the church land.
40. It is not denied that land parcel no. L.R 1087/3 was a product of L.R NO. 1087/1/1 belonging to the 1<sup>st</sup> Defendant. It is also not denied that it is the 1<sup>st</sup> Defendant who caused the survey and sub-division of L.R NO.1087/1/1 so as to create inter alia L.R NO.1087/3 which was subsequently transferred to the Plaintiff. The question is whether this was an act of fraud and bad faith as contended by the Plaintiff.
41. Fraud has been defined in *Black's Law Dictionary* 11<sup>th</sup> Edition as

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

It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

42. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

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

Also in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”  
In case where fraud is alleged it is not enough to simply infer fraud from the facts.



43. There is no evidence that there was an agreement or understanding between the Plaintiff and the Defendants that the 1<sup>st</sup> Defendant transfers the entire of land parcel known as L.R 1087/1/1 to the Plaintiff. No Memorandum of Understanding, Contract or Agreement was produced to this effect Land parcel No LR 1087/1/1 belonged to the 1<sup>st</sup> Defendant who was entitled to deal with it however it desired within the confines of the law. The 1<sup>st</sup> Defendant's rights in the land were protected by law. Further, the basis of the transaction between the Plaintiff and the 1<sup>st</sup> Defendant was a donation out of which the Plaintiff received land in excess of 200 acres, that is to say; LR 1087/2 measuring 40.69hactares and LR 1087/3 measuring 42hactares.
44. I find on this issue that no basis has been laid for the allegation that the 1<sup>st</sup> Defendant's action of subdividing its land parcel No. LR 1087/1 so as to carve out the portion that it desired to donate to the Plaintiff was fraudulent or in bad faith. The ingredients of fraud or bad faith have not been proved to the required degree or at all.

#### **Whether the court should order cancellation L.R 1087/3 and reinstate L.R NO.1087/1/1**

45. The plaintiff prayed in the Originating Summons that an order be issued that the Chief Land Registrar in custody of the subject registers do proceed and rectify the registers by cancelling titles to land parcel No.1087/4 which resulted from the sub-division of L.R NO.1087, secondly that there be an order for cancellation and rectification of the registers to reflect the true position on the ground of land parcel NO.1087/3 and 1087/4 and errors on the face of the record be rectified, thirdly, for orders that the Chief Land Registrar and District Surveyor Vihiga do rectify the boundaries between parcels L.R NO.1087/3 and L.R NO. 1087/4 and finally that the Chief Land Registrar revokes the title for L.R NO 1087/4 forthwith to restore the register of the land parcel L.R NO.1087/3 name and re-establish the beacons thereof.
46. Among the grounds for these prayers is that the 1<sup>st</sup> Defendant commissioned a survey on the land owned by the third defendant since 1940s and developed by the government funds thereby creating an inaccuracy of the boundaries of L.R 1087/3 and the outcome of the alienated assets of the University College that once belonged to the third Defendant, a government institution.
47. The certificate of search for L.R NO 1087/1/1 was not produced by any of the parties. But the parties agree that land parcel 1087/1/1 did exist, that it was registered in the name of the 1<sup>st</sup> defendant and that it is the parcel that was subdivided so as to create parcel no 1087/3.
48. The law regarding rectification of register and cancellation of title to land is contained in Sections 80 and 26 of the [Land registration Act](#) which provides as follows:

##### Section 80

- 1) "subject to sub section (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made all omitted by fraud or mistake.
- 2) the register shall not be rectified to affect the title of proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

##### Section 26

- 1) the certificate of title issued by the registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence



that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except:-

- a) On the grounds of fraud or mis-representation to which the person is proved a party.
  - b) Where the certificate of the title has been acquired illegally, un-procedurally or through a corrupt scheme.
3. a certified copy of any registered instrument, signed by the registrar and sealed with the seal of registrar shall be received in evidence in the same manner as the original”.
49. The court has considered the evidence adduced. The Plaintiff’s claim for cancellation is based on its contention that the sub-division was done so as to carve out some assets off the land that was ultimately given to the Plaintiff.
50. The court finds that the grounds for cancellation of the title or rectification of the register as set out in the above quoted law namely fraud, mistake or corrupt scheme have not been proved. Hence there is no basis for orders of cancellation of title or rectification of the register. There is no evidence that the parcel no 1087/1 belonged to the Kaimosi Teachers’ Training College since the 1940s as alleged by the Plaintiff.

#### **Whether the Plaintiff is entitled to the houses and other utilities claimed in the Originating Summons**

51. The Plaintiff prays for a declaration that land parcel L.R NO.1087/3 extends to include houses and tea plantation established by government funds and previously owned by Kaimosi Teachers Training College- and that if the registry index map does not reflect that, then it is an error apparent on the face of the record. It pleads that the alienation of the government assets by the 1<sup>st</sup> Defendant during the survey and transition between the Plaintiff and the 3<sup>rd</sup> Defendant was un-procedural, fraudulent or by way of a corrupt scheme.
52. The Plaintiff further pleads that following the relocation of the 3<sup>rd</sup> Defendant on or about September 2018 to its new site the 3<sup>rd</sup> Defendant failed to hand over to the Plaintiff some of the assets namely; the Principal’s house, fuel pump, 8 other houses and tea plantation of about 5092 bushes registered as No. MDO390128 at Mudefe’s Tea factory in KTTC’s name (PIN NO. P051099770Q).
53. Counsel for the Plaintiff submitted that the evidence shows that the 1<sup>st</sup> Defendant deliberately altered the boundaries with the effect of alienating the tea bushes and some government houses to their use. He relied on the case of *Francis Nyauma Obare & 3 others =VS= Maina Morwanga Omwamire and another* [2017] eKLR where the Defendant had undertaken a resurvey and encroached largely on the Plaintiff’s land and the court ordered for rectification of the register to the parcels of land involved to be in tandem with their respective title deeds as well as measurements as per the adjudication process. Counsel urged this court to make similar orders in this case.
54. The Defendant on the other hand pleaded that neither the land nor the claimed assets belonged to the 3<sup>rd</sup> Defendant. That the claimed houses were not built by government or government funds. That they all belonged to the 1<sup>st</sup> Defendant. That the houses are on the “Hill of Vision” and directly falling within the church chapel corridors and were part of the church properties of historical importance and do not form part of the University land. That the fuel tank / pump was a tank sunk by the church which is similar with other tanks sunk by the church at Mission headquarters including Lulanda in Kakamega



County and Lugulu in Bungoma county. That the houses are being used by the 1<sup>st</sup> Defendant to house church workers.

55. No evidence was tabled that the assets were established using government funds or by government. Secondly there was no evidence that the Plaintiff was to take over land parcel no. 1087/1/1 and all that was in it. While the Plaintiff contends that the University was the successor of the KTTC and hence took over all the rights, assets and liabilities of the KTTC, the Defendants contend that the 1<sup>st</sup> Defendant only donated land with structures which was land parcel NO.1087/3. From the evidence parcel NO. 1087/3 was created in the year 2014 and gifted to the Plaintiff vide the Conveyance instrument signed on 18<sup>th</sup> July 2014. It was registered in the name of the Plaintiff on 14/8/2014. The transfer was absolute. There is nothing in the conveyance to suggest that the claimed assets were to be part of the land the subject of the conveyance. The Constitution of Kenya defines land at Article 260 thus:

“land includes-

- (a) the surface of the earth and the subsurface rock
  - (b) any body of water- on or under the surface;
  - (c) marine waters in the territorial sea and exclusive economic zone;
  - (d) natural resources completely contained on or under the subsurface;
- and
- (e) the air space above the surface;”

In the case of *Co-operative Bank- of Kenya Limited vs Patrick Kangethe Njuguna & 5 others* [2017] eKLR the Court of appeal held that the

“definition of land in article 260 of the constitution echoes the traditional definition of land under the Common Law doctrine known as Cujus est solum, ejus usque ad coelum et ad inferos (Cujus doctrine) which translates to “whenever owns [the] soil, it is theirs all the way [up] to Heaven and [down] to Hell.”

The import of this definition is that one cannot separate the developments/assets on the land from the land. They are included in the definition of the land.

The assets being claimed by the Plaintiff are on private land that belongs to the 1<sup>st</sup> Defendant. Private land is defined in Article 64 as including land registered and held by any person under any free hold tenure, land held by any person under leasehold tenure and any other land declared private land under an Act of parliament.

56. I have read the report titled report on assessment of facilities at Kaimosi Teachers Training College for upgrading to Kaimosi Friends University College as at 22<sup>nd</sup> August 2014. The report was done by Ministry of Education Science and Technology. The Plaintiff evidence about the report is that the assets of KTTC were documented in the report and that it was the Principal secretary, Ministry of Education Science and Technology state department who sent officers to take a stock of all the assets there in possession of KTTC and within the precinct of KTTC. That the report was shared to various parties but no party raised objection.
57. The Defendants’ response on the report as contained in the submissions is that the purpose of the assessment report was to provide for the sharing of the facilities between TTC and the University



during transition and was not an audit conducted to establish the property owned by the college for transfer to the University.

58. I find no evidence on record that there was any agreement that the Defendants were to surrender all assets previously utilized by Kaimosi Teachers' Training College to the University. The University accepted the conveyance of land parcel No. 1087/3 as it was. The evidence on record is that the claimed assets are not part of L.R No. 1087/3 and having already found herein that the sub-division of land parcel known as L.R No.1087/1/1 was not done by fraud or bad faith; the claimed assets are on a different parcel of land namely land parcel No. 1087/4. The court cannot order surrender to the Plaintiff's assets which are on different parcel of land not belonging to the University.
59. The legal notice (annexed to the Supporting affidavit and marked OMJ-6) in paragraph 3:3 indicated that the University was to be the successor of Kaimosi Teachers Training Colle. However, no background was laid to this statement. Kaimosi Teachers' Training College did not own land or assets. The land that the church voluntarily donated to the University was already carved out and transferred to the Plaintiff by the time of legal notice was published. The 1<sup>st</sup> Defendant's rights over the remainder of the land are protected by the Constitution and other laws inclusive of the [Land Registration Act](#). The provisions of the legal notice as a subsidiary legislation cannot supersede the Provisions of Constitution and Acts of Parliament that protect the rights of the 1<sup>st</sup> Defendant over its land.
60. I find that there is no basis to award the claimed assets to the Plaintiff.

**Whether the Plaintiff should be ordered to pay the 3<sup>rd</sup> Defendant (Kaimosi Teachers Training College) the sum of Kshs.49 million as liabilities taken over by the University.**

61. In paragraph 24 of the Answer to Originating Summons, the Defendants lists the liabilities of the KTTC as at the time of relocation to the new site as salary arrears of 63 non-teaching staff of Kshs.14.4 million and Kshs.35 Million owed to contractors. In paragraph 26 of the Answer to Originating Summons the Defendants' counterclaim inter alia for Kshs.49,000/= to be paid to Kaimosi Teachers Training College as liabilities taken over by the University. The Plaintiff did not respond to this claim in its pleading and submissions.
62. This is a claim for arrears of salaries for non-teaching staff of the 3<sup>rd</sup> Defendant and monies owed to contractors by the 3<sup>rd</sup> Defendant. The jurisdiction of this court as provided for in article 162 (2) (b) is to hear and determine disputes relating to the environment and the use and occupation of land and title to land. Section 13 of the [environment and Land Court Act](#) contains similar provisions. In the case of [Owners of the Motor Vessel "Lillian S" vs Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR the court held that jurisdiction is everything and without it a court has no power to make one more step, it must down its tools. Similarly in the case of [Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR the supreme Court of Kenya held at paragraph 68 that:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial



craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the Legislature would be within its authority to prescribe the jurisdiction of such a court.”

63. The jurisdiction of this court is clearly delineated by the Constitution and the [Environment and Land Court Act](#). The claim for payment of the liabilities is in my view beyond the jurisdiction of this court as the same is not related to the occupation, use or title to land or the environment even remotely. Though no evidence was presented in respect of the same and the plaintiff never addressed the same, I decline to entertain the same for lack of jurisdiction. The Defendants can pursue the claim either in the High Court or the Employment and Labour Relations Court if employer/employee relationship exists

### **Conclusion.**

64. Having analysed the evidence and the law, the court comes to the conclusion that:-
- i) The plaintiff is entitled to retain land parcel No. L.R 1087/2
  - ii) The sub-division of land parcel No.1087/1 to create parcel No. L.R 1087/3 and 1087/4 was not fraudulent.
  - iii) No sufficient ground has been demonstrated for an order for cancellation of title No. L.R 1087/3 OR reinstatement of land parcel No. LR 1087/1/1.
  - iv) The plaintiff is not entitled to the houses and other assets which are not within its land parcel No.L.R 1087/3.
  - v) The counterclaim for Kshs.49 million is beyond the jurisdiction of the Environment and Land Court and can be canvassed in the appropriate forum.
  - vi) On costs; though the law is that costs follows the event, considering the relationship between the parties herein namely that they are now neighbours, it will not be just to burden any of them with costs.
65. On the basis of the above stated conclusions, the court finds firstly that the plaintiff has partly proved its claim on a balance of probabilities. Secondly that the Counterclaim by the Defendants for Kshs 49 Million is beyond the jurisdiction of the court. The court makes the following orders:
- i. A declaration that land parcel known as L.R No. 1087/2 rightfully belongs to the Plaintiff, the registered owner.
  - ii. The Defendants are restrained from interfering with land parcel No. LR 1087/2
  - iii. The rest of the plaintiff's claim is dismissed.
  - iv. The counterclaim by the Defendants for Kshs 49 Million is declined for lack of jurisdiction.
  - v. Each party to bear its own costs.

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 31ST DAY OF MAY 2022.**

**E. ASATI  
JUDGE.**



**In the presence of;**

**No appearance for the Plaintiff.**

**Shijenje Advocate for the Defendants.**

**Court Assistant.....Ajevi.**

**E. ASATI**

**JUDGE.**

