



**Glenview Holdings Limited v Management Committee GK Remand
Prison Primary School & 2 others (Environment & Land Case
115 of 2018) [2025] KEELC 3316 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 115 OF 2018**

FO NYAGAKA, J

APRIL 2, 2025

BETWEEN

GLENVIEW HOLDINGS LIMITED PLAINTIFF

AND

**THE MANAGEMENT COMMITTEE GK REMAND PRISON PRIMARY
SCHOOL 1ST DEFENDANT**

THE CABINET SECRETARY, MINISTRY OF EDUCATION ... 2ND DEFENDANT

**THE HONORABLE ATTORNEY GENERAL OF THE REPUBLIC OF
KENYA 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff brought this suit through a Plaint dated 28th November 2018 and verified by an Affidavit sworn by Anthony Max Lucas on the same date. It described itself as a limited liability company incorporated in Kenya. It described the first defendant as a body appointed under the Education Act to oversee the management of the Defendant School and the second defendant as the chief executive officer and in charge of registration and licensing of schools. And the third defendant as the principal legal adviser of the Government of Kenya, sued in its capacity as such.
2. It was the Plaintiff's claim that it was the registered owner of Land Reference 2116/953 situated with Kitale Municipality in Trans Nzoia County. It purchased the suit property for valuable consideration from Kenya Utensils Limited and had it transferred to itself on 28th April 1998. It averred further that it was an innocent purchaser for value without notice of third party claims whatsoever. Sometime in 2009 it came to its knowledge that the 1st Defendant School had without lawful excuse or consent or authority of the Plaintiff or any colour of right encroached into part of the suit premises and erected brick structures to house the School. The structures were illegal in that the consent and approval of



the Physical Planning Act was never sought from the Local Authority or any other department of Government.

3. The Plaintiff pleaded further that it sought the assistance of the Municipal Council of Kitale and its successor, the County Government of Trans Nzoia to broker a solution to the dispute or have the 1st Defendant School cease the illegal activities of occupation of the land but in vain. The County Government advised the Plaintiff to fence off the portion of the premises which was not occupied but strangely the Plaintiff's workers were obstructed from doing their work by armed prison wardens who threatened them with harm and arrest. The Plaintiff had funds in place to undertake an ambitious project of building several blocks of modern luxury apartments to earn huge sums of money. As a result, it had suffered loss and damage and prayed for damages for the loss of anticipated income and mesne profits.
4. It was the Plaintiff's further claim that it had tried alternative dispute resolution of the dispute by offering to construct the equivalent number of classrooms and incidental facilities on alternative land which the Plaintiff urged the Government to consider allocating the 2nd Defendant School but this magnanimous offer did not receive favour from the Defendants. The plaintiff claimed further, the second defendant acted wrongfully in licensing the 1st Defendants School without the prerequisite facilities stipulated under the Education Act, and by extension it sanctified the act of trespass and encroachment into the Plaintiff's private property. It prayed for an order of eviction of the 1st Defendant School together with the demolition of illegal structures on the suit land at the Defendant's own cost. It sought the following reliefs: -
 1. A declaration that the Plaintiff is the lawful owner of land Reference 2116/953 situate within Kitale Municipality.
 2. An order of this Honourable Court for the unconditional and immediate demolition of the illegal structures erected by the 1st defendant on Land Reference 2116/953 and eviction of the 1st Defendant's school, its servants and/ or employees or anyone claiming through the 1st defendant.
 3. An order directed to the Police Commander Trans Nzoia County to provide security and oversee the demolition and eviction.
 4. An order of permanent injunction to restrain the Defendant School, its staff, workers or anyone else claiming through them from continuing to trespass, remaining on L.R. 2116/953 or in any way interfering with the plaintiff's possession and quiet enjoyment of its rights of ownership.
 5. An order of payment of general and punitive damages for trespass/mesne profits and loss of anticipated financial investment opportunities and income.
 6. Costs.
 7. Interest on item (5) and (6) above.
5. In response to the claim, the Defendants filed a Defence and raised a counterclaim.

Defence And Counterclaim

6. The Defendants filed their defence and counterclaim titled "The Defendants Statement of Defence and Counterclaim". It was dated 27th November 2019 and verified by an Affidavit sworn by one Fatima Omar on the same date. They denied the contents of paragraphs 5, 6 and 7 of the Plaint, more



particularly that the Plaintiff was allocated all that parcel of land known as Land Reference 2116/95 by the Government or any other person. Paragraph 5 was that the Plaintiff was the registered owner of the land, paragraph 6 that it purchased the parcel of Utensils Kenya Limited for valuable consideration and transferred it to itself, and 7 that it was an innocent purchaser for value. They denied further the contents of paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the Plaintiff which are summarized above and put the Plaintiff to strict proof thereof.

7. The Defendants pleaded further that the 1st Defendant had been in occupation of the suit land since its inception in 1990 to date and was allocated it from the original Kitale Medium Prison by the Kenya Prisons Service. They denied the allegation of encroachment onto the and as the Plaintiff's or that the 1st Defendant took possession of the land illegally.
8. They pleaded in the alternative and without prejudice that the Plaintiff's suit disclosed no cause of action, was frivolous, mischievous, scandalous, statute barred, a grope in the dark, untenable and an abuse of the precious judicial time. They pleaded again that the suit land fell within a parcel of land measuring 159 acres gazetted as prison land as per Gazette Notice No. 145 of 1943 which Gazette had never been degazetted. It was the Defendants' further averment that parcel Land Reference 2116/953 fell within the land reserved for prison use and had never been allocated to the plaintiff.
9. The Defendants pleaded further that the registration of a plaintiff as the registered owner of that parcel of land was tainted with fraud, illegality, mistake and error, and they (Defendants) were not privy to the same hence it was good for cancellation. They averred that as per the PDP Approved Plan No. 393 of 1996 referenced KIT.10/96/95 the suit land lay within an area allocated to the Kenya Prison Service and later donated to the first defendant for public purposes thus it was public land and therefore not available for allocation or alienation to any persons.
10. Upon reiterating all the contents of foregoing averments, the Defendants pleaded a Counterclaim by stating that the land measuring 159 acres gazetted as prison land vide Gazette Notice No. 145 of 1943 was government land reserved for public purpose hence not available for allocation or alienation for private purposes, including allocation to the plaintiff. Consequently, all transactions purporting to create titles in the names of the Plaintiff or any other person out of a gazetted Prison Land without due process, including alteration of boundaries on the survey plan or amendment of the Gazette Notice was tainted with fraud illegality and all titles created, including the Plaintiffs were a nullity.
11. They gave particulars of fraud and illegality on the part of the Plaintiff as follows:-
 1. Holding out ownership title to the suit parcel of land knowing or having reasons to know that such title did not exist in the first place.
 2. Obtaining or purporting to hold tight on documents in respect of the suit parcel of knowing or having reasons to know that such documents were fraudulently procured and or obtained.
 3. Purporting to acquire interest in the suit parcel of land when no such interest was capable of being created.
 4. Deliberately failing to exercise due diligence and assiduousness in ascertaining the particulars of ownership of personal parcels of land in furtherance of fraud and illegality.
 5. Obtaining or purporting to obtain interest in their suit land knowing or having reasons to know that the same was part of the larger parcel of land known as Kitale Medium Prison Farm, gazetted as such when they knew or ought to have known that no de-gazettement was procured within the dictates of the law.



6. Colluding or connecting with or influencing unscrupulous and corrupt land surveyors and land officers to unlawfully, illegally and procedurally and fraudulently create the suit parcel of land superimpose the suit land on already existing title by virtue of the gazettelement and purportedly creating or superimposing a Registry Index Map on an existing survey plan.
12. They pleaded that the issuance of title over the suit land or any other Plot to the plaintiff or other person over gazetted prison land was illegal, null and void ab initio hence did not confer any good title to the holder. They prayed for a permanent injunction against the plaintiff, restraining it, its agents, employees, servants or families from occupying their suit parcels of land, and revocation, cancellation and rectification of the Register and reversion of the suit land to the first defendant's ownership and exclusive use and enjoyment. They sought the following reliefs: -
 1. The plaintiffs are sought to be dismissed with costs.
 2. Judgment be entered against the plaintiff in terms of the counterclaim as follows.
 3. A declaration that the land reference 2116/953 or any title in the Plaintiff's name arising from the prison land was unlawfully, irregularly and fraudulently hived out and/ or excised from gazetted prison land.
 4. A declaration that the Plaintiff's acquisition of Kitale land reference 2116/953 is illegal, unlawful and fraudulent and the Plaintiff's title documents are null and void ab initio.
 5. And the order cancelling the title and all entries made the register of Kitale Land reference 2116/953, (the) suit parcel of land herein and all titles obtained in a similar fashion.
 6. A declaration that the first defendant, and by extension Kitale Medium Prison, is entitled to peaceful and quiet possession and use of all land forming (the) suit parcel land.
 7. An order of permanent injunction restraining the plaintiff, its servants, agents and or any other person acting under it from ever laying claim, interfering with or in any other manner, dealing with the suit parcel of land herein
 8. Costs of the Counterclaim and interest thereon at court rates.

Evidence

13. The Plaintiff filed its written witness statement dated 28th November 2018, signed by one Anthony Max Lucas who testified as PW1. He adopted the Statement before adding oral testimony. In the written Statement he stated that he had written authority to represent the plaintiff. The Plaintiff had sued the defendant over the Land Reference number 2116/953 Grant Number. I.R. 43902 which consisted of an Interest for a term of 99 years with effect from 1/07/1982. He added that the plaintiff bought the suit land in September 1997 in the sum of Kshs. 400,000/= which was duly paid to the vendor, Kenya Utensils Limited. Subsequently, on 28th April 1998 the suit premises were transferred to the plaintiff.
14. Sometime in January 2007, the plaintiff discovered that the 1st Defendant, the G.K. Remand Prison Primary School had encroached on to part of this suit land and elected classrooms, claiming that part of the suit premises formed a part of the G. K. Remand Prison. This denied the plaintiff the enjoyment of the rights of ownership.
15. The Plaintiff approached the Municipal Council, the predecessor of the County Government of Trans Nzoia for intervention but the efforts to have the 1st defendant vacate the premises did not bear fruit.



The various responses on correspondences between the plaintiffs, lawyers and the relevant departments of Government also failed to resolve the problem.

- 16 Further, the school was started by the 1st Defendant Management Committee without approval from the Ministry of Education. He had confirmed that building plans were never forwarded to the relevant government departments for approval for the commencement of the construction of the classrooms on the suit premises. Also, it was true that there were more than five public primary schools in the vicinity and there was no need for another school in the area. The setting up of the 1st the defendant school and the encroachment of on the plaintiff's land bordered on impunity. There had been no offer to buy the plaintiff's land to set up the school or any notice of intention to compulsorily acquire the suit land for public purpose. The plaintiff had a constitutional right to not be deprived of private property and without due process. The plaintiff had always had very ambitious development plans over the land but the encroachment by the 1st Defendant hampered them. The plaintiff blamed the Ministry of Education for finally approving the school and posting teachers there yet the school did not qualify for registrations since it occupied less than 5 acres of land inclusive of part of the premises. The plaintiff had always been ready to develop the parcel with 53 apartments at a cost of Kshs. 594, 000,000/= million and intended to sell the same in the sum of Kshs. 800, 000,000/= million which would earn it a profit sum of Kenya Shillings 206,000,000 which loss the Plaintiff got due to the encroachment. The validity of the plaintiff's title had never been put to question at any forum. It was indefeasible and the rights of the registered owner should be protected by an order of compensation and the issuance of an order for eviction of the first defendant, and the demolition of its illegal structures. It prayed for costs of the suit.
17. In his oral testimony PW1 stated he was a resident of Kibagenge area in Kitale. He was a businessman, farmer and the General Manager of the Plaintiff company, based in Nairobi. He was authorized to appear for it. He produced as P. Exhibit 49 Minutes of the company meeting held on 18/9/2018 authorizing him to represent it.
- 18 He added that the dispute was about land parcel No. LR No. 2116/953 approximately 1.260 Ha. situate in Line Moja within Kitale Municipality. It was purchased by the Plaintiff from Kenya Utensils Ltd. It was transferred to the plaintiff on 24/4/1998. He produced as P. Exhibit 8 a copy of the title. His further evidence was that he had been to the land before but never saw the school on it. He did not know when the school was established. He denied the claim that the Defendant owned and possessed land belonging to the G.K. Remand Prison (the 1st defendant). He added, the documents they held were a forgery and not genuine. He prayed that their counterclaim be dismissed and the plaintiff's title not to be cancelled. He added the Plaintiff had title but the Defendants did not.
19. About the letter of allotment dated 17/8/2018 issued to the 1st defendant yet the Plaintiff had title to LR 2116/953 since 1/7/1982 he stated that by 2018 the land was not available for allocation. The letter was neither genuine nor rightly issued.
20. About the letter dated 16/9/1996 from the Commissioner of Prisons, he stated that it attached a list showing Appendix 1.11. The Appendix was a list of persons and companies who had encroached on Prison's land. The plaintiff (Glenview Holdings Ltd) did not appear on it. Further, the previous owner of the land in dispute was not on the list either. He prayed the Court to reject the defence case even though the 1st Defendant was occupying the Plaintiff's land. He prayed for eviction of the Defendants and that they vacate it.
21. He produced as P. Exhibits 1-48 the bundle of copies of all the documents listed in the Plaintiff's List filed on 11/1/2022.



22. Further, the Plaintiff had been paying land rates and rent on the land. He added that the company had suffered loss all the years the school occupied its land as a trespasser. He prayed the Defendants be ordered to pay damages, profit loss and anticipated financial opportunity. He prayed for all the reliefs in the Plaintiff.
23. He added the company records evidenced his employment. He could not recall the year the plaintiff bought the land from Utensils Ltd. But Glenview Limited was in occupation of the land since the time it bought it. He denied that the 1st defendant had been in occupation since 1995. He did not have the copy of the sale agreement with the previous owner. He added he was not aware that the land was part of prison land. He did not have a survey report to show encroachment. He did not have any document showing the company had been paying rent for the land.
24. In re-examination he stated that he saw the agreement of sale between the plaintiff and Utensils Ltd. He denied still the occupation of the land by the school since 1995. The land was transferred to the company in 24/4/1998. His plea was for a surveyor's report although the 1st defendant had encroached onto the whole land.
25. The Defendants called three witnesses. Raphael Wanyonyi the Headteacher of the school testified as DW1. He together with DW2 testified in the locus in quo.
26. DW1 started his testimony by adopting his written Statement he recorded on 12/5/2022 as his evidence in-chief. In the Statement dated he stated that he was the head teacher and the Secretary to the Board of Management (BOM) of the G.K. Remained Prison Primary School. The School had been in occupation of the parcel of Land Reference Number 2116/953 within Trans Nzoia County since its inception in 1990 to date. The land had been allocated to it from the original Kitale Medium Prison land by the Kenya Prison Service.
27. In that regard School had grown from inception to include 10 classrooms, the Head Teachers office, Deputy Head-teacher's office, staff room and a library room. With the support of the Officer In-charge of the G. K. Remand Prison and the Department of Prisons Service the school had been in quiet possession and use of the suit land. It was a stranger to the plaintiffs.
28. In compliance with the requirements of the Ministry of Education's directive that all public schools be issued with title deeds the School proceeded to the office of the National Land Commission which in turn issued the school with a letter of allotment on dated 17th August 2018 based on the Part Development Plan (PDP) KTL 10.96.95.
29. The suit land fell within the parcel of land measuring 159 acres gazetted as prison land by Gazette Notice 145 of 1943 which had never been degazetted to date. The land fell within the land reserved for prison use and had never been allocated to the plaintiff. According to the PDP Approved Plan, No. 393 of 1996, KTL 10.96.95 the suit land lay within an area allocated to the Kenya Prison Service which it donated to the school for public purposes hence it was public land hence not available for allocation to private persons.
30. The registration of the plaintiff as the owner of the land was tainted with fraud, illegality, mistake and error, hence the same should be cancelled. The insurance of the title deed over the land to the Plaintiff or any other person was illegal, null and void, hence not capable of conferring any good title to the holder. He asked the court to declare the school the right for beneficial owner of the land and order an injunction against the plaintiff restraining it, its agents, employees, servants or families from occupying the suit land, revocation, cancellation and rectification of the register to revert the land to the school.



31. In his oral testimony he stated that he was also the Administrator of the G.K. Remand Prison School since 13/8/2021 having taken over from Madam Fatuma Omar. Previously he was the head-teacher of Showground Primary School in Kiminini Sub-County.
32. He added the suit land involved the entire school compound where the Court session was taking place. The School farm was 5Ha. It stretched to Market Road and was bordered by a “through way” going down to the (G.K. Prison) Farm. It bordered the Prison Site which was to the right side facing the gate. The land was bordered by Market Road and Prison Site.
33. He produced as D. Exhibit 1-8 the documents in the List of Documents dated 8/12/2019 and filed on 23/1/2020 and marked for identification DMFI 9 and 10. He stated the school started in 1982 and was under the management of the G.K. Prison.
34. On cross-examination, he admitted that his statement showed the School was established in 1990. It was registered by the Ministry of Education two weeks prior to his testimony, in March 2023. The registration was completed when it started offering junior secondary school but before then it had been having pupils up to class eight.
35. Asked about the letter of allotment marked as DMFI-9 he stated it was dated 17/8/2018. It indicated the size of land allocated was approximately 5Ha, about 12.355 acres on which the school stood. He could not tell if someone had been to the land to fix beacons. Asked about D. Exhibit 4, the Letter dated 4/12/2009, he stated that the annexure known as Appendix 1.11 showed the (list of) persons who had encroached to the Prison land. Further, parcel No. LR 2116/953 was not in the list.
36. Upon further cross-examination on P. Exhibit 8 which was the Grant over parcel LR 439002, he stated it was from 1/7/1982. The title was older than the school. He could not have any accusations (complaints) against the owner of the title. About DMFI-9 (the allocation to the school), he added the letter was given after the school applied for it but did not have the letter of application hence could not tell when the application was made. The National Land Commission (N.L.C.) was not joined as a party. He named the parties in the case after which he stated that he did not have evidence to show that the N.L.C. is questioning the Plaintiff’s title.
37. In re-examination, he stated, about DMFI-9 and 10, that the key at the bottom read “existing sites for” hence the allocation was pursuant to the existing sites. About D. Exhibit 4 which had Appendix 1.11, he admitted the suit land was not in the List but he clarified that the ones in the List were those that had encroached the land. That was what the status report was about. He stated that for the subject land the school was in occupation. The List contains names and numbers of those who had encroached the Prison land hence were in occupation or on the land. By encroachment he meant those who had grabbed the land. The plaintiff is not here on the list.
38. DW2, Ogotu Leonard Odhiambo, after giving his Service Number stated that he was a Trained Surveyor of the Kenya Prisons Service. He had worked as such for 17 years and knew the dispute before court. It involved the land occupied by the G.K. Primary School which is under the Prison Service from which the school came up. Further, in every set up in our Prisons, three facilities were a must-be present. These were a school, hospital, and churches and mosque.
39. The school serves the children of staff and neighbours to the Prison. The facilities also serve the public. That was how the Kitale G.K. Primary School came to be while its name suggested a connection with the Prison Department. The school was built within Prison land. The land parcel (for Kitale Prison) was 159 acres, extending from next to the dumping site, and separated by the road connecting to the Lower Elgon road and neighbouring the Kitale Market/Stage and on the eastern side the end of the Cemeteries line.



40. The witness then took the Court to the site and stated further, that he could show the upper side stretch of the land to. He stated the upper part was demarcated with the Market Road. He showed the outside of the school compound, starting with the Market Road that separated the town from school. He added, the road was from the market and led to the end of the road next to the Kitale Central Primary School. The road formed the junction to Market Road and past the school gate. It led to Ninami Estate. The school boundary was the wall of Munawar Muslim School. He showed another road which was within Prison land. He added the Plaintiff claimed the land stretched from where the court stood and the school (of which the Court drew a sketch). He stated that all of it was Prison land.
41. On cross-examination he stated he was employed with the Prisons in 2006. The G.K. Prisons was established in the 1930s. The Kitale Prison land was 159 acres then. He acknowledged there were houses on the right side of the road to Ninami Estate which are next to Munawar Muslim School. He did not know if they and Munawar Muslim School fell on or are on Prison land but Ninami Estate was on Prison land.
42. Referred to DMFI-9, he stated that the School was allocated the land by the G.K. Prison and it was 5 Ha or 12 acres. The school sat on less than the 12 acres' land. He added the G.K. Prisons had authority to allocate the land that fell on its public land because it owned the land. It allocated through a gazette notice. Regarding the extent of parcel No. 2116/953, he showed was part of the 159 acres.
43. About DMFI-8, the aerial photo of the survey done of the 159 acres, he pointed where the suit land lay on it. He restated that by the time the Report on encroachment was done, the plaintiff had not come out to claim the ownership of the disputed land hence his name could not feature on it as one of those who encroached.
44. On the allotment to the 1st Defendant he said it was done by the National Land Commission. He added the title remains Prisons but not of the primary school. If allotment was made to the Plaintiff, it was the Ministry of Lands which issued the title to be blamed.
45. On re-examination he stated that the land where the G.K. Primary School sat was part of the 159 acres of prison land.
46. DW3, Sylvester Musera Osodo, testified that he was an employee of the National Land Commission (N.L.C.). He was the County Coordinator of Taita Taveta County and stationed in Wundanyi. He testified that the allocation of land to Prison Primary School of Kitale Municipality was within the boundaries of G.K. Remand Prison.
47. He added that he issued DMFI-9, the letter of allotment dated 17/8/2018 of Reference number is 309059/4, to the Cabinet Secretary Treasury as Trustee for Remand Prison Primary School, Kitale. He produced it as D. Exhibit 9.
48. He explained the basis for issuance of the letter as government exercise to secure all public land for schools because there was a threat of invasion and land grabbing hence securing it for public purpose. The letter of allotment had a Part Development Plan (PDP) attached to it to define the allocation and size. The PDP reference was KTL/10/96/95 and it was approved vide plan No. 393. He produced it as D. Exhibit 10.
49. On cross-examination, he admitted he did not have the employment card with him but he was employed in 1989 as a Land Administration Officer. He stated the PDP was prepared by the Department of Physical Planning in the Kitale office.



50. About the existence of the title for plot No. LR. 2116/953 he acknowledged it was issued on 9/3/1988 to Kenya Utensils Ltd and transferred to the plaintiff on 28/4/1988. He admitted by the time he prepared the letter of allotment the title was in existence for 10 years.
51. He added that by the time he issued the allotment he did not know someone already owned the title. He could not tell if the NLC received an application for allotment for the School. He added the NLC received a national directive to issue titles for public lands. He relied on the P.D.P. brought by the Physical Planning Department officer. By the time he took it there, the School was in existence before issuing the letter of allotment DW3 visited the ground to confirm the occupation. He could not recall the date he did. He did not do a site visit report. He could not know whether the plaintiff's title had ever been cancelled. He added if a title is issued over land it ceases to be available for allotment.
52. In re-examination he repeated the testimony that government issued a directive to secure all public land in the country. He visited the land and found an existing school in the G.K. Remand Prison area. He was unaware of existence of title when he issued the allotment. He added there cannot be two titles over the same land. At the time of allocation, the land had been planned set aside for Remand Prison Primary School, having been done in 1995 as per D. Exhibit 10. The allocation he made was based on that Plan. The Defence closed its case with that evidence.

Submissions

53. The Plaintiff filed submissions dated 2nd September, 2024. The Defendant filed its dated 21/10/2024. The Court will incorporate the arguments in each of the submissions as and when it analyses the issues for determination, as listed below.

Issue, Analysis And Determination

54. I have considered the Plaintiff's Claim and the Defendants' Defence and Counterclaim. I have considered the law, the evidence and the submissions of the parties. The Court shall consider the parties' written submissions as it analyses the issues raised and determines them.
55. On their part the Plaintiff listed the following issues for determination.
- a. Whether the certificate of lease for parcel No. L.R. No. 211-6953 existed before the birth of the first Defendant School.
 - b. Whether the letter of allotment issued on 17th August 2018 was validly issued
 - c. Whether the plaintiff's certificate of lease should be cancelled on the grounds of fraud and or illegality.
 - d. Whether the plaintiff is entitled to the relief sought.
 - e. Who should pay the costs of this suit.
56. The Defendants, on their part, listed the following issues:
- i. Where Kitale Municipality Block 2116/ 953 is part of and/ or was hived out of gazetted prison land.
 - ii. Whether Kitale Municipality Block 2116/953 was acquired unlawfully and fraudulently.
 - iii. Whether the 1st Defendant is entitled to peaceful and quiet possession and use of the suit land
 - iv. Whether the Plaintiff's suit has merits



- v. Whether the counterclaim has merits
 - vi. Whether the orders sought ought to be granted.
57. Having considered the parties' issues, I am of the opinion that the following ones lie for determination in this matter:
1. Whether the Plaintiff lawfully acquired land parcel number Kitale Municipality LR. Block 2116/953.
 2. Whether parcel No. Kitale Municipality Block 2116/953 is part of the gazette Prison land.
 3. Whether the Plaintiff has proved continuous quiet possession as to entitle it to a claim of recovery under Section 7 of the Limitation of Actions Act hence the 1st Defendant is not entitled to quiet possession.
 4. Whether the Plaintiff has proved its case on a balance of probabilities.
 5. Whether the Plaintiff's title should be cancelled.
 6. Whether the Defendant has proved its counterclaim to the required standard.
 7. Who to bear the costs of the suit and counterclaim.
58. This Court sets out to determine sequentially the issues herein as listed above.

(1) Whether the Plaintiff lawfully acquired land parcel number Kitale Municipality Block L.R. No. 2116/953

59. It was the Plaintiff's claim that it was the registered owner of Land Reference 2116/953 situated with Kitale Municipality in Trans Nzoia County. Further, that it became the registered proprietor upon transfer of the same, upon purchase for valuable consideration from Kenya Utensils Limited. The evidence of PW1 was that Land Reference Number 2116/953 Grant number. I.R. 43902 measuring approximately 1.260 HA. consisted of an interest in favour of the Kenya Utensils Limited for a term of 99 years with effect from 1/07/1982.
60. Its evidence in support of the claim was that it bought the land from Kenya Utensils Limited in September 1997 in the sum of Kshs. 400,000/= and had it transferred to itself on 28th April 1998. He produced as P. Exhibit 8 a copy of the title. Contending that the documents held by the Defendants were a forgery and not genuine he denied the claim that the Defendant owned and possessed land as belonging to the G.K. Remand Prison.
61. About the 1st defendant's letter of allotment dated 17/8/2018 he testified that the land having been allocated on 1/07/1982 was not available for allocation to the School. To buttress its averment PW1 stated that the letter dated 16/9/1996 from the Commissioner of Prisons attached to it a list known as Appendix 1.11, of persons and companies who had encroached on Prison's land. Neither its name nor that of the previous owner did appear on it.
62. On cross-examination PW1's evidence was that he could not recall the year the plaintiff bought the land from Utensils Ltd. He did not have the copy of the sale agreement with the previous owner. He added that the Plaintiff had occupation from the time it bought the land. He denied that the 1st defendant had been in occupation since 1995.
63. It averred further that it was an innocent purchaser for value without notice of third party claims whatsoever. Sometime in 2009 it came to its knowledge that the 1st Defendant School had without



- lawful excuse or consent or authority of the Plaintiff or any colour of right encroached into part of the suit premises and erected brick structures to house the School. His further evidence was that he had been to the land before but never saw the school on it. He did not know when the school was established.
64. In its submissions, the Plaintiff relied on Section 24(a) of the Land Registration Act of 2012 arguing that its registration as proprietor of the land vested in it the absolute ownership of that land, together with all the rights and privileges belonging or appurtenant thereto. It also relied on Section 26(1) of the Land Registration Act which is about a certificate of title being taken as prima facie evidence that the person named thereon is the proprietor and his ownership absolute and indefensible, subject to the conditions given thereto (in the provision). Further, it relied on the case of *Elijah Mackeri Nyangw'ara vs Stephen Mungai Njuguna & Another* (2013) eKLR and the case of *Nicholas Kioko Muoki & Another v. Omar Faisal Mohammed* [2021] eKLR.
 65. On their part, the Defendants relied on Section 2(a) of the Government Lands Act, Chapter 218 of the Laws of Kenya (repealed) wherein, under Section 2, the law defined unalienated government land. They also relied on Section 3 of the Physical Planning Act, Chapter 286 of the Laws of Kenya and submitted that the suit land unalienated land which had been reserved for a particular purpose hence public land. They relied on ELD CACA No. 288 of 2010 *Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission* in which the Court of Appeal found that the property which had been planned as an “open space” was not available for allocation to any person as it was reserved for public use. They also relied on the case of *Chemey Investment Limited versus The Attorney General & 2 Others* [2018] eKLR. Further, *Kenya Anti-Corruption Commission v Lima Limited & 2 others* [2019] eKLR and *Timothy Ingosi and 87 others v Kenya Forestry Services & 2 others* [2015] eKLR and Section 7 of the Government Lands Act. Further, they relied on the case of *Henry Muthee Kathurima v Commissioner of Lands and another* [2015] eKLR which held that it was upon the appellant to show how he went on to be registered as proprietor of the suit property, which was a public utility, a fact peculiar and special knowledge of the appellant, and that the procedure of alienating the property as a public land was not followed under the provisions of Section 112 of the Evidence Act.
 66. They submitted that the procedure for acquiring government land by a private person was elaborately given in the case of *Ali Mohammed Dagono vs Hakar Abshir & 3 Others* as provided for under Section of the Government Lands Act. They submitted that the Plaintiff did not show that it followed the steps.
 67. A number of sub-issues emerge from the evidence. One is whether the Plaintiff proved has shown that the previous owner rightly acquired the land so as to transfer good title to it. Two, whether the Plaintiff demonstrated that it bought the land from the previous registered owner. Third, whether the Plaintiff can be said to be an innocent purchaser for value.
 68. On the first sub-issue, it is clear that the Plaintiff produced only a title, P. Exhibit 1 to show that Kenya Utensils Limited owned the suit land previously. The ownership of the land by the said company was contested in that the Plaintiff's ownership was of the same was contested: the Defendants did not admit the valid ownership by the 1st registered owner. If anything, they contended that the land was hived off from the greater 159 acres reserved for the G.K. Kitale Medium Prison land. Put clearly, the Defendants averred that the land was prison land having been part of the greater gazetted 159 acres of the prison land from which it was hived. The Defendants called DW1, DW2 and DW3 to confirm this contention. They also produced D. Exhibits 1, 2, 4 and 7. Indeed, D. Exhibit 4 showed that the suit land lay within the G.K. Kitale Medium Prisons land.



69. The Plaintiff produced P. Exhibit 34 - a Clearance Certificate dated 7th April 2011 issued by the Municipal Council of Kitale, P. Exhibit 40 - a Beacon Certificate dated 5th March 2008, and P. Exhibits 44 and 45 - Assessments Notices and Receipts thereof, to evidence payments by the Plaintiff as the owner of the suit land.
70. First, it is important to indicate that the four exhibits referred to above were issued by third parties or offices which do not in any way give ownership of property such as the instant one to any person or individual. Only the then Commissioner of Lands or the National Land Commissioner currently are vested with the authority to issue ownership documents of properties such as the instant one. To the extent that the said entities did not issue the documents in issue, such documents cannot found the basis of legal ownership of the suit land.
71. The only remaining documents issued by the relevant offices is P. Exhibit 1. As much as P. Exhibit 1 showed that the suit land was at first registered in the name of Kenya Utensils Limited, neither the said Kenya Utensils Limited nor the Plaintiff had or produced any other documents to demonstrate the root of the said title. The title stands on nothing in terms of documents to create it: it just emerges, so to say, from nowhere. For instance, the Plaintiff did not prove that the previous owner applied for and was allocated the land first before processing the title. Additionally, it did not give evidence to show that indeed the land was degazetted before allocation, if all. In essence, the Plaintiff failed to show the process of acquisition of the land to establish the root thereof.
72. Even so, in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), it was held that:
- “As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”
73. Further, Section 26(1) of the Land Registration Act, Chapter 3 of 2012 provides that a title is prima facie evidence of ownership of land. It stipulates that:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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 that proprietor shall not be subject to challenge, except-
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
74. In my humble view, the Plaintiff’s title was only prima facie evidence of ownership. However, since it was challenged, the Plaintiff needed to go beyond dangling it as evidence of ownership. In my opinion,



- the Plaintiff failed to bring itself within the conditions of the provision as to entitle it to be declared the lawful owner for reason of several sub-issues not successfully proven.
75. The first sub-issue aside, the Plaintiff claimed to have brought the land from Kenya Utensils Limited. It is worth noting that the Plaintiff and the alleged previous vendor are companies which are entities with separate legal existence from the owners. That being so, to evidence that the instrument of transfer was effected by the vendor company, it was imperative that the company seal be affixed to it. I have carefully analyzed P. Exhibit 6. Whereas it bears the signatures of the vendor and the transferee, it does not have any company seal(s). It means it was not executed by the company. It could not be a proper instrument of transfer.
76. In any event, the Plaintiff's witness claimed that the company bought the land from Kenya Utensils Limited in the sum of Kenya Shillings 400,000/=. He did not produce both the sale agreement and the evidence of payment. Land is not a resource whose sale transaction is oral.
77. Section 3 of the Law of Contract Act, Chapter 23 Laws of Kenya it is provided:
- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) the contract upon which the suit is founded-
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”
78. In the circumstances it was imperative for the Plaintiff to adduce evidence of the transaction of purchase that it alleged to have done. It failed to. It is doubtful whether such a transaction ever took place. If it did, it was not difficult to show it in writing as was purported to be done regarding the instrument of transfer.
79. The third sub-theme was whether the Plaintiff was a bona fide purchaser (of the land) for value without notice (of any issues pertaining the suit land). This Court has already found that the Plaintiff did not buy the land from Kenya Utensils Limited. This automatically places it outside of the doctrine of a bona fide purchaser for value because for such to exist it must be shown that valuable consideration passed between the vendor and the purchaser. There was none in this case: a verbal assertion of payment of Kshs. 400,000/= was insufficient.
80. In *Sugawara v Kiruti (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutarakwa Kiroti Lepaso and on her Own) & 3 others (Petition (Application) E038 of 2024) [2025] KESC 9 (KLR) (21 March 2025) (Ruling)*, the Supreme Court of Kenya held that:
- “We now opine and determine as follows: “ii....the appellant could not be considered a bona fide purchaser for value as no evidence was produced to show that she had paid valuable consideration for the suit parcels.”
81. Also, in *Dina Management Limited (supra)*,
- “The Black's Law Dictionary 9th Edition defines a bona fide purchaser as: “One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's



title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

92 The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajjido Civil Appeal No 28 of 2005* [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

82. Section 107(1) of the Evidence Act, Chapter 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

83. Additionally, Sub-Section 2 provides that, “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

84. It flows from the foregoing provisions and the decisions cited immediately before them that it was the duty of the Plaintiff to first prove that it acquired the title lawfully, that is to say, as provided by law. Thus, it was imperative for it to prove that it bought the land from Kenya Utensils Limited, and if so, it was a bona fide purchaser for value, that is to say, without notice of any encumbrances or defect in title and that it carried out due diligence to that effect. I have so far found that it did not buy the land; if it did then it did not prove it. It never even called any witness from the alleged seller company to testify.

85. The second limb of bona fide purchaser is that of the purchaser being innocent of any prior defects on the title, including vacant possession. What is clear from the Plaintiff’s evidence is that the instrument of title was created, as shown by P. Exhibit 8 is that the Grant was signed on 9th March 1998 and registered as No. 43902/1 on 15th March 1998. By 28th April 1998, that is one and half months later, it was already transferred to the Plaintiff. That being so, then and contrary to the Plaintiff’s oral testimony that it took immediate occupation, the Plaintiff would complain to the Commissioner of Lands in writing on 10/01/2007 as evidenced in P. Exhibit 9 that “We write to inform you of our continued



efforts to gain possession of our above-mentioned parcel of land, but to no avail, as we are told that the parcel of land is part of prisons land.”

86. This fact of the presence of the 1st Defendant on the land, as established above, is echoed in the Plaintiff’s letters dated 06/05/2009 and 20/08/2009 being P. Exhibits 11 and 13 respectively and the response by the Town Clerk on 30/03/2010 being P. Exhibit 14. It means that at no point in time did the Plaintiff gain possession. It is doubtful whether the Plaintiff ever took possession as it stated in evidence or even whether the vendor ever had possession at all. It is not shown if and when either the seller or the Plaintiff parted with possession. My humble view is that they both never had possession of the land. Indeed, if the Defendant had possession prior to the alleged sale transaction the Plaintiff’s intent and step to occupy the land could not have been hampered.
87. Lastly, before this court pens off from this issue, it is even more curious whether the Plaintiff actually bought the suit. If anything, this Court is of the view that the sale transaction, if it ever took place, was invalid for reasons of it going against the terms and conditions of the Grant itself. Condition Number 9 of the “Special Conditions” was that “The Grantee shall not sell, transfer, sublet, charge or part with the possession of the land or any part thereof or any buildings thereon except with the prior consent in writing of the Commissioner of Lands.” The Plaintiff did not produce any consent in writing from the Commissioner of Lands to show that he was requested for the transaction to take place and granted permission. Thus, the instrument of transfer, P. Exhibit. 6, even if it would have been properly executed could still not have been in fulfillment of such a special condition.
88. In *Dina Management Limited* (supra) the Supreme Court held further that:
- “Article 40 of the Constitution entitled every person to the right to property, subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter could not therefore be protected under article 40. The root of the title having been challenged; the appellant could not benefit from the doctrine of bona fide purchaser.”
89. The totality of the above analysis that the Plaintiff did not lawfully acquire the suit parcel of land and is not entitled to lay a claim to it, if it ever exists, although the Court has found elsewhere (in the issue determined below) that the suit land as registered as Kitale Municipality L.R. No. 2116/953 is illegal, null and void.

2. Whether Parcel No. Kitale Municipality Block 2116/953 is valid

90. The Plaintiff claimed to have bought the suit land herein from Kenya Utensils Limited. Further, that the parcel of land was transferred to it and the 1st Defendant had trespassed onto it. Also, that having been the registered owner the National Land Commission had no business allocating land already owned by a private entity to any person as it did to the 1st Defendant. PW1 added that the Defendants did not offer to buy the Plaintiff’s land so to set up the school. Further, the Defendant(s) did not give any notice of intention to compulsorily acquire the suit land for public purpose. He added that the Plaintiff had a constitutional right to not be deprived of private property without due process. The Defendants, on their part, refuted the claim. They contended that the title did not exist since it was hived off unprocedurally from prison land which was gazetted as such. The issue that flows from the claim is whether the title was valid.



91. Section 26(1) of the Land Registration Act, Chapter 3 of 2012 provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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 that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

92. It follows that the Plaintiff ought to have proved to this Court that that title it held was valid, that is to say, the Plaintiff ought to have adduced evidence to the effect that the title was not acquired by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. It was not upon the Defendants to prove that the title was not valid. All the Defendants needed to do was provide evidence that casts doubt on the validity of the Plaintiff’s ownership of the suit parcel of land.

93. Whenever the validity of a title is challenged, it is upon the party claiming that it is valid to prove the same. Holding and waving to anyone and all a title which is impugned is not enough because the issue at that point is that that title is not one that can stand the test of validity even if it is issued by the relevant office. Thus, the registered owner has to prove that he got registered as such in through lawful means or following the procedure protected by the law. And to do so, the owner has to demonstrate how the title came into existence, and if he is not the original owner, how the original ownership ceased to be until he so got registered.

94. The above view finds support in a number of decisions. The first one is that of the Court of Appeal in *Joseph N.K. Arap Ng’ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR where the court stated thus;

-a. ‘.....Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

95. In essence, before a parcel of land is registered in the name of an individual or entity whether one or many, it has to have a root which must be traced so to say, to the origin which is basically the radical title source.

96. Thus, in *Caroline Awinja Ochieng & Ano. Vs. Jane Mbithe Gitau & 2 Others* (2015) eKLR, Onguto J. (as he then was) stated:

“In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered



titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

97. A title, as a finished product, will only stand on its own when it is traced to how it was created. There has to be a chain of ownership or a thread that runs from the origin to the current registered ownership. Therefore, in *Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others* [2018] eKLR the Court of Appeal held:

“47. It is thus our considered view that the respondents have successfully shown how they acquired their title by producing all the documents that must be in place before a Grant could be issued and registered in their favour.

48. The 3rd and 4th respondents have sufficient evidence to prove that they acquired the suit property lawfully.”

98. Similarly, the same Court, in *Munyua Maina – versus – Hiram Gathiha Maina* [2013] eKLR, held as follows:

“We state that when a registered proprietor’s root of title is under challenge: it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that it is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

99. Also, in *Korir v Njoki & another (Civil Appeal 34 of 2020)* [2023] KECA 439 (KLR) (14 April 2023) (Judgment), the Court of Appeal once again held that:

“It is now law that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title. Courts of this country have therefore held that they would not hesitate to nullify titles held by those who stare at the court and wave a title of a grabbed land by merely and pleading loudly the principle of the indefeasibility of title deed. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the title.”

100. In the instant case, in its evidence the Plaintiff only produced the title P. Exhibit 8 to show ownership. It also produced, as P. Exhibit 6 a transfer instrument for the parcel of land LR. No. 2116/953, purportedly signed by the vendor and itself. This Court has already found the instrument of transfer wanting or flawed hence incapable of conveying ownership to the Plaintiff. Besides that, apart from



the verbal testimony that the Plaintiff bought the land it did not produce any documentary evidence to that effect, which is contrary to Section 3(3) of the Law of Contract Act, as seen above (at paragraph 77). Further, on cross-examination PW1 added that he was not aware that the suit land was part of prison land.

101. One fact came out of the Plaintiff's witness evidence: the Plaintiff never took occupation of the land at any one given point in time. It is my humble view, had it carried out due diligence it could have found as much before entering into the same if any. It has itself to blame. In any event, the documents marked P. Exhibits 2, 3, 9, 11, 12, 13, 14, 15, 20 at MIN/TPWC/16/2011, 21, 22, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 41, 43, 46 at MIN/EDU/17/06, and P. Exhibit 47 at MIN/EDU/19/06, all demonstrate that soon after the purported sale transaction, it came to light that the land was part of prison land. Then there was the flurry of communications and Minutes of Meetings of various bodies over the same issue as shown by the above documents, all of which were photocopies. Thus, the Plaintiff should have sued the seller for breach of contract by failing to hand over vacant possession to it, if at all.
102. The finding of the Court is that the Plaintiff did not show how it acquired the land and how the purported initial owner acquired it in the first place. This it ought to have done by showing the step by the initial seller in applying for allocation of the land, being allocated the same, complying with the conditions of allocation, being issued with the title thereto, seeking written consent to sell, obtaining the said consent and then selling and transferring it.
103. In its submissions, the Plaintiff argued that its registration of a proprietor of land vested in it the absolute ownership of that land, together with all the rights and privileges belonging or appurtenant thereto. It also relied on Section 26(1) of the Land Registration Act about registration of a person conferring upon him/her a title subject to it being challenged under the exceptions thereto. They relied on the case of Elijah Mackeri Nyangw'ara vs Stephen Mungai Njuguna & Another (2013) eKLR and the case of Nicholas Kioko Muoki & another v. Omar Faisal Mohammed [2021] eKLR.
104. It argued that the G.K. Remand Prison Service was not a party to the suit and neither was The National Land Commission.
105. Regarding the law on the position of a certificate of title in relation to a letter of allotment it submitted that the latter does not confer title or proprietary interest to anyone. It relied on the case of Lillian Waithera Gichuhi vs David Shikuku Mzee [2005] eKLR and Torino Enterprises Limited v The Attorney General (Petition 5 (E006 of 2022) [2023] KESC 79 (KLR) (22 September 2023) and in the case of Kaseve Welfare Society v The Harp Housing Limited [2020] eKLR. It concluded that the defendants did not adduce any evidence to prove fraud on its part (i.e. the plaintiff). It stated that reliance on D. Exhibit 1 and 2, being Legal Notices Nos. 721 of 15/12/1961 and 145 of 1943 was availed since the Notices were not relevant to the instant case.
106. This Court has carefully analyzed the parties' submissions on this issue and now finds as below regarding the arguments, the law and the evidence.
107. It is this Court's humble view that the argument that some parties such as the G.K. Remand Prison and the National Land Commission were not parties to the suit hence making it incapable of yielding the reliefs the Defendants sought, it is important to note that it was the Plaintiff's obligation to apply for the parties, if necessary, to be joined. In any event Order 1 Rule 9 of the Civil Procedure Rules provides that no suit shall be defeated for reason of non-joinder of a necessary party.
108. In short, by virtue of the fact that the Plaintiff failed to demonstrate the steps which would show how it acquired the parcel of land, beginning from the initial purported registered owner, this Court finds that it did not validly acquire the suit land.



3. Whether Parcel No. Kitale Municipality Block 2116/953 is part of the Gazetted Prison land

109. The Plaintiff claimed the land to belong to it. The Defendants refuted the claim. In support of the Defendant's claim the Defendant produced as D. Exhibits 1 and 2 two Legal Notices No. 721 of 15/12/1961 and Gazette Notice No. 145 of 1943. It also produced as D. Exhibits 5 and 6 being the a aerial view of the Kitale Medium Prison Land showing encroachments, and D. Exhibit 6 being the Appendix of encroachments.
110. On their part the Plaintiff submitted that the Defendants had not produced evidence to show that indeed the suit land purported to be in issue was part of prison land. The Plaintiff argued that the Defendant did not carry out a survey to show that indeed the suit land lay within the prison land.
111. This Court took evidence on the site, that is to say, at the locus in quo, and the adverse parties claimed the same portion of land where the school is built and running.
112. I have carefully considered the evidence. It is indeed true from the two Gazette Notices that in 1943 and 1961 the Kitale G.K. Medium Remand Prison was allocated 159 acres. It produced an aerial photograph showing the extent of prison land and encroachments thereof. Furthermore, I have carefully analyzed the D. Exhibit 9 which is the Part Development Plan (PDP) No. 393 attached to the Letter of Allotment dated 17/08/2018 - D. Exhibit 10. It refers to the parcel of land which is approximately 5.0 Ha. Adjacent to it but separated by a road is a plot labelled "Kenya Utensils" which is smaller in size than the one allocated to the 1st Defendant school and lying within the G.K. Prison Land. The one referring to an entity which might be the one that allegedly sold a property claimed to have been bought by the Plaintiff is clearly outside of the prison land.
113. I have also carefully looked at the PDP/Deed Plan attached to the P. Exhibit No. 8 - the title deed purported to be issued to the Plaintiff. Its approximate area, as per the fixed coordinates is 1.260 Ha which is approximately 3.114 acres. It is adjacent to many other smaller parcel of land compared to the bigger sizes that lie adjacent to the one allocated the 1st Plaintiff.
114. It is my finding that to the extent that the Plaintiff claims a parcel of land that was part of the 159 acres reserved for the G. K. Medium Remand Prison, the said title number LR. No. 2116/953 it was hived off from the said Prison land.
115. But to the extent that there exists a separate parcel that is clearly noted in the PDP as being away from the Prison Land and separated by a road, the parcel of land may be in existence, and the claim over land initially reserved for the G.K. Kitale Medium Prison is misconceived.

(4) Whether the Plaintiff has proved continuous quiet possession as to entitle it to a claim of recovery under Section 7 of the Limitation of Actions Act hence the 1st Defendant is not entitled to quiet possession

116. This is an issue the Court considered in the alternative and without prejudice to the finding of foregoing three issues but which arises from one of the issues framed by the Defendants, which is on whether the party is entitled to quiet possession of the land.
117. In order for a party to be entitled to quiet possession of land, it means that the same is either the registered owner in occupation or a party that is not registered but has resided on or occupied the parcel of land without the permission of the owner for a period more than the required statutory period for recovery thereof so as to entitle it raise a Defence of limitation of time regarding recovery of the same by the lawful owner.



118. The Plaintiff claimed that upon purchase of the land it took possession of the same and had been in occupation. While it claimed as such, it led evidence that sometime in 2009 it came to its knowledge that the 1st Defendant School had without its lawful excuse, consent or authority or colour of right encroached into part of the suit premises and erected brick structures to house the School. It produced several documents to show that indeed when it attempted to secure the quiet possession of the land but in vain. This Court is prepared to agree that the Plaintiff never took possession of the suit land (specific portion of earth). This is the portion that has been occupied by the 1st Defendant school since its inception, way back from 1995. DW1 testified that the school had always occupied the land for a period of more than twelve years. It means that even if the finding of this Court were to be wrong hence the Plaintiff's title not subject to cancellation, the same can only be found to have been extinguished: the Plaintiff cannot recover possession of the said parcel of land.
119. Section 7 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya provides that,
- “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.”
120. Further, Section 17 of the same Act provides that:
- “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
121. It follows that for reason that the Plaintiff has been in open, quiet uninterrupted period of more than twelve years, then the Plaintiff's title, if it ever exists over the same parcel of land, it was extinguished and ought to be cancelled on that score.

(5) Whether the Plaintiff's title should be cancelled

122. The Plaintiff sought to prove that the portion of earth it purportedly bought from the Kenya Utensils Limited lay within the G. K. Kitale Medium Prison land. While the PDP attached to P. Exhibit 1 showed the boundaries of the parcel and that the parcel of land was separated from the other prison land with a road, and it (the suit land) lay between other parcels of land, when the Court visited the site, it was clear that the suit land (portion) claimed by the Plaintiff was not between other parcels of land such as 2116/807, 2116/682, 2116/683, 2116/687 etc., with roads in between them, as shown in the Deed Plan. To the extent that the suit land claimed by the Plaintiff lay within the prison land it was illegally and unprocedurally created from the said public land. There was no evidence that the said public land was ever degazetted and alienated for allocation to a private entity. This, the Plaintiff failed to prove the legal ownership of the title in question. It must be cancelled.

(6) Whether the Plaintiff has proved its case on a balance of probabilities

123. Under Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya, as reproduced above, any party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and the burden lies on him/her/it to prove them unless the law specifically lays that burden on another. In the instant case, the Plaintiff claimed it owned the parcel of land. This Court has found that the root of the title is not existent and the ownership could not therefore exist 'in the air', that is to say, on nothing. It claimed further about loss



of earnings and others. In my humble view, one who does not own something cannot successfully claim the item or any benefits attached to it. Thus, the Plaintiff's claims have not been proved hence they fail.

(7) Whether the Defendant has proved its counterclaim to the required standard

124. DW1 produced as D. Exhibits 1-8 of which D. Exhibit 1 was Gazette Notice No. 721 of 15/12/1961, D. Exhibit 2 Gazette Notice No. 145 of 1943 both declaring the land as reserved, and D. Exhibit 4 showing the aerial view of the prison land and the encroachments thereon. He added that DMFI-9, which DW3 produced later as D. Exhibit 9 was the letter of allotment issued on 17/8/2018 for the size of land allocated to the School, approximately 5Ha, about 12.355 acres.
125. On its part, PW1 claimed that the Defendant had not produced a survey report to show that the suit land on which the 1st Defendant school lay was prison land. While that may appear plausible a piece of evidence, the proper legal position is that the Plaintiff which allegedly bought the Land Reference No. 2116/953 but never occupied it at all for reason that it found the G.K. Kitale Medium Prison on it and by extension the 1st Defendant School was the one which was supposed to produce a survey report to show that the suit land occupied by the said defendants was indeed the said parcel of land.
126. The legal position on the burden of proof did not invert at any one point in time. All that the Defendant needed to show was that it had been in possession of the land it claimed to be prison land all along and had never been disposed of it by the plaintiff. This it did by inviting the court to carry out a site visit which it conducted, as evidence of DW1 and DW2 shows.
127. DW2, testified that the 1st Defendant school was established on Kitale Prison land whose size was 159 acres, as per the regulations and practice of the government regarding establishing school and church plus mosque facilities on prison lands. Further, the school served the children of staff and neighbours to the Prison and the public. He added that the G.K. Prisons was established in the 1930s. Further, he acknowledged there were houses on the right side of the road to Ninami Estate which are next to Munawar Muslim School and Ninami Estate was on Prison land. The School was allocated the land of approximately 5 Ha or 12 acres by the G.K. Prison. The G.K. Prisons had authority to allocate the land that fell on its public land to the School because it owned the land. It allocated through a Gazette Notice. He added that parcel No. 2116/953 was part of the 159 acres. Further, that D. Exhibit 8 the aerial photo was of the survey done of the 159 acres and he pointed where the suit land lay on it. His further evidence was that although the allotment to the 1st Defendant was done by the National Land Commission, the land/title remained Prisons but not of the primary school. About the allotment to the Plaintiff he stated that if it ever was done the Ministry of Lands which issued the title to be blamed for it.
128. DW3, Sylvester Musera Osodo, testified that the allocation of land to Prison Primary School of Kitale Municipality was within the boundaries of G.K. Remand Prison. He produced as D. Exhibit 9 the letter of allotment dated 17/8/2018 of Reference Number is 309059/4, issued to the Cabinet Secretary Treasury as Trustee for Remand Prison Primary School, Kitale. He explained the basis for issuance of the letter as government exercise to secure all public land for schools because there was a threat of invasion and land grabbing hence securing it for public purpose. The letter of allotment had a Part Development Plan (PDP) attached to it to define the allocation and size. The PDP reference was KTL/10/96/95 and it was approved vide plan No. 393 which he produced as D. Exhibit 10.
129. About the existence of the title for plot No. LR. 2116/953 he acknowledged it was issued on 9/3/1988 to Kenya Utensils Ltd and transferred to the plaintiff on 28/4/1988 and that by the time he issued the allotment letter to the school the LR. No. 2116/953 had been in existence for 10 years. Further, that by the time he issued the allotment he did not know someone already owned the title. He could not



tell if the NLC received an application for allotment for the School but the NLC received a national directive to issue titles for public lands. He relied on the P.D.P. brought by the Physical Planning Department officer. By the time he took it there the School was in existence. Then before issuing the letter of allotment DW3 visited the ground to confirm the occupation. He could not recall the date he did. He did not do a site visit report.

130. The parties submitted about this piece of evidence. The Plaintiff argued that the Defendants could not be issued with the allotment letter while its title was already in existence. The allotment was therefore null and void since the land was already private.
131. On their part the defendants summed it that the allocation was lawful given that the NLC was not aware of any existence of another title to the land, and that titles obtained from a flawed process were impeachable and not protected under Article 40(6) of the Constitution.
132. I have carefully considered the evidence and the submissions by the rival parties. I have particularly paid attention to the two sets of submissions by the Plaintiff and the single set of the Defendant's submissions as applied to the law and evidence.
133. First, I note that whereas the Plaintiff claimed to own parcel No. 2116/953, this Court has found it to have been acquired through a flawed process. I have also, carefully noted that the size of the parcel claimed by the Plaintiff was 3.114 acres or 1.260 Hectares, as per P. Exhibit 8. I have looked at D. Exhibit No. 7 and 8 on the allotment to the School and the acreage of the land. The size of the land allocated to the School is 5.0 hectares as per the PDP Reference No. KIT.10/96/95 of 25/06/1996.
134. The sizes of the two parcels referenced by the two documents are by far too diverse or different that there would be any doubt in anyone's mind that there was an error in issuing the allocation of 17/08/2018 to the School as to amount to a double allocation of the same plot. Land approximately 12 acres cannot be equivalent or closer in size to land approximately 3.114 acres. The allocations, if both ever existed refer to two different PDPs or Deed Plans.
135. Lastly, given that the court has found the allocation of the LR. No. 2116/953 from the prison land to be unlawful, illegal and irregular and directed that the same be cancelled then the land allocated to the 1st Defendant, having been allocated by the Prisons Department to an institution owned by it, and the title having been said to remain with the prisons, was properly allocated. The Counterclaim has been proven on a balance of probabilities and therefore succeeds.

(8) Who to bear the costs of the suit and counterclaim

136. This Plaintiff's suit has not succeeded. The Defendant's counterclaim has succeeded. Section 27(1) of the Civil Procedure Act provides that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

137. This was not a public interest claim. This Court has no good reason to order otherwise than that the costs follow the event. Therefore, it awards costs of both the suit and counterclaim to the Defendant.



Consequently, the Court enters Judgment for the Defendant against the Plaintiff on the following terms:

- a. The Plaintiffs suit is hereby dismissed.
- b. Judgment is hereby entered for the Defendants on their Counterclaim as prayed.
- c. A declaration is hereby issued that the Land Reference 2116/953 or any title in the Plaintiff's name arising from the prison land was unlawfully, irregularly and fraudulently hived out and/or excised from gazetted prison land.
- d. A declaration is hereby issued that the Plaintiff's acquisition of Kitale Land Reference 2116/953 was and is illegal, unlawful and fraudulent and the Plaintiff's title documents are null and void ab initio.
- e. There is hereby issued the order cancelling the title and all entries made in the register in respect of parcel No. Kitale Municipality L.R. No. 2116/953, (the) suit parcel of land herein in so far as the same is excised from the G.K. Kitale Medium Prison land comprising in the 159 acres reserved for it.
- f. A declaration is hereby issued that the 1st defendant, and by extension Kitale Medium Prison, is entitled to peaceful and quiet possession and use of all land forming (the) suit parcel land.
- g. An order of permanent injunction is hereby issued restraining the Plaintiff, its servants, agents and or any other person acting under it from entering, or ever laying claim or interfering with or in any other manner dealing with the suit parcel of land whose title is now cancelled.
- h. Costs of the both the suit and Counterclaim awarded to the Defendants.

138. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM ON THIS 2ND DAY OF APRIL, 2025.

HON. DR. IUR FRED NYAGAKA

JUDGE

At 1:07 PM in the presence of:

Ms. Nafula Advocate for Samba & Co. for the Plaintiff

Ms. Odeyo, State Counsel for the Defendants\

