



Aly (As trustee of the Wakf Properties of Ali Bin Mohamed Ali Muses Mohamed) & 2 others v Islamic Foundation (Environment & Land Case 219 of 2016) [2022] KEELC 14469 (KLR) (18 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 219 OF 2016**

**LL NAIKUNI, J
OCTOBER 18, 2022**

BETWEEN

**MOHAMED NAAMAN ALY (AS TRUSTEE OF THE WAKF PROPERTIES OF ALI BIN MOHAMED ALI MUSES MOHAMED) 1ST PLAINTIFF
ABDALLA MOHAMED ALY MUSES 2ND PLAINTIFF
ALY KHAN ALY MUSES 3RD PLAINTIFF**

AND

ISLAMIC FOUNDATION DEFENDANT

JUDGMENT

I. Preliminaries.

1. This judgement pertains the suit instituted by the 1st, 2nd and 3rd plaintiffs herein – Mr Mohamed Naaman Aly (as trustee of the Wakf properties of Ali bin Mohamed Ali Muses Mohamed), Abdalla Mohamed Aly Muses and Aly Khan Aly Muses against the defendant – the Islamic foundation. It was filed on August 11, 2016 a plaint dated even date before this honorable court against the 1st, 2nd and 3rd defendants herein. In the course of time, on October 10, 2017, the plaintiff filed an amended plaint dated October 4, 2017. The plaintiff sought the following reliefs:
 - a. The defendant is illegally in occupation of the plaintiffs’ land as a trespasser, and in breach of the powers given to the plaintiff under that Wakf or under the relevant legislation of the country such as the [Land Control Act](#).
 - b. The defendant be evicted from the suit premises and vacant possession of the suit premises to be delivered to the plaintiffs with the assistance of the Police;



- c. All the works being presently carried on by the defendant on the plaintiff's land be stopped immediately, and that all contractors, sub – contractors, workmen, mechanics and fundis be ordered to leave the suit premises immediately and an “ex – parte” order to that effect be issued and a date be fixed for “inter parte” hearing.
 - d. All other activities of the defendant being carried on from the plaintiff's land be stopped with immediate effect.
 - e. Damages for illegal occupation of the property for two (2) acres in the sum of Kenya shillings four hundred and fifty thousand (Kshs 450, 000.00) per acre encroached upon for each year of illegal occupation, with interest at court rates on delayed payment, until payment in full.
 - f. Any other relief which the court deems fit in the circumstances.
 - g. Costs of and incidental to and of these proceedings.
2. Upon being served with summons to enter appearance and pleadings, on September 16, 2016 the defendant filed its defence. Subsequently, on November 15, 2017 the defendants filed an amended defence and counter claim dated even date. From the counter claim they sought for the following reliefs:-
- a. A declaration that the plaintiff had the legal capacity, authority and/or mandate to grant the defendant the 50 acres parcels of land from the Wakf Property created by Muses Mohamed.
 - b. An order that the 50 acres parcel of land granted to the defendant pursuant to the agreement of March 23, 2009 be annexed and sub – divided from the larger portion of Plot No 9 section III measuring 162 acres being CR No, 572/1 and subsequently the same be transferred to the defendant.
 - c. Costs of this suit.
3. In summary, the main bone of contention in this protracted suit is the rights, interests and title of some part of the suit property under a created Muslim Charitable Trust deed, known as “Wakf” over property. The “Wakf” is defined by the [Wakf Commissioners Act](#) to mean “the religion, charitable or benevolent endowment or dedication of any property in accordance with the Muslim Law”. Further, sometimes in the year 2009 a letter of offer is alleged to have been duly executed by some of the trustees of the Wakf and the defendants herein whereupon some parcel of land was measuring 50 acres was acquired by the defendants for the construction of a university. Indeed, the project started but later on the plaintiff when they became aware of it held that this had been against the conditions stipulated in the Wakf deed. A dispute arose which culminated to filing of this suit.

II. The Plaintiff's Case.

4. On February 12, 2019 the suit by the plaintiff commenced and closed on the same day. The plaintiff summoned only one witness – PW – 1 to testify and support its case in accordance with the filed amended plaint. These were the proceedings.

Examination in chief of PW - 1: Mr Aly Khan Aly Mose by Mrs K Moolraj Advocate.

5. He was sworn and testified in English language. He recorded his witness statement dated January 22, 2019 and filed on January 23, 2019. He was aware of the suit property. He also filed the list of documents on behalf of the plaintiff on November 26, 2018. He stated that the owner of the suit property was his late grandfather, one the late Ali bin Mohamed. It was known as CR 5792/4 as per



the entry No 4 of the title document. His grandfather created a trust dated November 12, 1941. The first Waqf deed mentioned the suit property. The first was registered against the title as seen from entry No 5 of the title deed. The one who is acting as a trustee was Mohamed Namaan Aly, the 1st plaintiff herein. He had a power of attorney to appear and adduce evidence in court on behalf of the trust and on his own behalf. He testified that the four main trustees of the Waqf were Mr Abdallah Mohamed Ali, Mr Mohamed Naaman Ali, Mr Ali Saleh Ali and himself.

6. According to him, the trust was set up for helping the mosque. Whatever they spent and what was left was for the benefit of the mosque and religious education. They put up an educational facility on the land and it was running. It was a family run trust.

In his witness statement, he had attached list of a schedule of names of all the trustees. If a family had to decide anything, all of them must be consulted. In the year 2015, they were called to a meeting by the head trustee. They wanted us to give 50 years lease on the 50 acre of land. This was the first time PW – 1 learnt of this development. He had not been aware of a letter of offer dated March 23, 2009 which was in the list of documents by the defendant. He emphasized not being aware of the letter. He did not sign it. Likewise, he informed court that none of the other four trustees had signed it. They had no such a name as Dalla Naama Ali Muses in the family. This letter was not drafted by them. The letter came to his attention around the year 2015. The whole family rejected it because it went against the provisions of the Wakf.

7. The trust deed did not allow grant of a lease of more than three (3) years at a time. That made the family to reject the offer. They were not authorized to lease for more than three (3) years. They told them they could not change the provisions of the trust. They were not aware that the defendants were already building. There had been no permission sought from them on the construction. Their consent to build was not given. The defendant was currently occupying less than 2 acres of the land. They had a survey carried out. PW – 1 referred to the last document in the list of documents by the plaintiff being a survey report conducted by Nadir Surveys. It indicated 0.7401 ha which is less than 2 acres as the land already utilized by the defendant. They had never rented or leased the land to the defendant. There was no lease agreement in place.

They had never transferred any portion to the defendant. The defendants had never paid them any rent. He did not know for how long the defendant had been in occupation of the suit land. When they had a meeting in year 2015, they asked them to stop constructing. They promised they would stop. But in the year 2016, they realized the defendant was still constructing. That was the reason they filed this case.

8. PW – 1 stated that they had a valuation of the land done. The valuation report by a valuation firm called Wyco Valuers was part of their list of documents by the plaintiffs. At page 3 of the valuation report, the valuer assessed rental value at a sum of Kenya shillings four million five hundred thousand (Kshs 4,500,000/=) or Kenya shillings ninety million (Kshs 90,000,000/=). An acre would be valued at a sum of Kenya shillings four fifty thousand (Kshs 450,000/=) and thus a sum of Kenya shillings nine them being hundred thousand (Kshs 900,000/=) for two (2) acres.
9. His testimony was that they were claiming for the illegal occupation of property for two (2) acres for each year of occupation by the defendant. He averred that the defendant should not be there. The defendant was a trespasser. The plaintiff sought for vacant possession and passion and for them to be evicted from the land. At the conclusion of his evidence in chief, produced his entire bundle of documents as the plaintiff exhibits 1 to 6. He also produced his witness statement as part of his evidence in support of the plaintiff's case. That was all.



Cross examination of PW – 1 by Mr Khalid Salim Advocate

10. He confirmed he was appearing in court on behalf of 1st plaintiff and myself. It was true he was given the power of attorney by the 1st plaintiff. He stated that this case involved a Wakf deed created by his grandfather, the late Ali Mohamed Moses. The Wakf deed was dated November 12, 1941. He confirmed that the Wakf concentrated on two properties namely Land Reference Plot No 9 and No 10 section III/MN/Kikambala. Plot No 9 measured 162 acres while Plot No 10 measures 4.2 acres. PW – 1 confirmed it being true that the 1st trustee was his grandfather. The second trustee was my grandmother, Moza who passed away in the year 1957. PW – 1 refuted that when Moza died Mohamed Namaan was appointed. It is his father. Namaan Ali Mohamed Muses who was appointed in 1981. Mohamed Naaman Ali was appointed after the death of his father. He could not remember when the 1st plaintiff was appointed. He confirmed that the Wakf restricted the lease of the land for more than 3 years. The Wakf specifically talked about lease. He came to learn about the defendant in the 2015. The defendant requested for 50 acres for 50 years lease. It was in the year 2015 that the family met. It was during that meeting that they rejected the request by the defendant. They rejected the offer because the 50 years suggested was forbidden by the Wakf. The main reason for the rejection was the request for 50 years lease. Only 3 years was provided.
11. He confirmed that upto then, Mr Mohamed Naaman, the 1st plaintiff was still a trustee of the Wakf. He was a trustee in year 2015. He was not aware what transpired in the year 2009. He confirmed that it was true that in year 2009 the 1st plaintiff was a trustee of the Wakf. He also confirmed it to be true that in year 2002, Mr Mohamed Naaman was a trustee of the Wakf trust. He was not a party to the agreement dated March 23, 2009 (in the list of the documents for the defendant). He testified that at page 2, it had been signed by Mr Mohamed Naaman Aly, Mr Naaman Mohamed Naaman, Mr Ahmed Naaman Aly, Mr Dalla Naaman Ali Muses, Mr Mohamed Abdalla Muses and Mr Abdulla Mohamed Ali. There was a stamp and signature of the Chief Kadhi affixed on the letter of offer.
12. He knew all of them, except Mr Dalla Naaman Ali Muses. PW – 1 stated that there was an Abdlla in their our family. He affirmed that the letter of offer made reference to a grant of 50 acres of land, not a lease of 50 years. According to the letter, he asserted that it was true it was to build an Islamic Institution or university. He affirmed it to be true that there was an Islamic learning institution that had been constructed on the ground. He denied having been a party to the agreement. There was no statement recorded by Abdalla that he did not sign the document. There is no report made to the police that a signature was forged.
13. PW – 1 testified that he was not aware that the 1st plaintiff was appointed as a member of the Board of Trustees of the University (See clause 3(a)). He had never seen the trust deed in the supplementary list of documents for the defendant. It was in relation to Kisauni Islamic University and 1st plaintiff trustee No 9.

He confirmed at page 15 of the trust deed, Mr Mohamed Naaman Aly signed the document. The document (trust deed) was registered on December 10, 2014. He stated that in the filed civil case they had challenged the agreement of March 23, 2009. It had been nullified by them by rejecting it. They rejected it. He did do not have any correspondence nor minutes of the said family meeting or indicating the family rejecting it. Prior to the year 2004, PW – 1 had been residing in the United Kingdom. He came back in year 2004. He used to come back to the country every year. He moved back to Kenya in the year 2004. He used to make frequent visits before that.
14. The eldest member of the family was Mohamed Naaman, who was a trustee. PW – 1 was a beneficiary of the trust. The trustee of the Wakf of Aly Mohamed Muses was Mohamed Naaman, the 1st plaintiff.



He confirmed that he was a beneficiary, not a trustee to the Wakf trust. He confirmed that it being true the defendant had built a portion of that land. He did not know how long they have taught there. The learning must have been after year 2016. There was a block that is complete. There was no other block. PW – 1 testified being aware of an application for injunction. It was true they wanted to stop them from constructing. There were structures for cows and that was what they stopped from continuing being built. PW – 1 stated that under the contents of paragraph 11(a) was about a portion of the land. It talked of it to be transferred. In the Wakf deed, there was no provision that the trustee could not transfer. It never restricted the trustee from charging. There was no provision that they could not gift it.

Re - examination of PW – 1 by Mrs K Moolraj Advocate

15. PW – 1 stated that In the title document there was entry No 7 being a declaration dated November 17, 1981 declaring Naaman Ali Muses alias Naaman Bin Ali Mohamed. The 1st plaintiff was the son of the registered trustee, who was registered as a trustee in entry No 7. The 1st plaintiff was not registered as a trustee in the title. The person who made the Wakf was his grandfather. There were four (4) heads of the family, including the 1st plaintiff. It was a family based trust. It was a must for all the four heads to make a decision of the trust. The letter of offer dated March 23, 2009 was not signed by all four (4) heads of the family. Instead, it was signed by other family members. Two heads did not sign. Some of those who signed were the great-grandchildren of the owner of the trust.
16. The letter of offer was from the Islamic foundation, the defendant. He did not have any correspondence that the letter of offer was accepted. There was no minutes to show acceptance. No action was taken to show the letter of offer was accepted. Before today, he had never seen the trust deed in the defendant's supplementary list of documents. The 1st plaintiff had never told him he was a trustee of the university. In their meeting, it was never indicated he was a trustee. There was no advocate who had witnessed the signature of Mohamed Naaman Aly. The trust did not allow them to give land. It did not allow them to sell land. It only allowed them to lease land but to a limited period of upto to 3 years. That was all.

III. The Defendant's Case.

17. On November 5, 2019 the suit by the defendants commenced. It closed on January 27, 2022. The defendants summoned one witness – DW – 1 who testified and supported its case as set out in the defence and counter claim. These were the proceedings.

Examination in chief of DW – 1 – Mr Mohamed Isam Rehmat Ali by Mr Khalid Salim Advocate.

18. He was sworn and testified in English language. He stated that he lived in Kisauni. He was a holder of the national identity card bearing number 5174446. He worked as the administrator of the Islamic foundation in the Coast region. The foundation was the defendant herein. DW – 1 stated that on September 16, 2016, he signed a witness statement which he adopted as his evidence in this case. He also produced the documents filed by the defendant on September 16, 2016 and further supplementary list of documents dated February 11, 2019 which he produced as defendant exhibits 1 to 5 in this case. He testified that he knew Mr Mohamed Naaman Aly, the plaintiff. He had known him for over 20 years period. He was the one who authorized the Islamic foundation to put up a college on the suit property. The first time was in year 2001 in a letter attested to by the Chief Kadhi at the time.
19. The Principal at that time, Sheikh Siraj had started an institution on the same plot known as Majlis Maaraf Islamia and he was the chairman and while DW – 1 was the secretary. This was in the late year 80's and early 90's. From that time he came to know the plaintiff. He informed court that after the authorization, they did a ceremony of laying the foundation stone in February, 2002 and it was presided over by the Ambassador of the Kingdom of Saudi Arabia. During the ceremony, the plaintiff



was present. There was an agreement between the plaintiff and the defendant signed on March 23, 2009.

There was no documents their donor insisted on documents in 2009 there was a letter of offer. They did it. An advocate Swaleh Advocate assisted them. The letter of offer dated March 23, 2009 was signed offer by the plaintiff, their cousin, brother and representative of the foundation signed. It was witnessed by the Chief Kadhi. They did not pay for it as consideration. They wanted to build a University. After signing it they took vacant possession. The plaintiff kept on saying that they take the property. They had students at the university which had 8 blocks. They had 90 students. They invested heavily to the tune of Kenya shillings two million (Kshs 200, 000, 000.00). The Late Mohamed Naaman was a trustee. He confirmed they had a trust deed and Mohamed Naaman the plaintiff was a trustee. The problems between them began in the year 2016. Some members of the family objected to the project. DW – 1 did not know the reason but perhaps they wanted to sub-divide the property. They could not could not agree and the matter ended up in court. Currently, they were in occupation of the suit property – at Kikambala.

20. They assumed that Mohamed Naaman had been involving the family. He was the one who resided at the United Kingdom. He would be making outrageous demands that we buy the property. The defendant refused as it was a grant made to them.

Cross examination of DW – 1 Mrs K Moolraj:-

21. He started working in the year 1982. DW – 1 stated that a letter of offer was not a transfer lease on land grant. The word “gift” was not mentioned. Neither was consideration was also not mentioned. He denied that it was the Islamic foundation that approached the plaintiff for the land. DW – 1 stated that he knew Wakf deed was registered in the title deed. He confirmed that from the plaintiff’s list of documents, there was the certificate of title registered under the [Land Titles Ordinance, 1908](#). The certificate of ownership was dated June 3, 1976. He was referred to the title (Wakf) dated November 12, 1941 which provided that:-

“From the time of this presents shall be utilized for the benefit of Mosque known as “Naima” situate at Amkeni and encouraging the worship.....”

22. It was meant for a lease for 3 years. The letter of offer did not go along with the terms of Wakf. DW – 1 confirmed never signing the letter of offer. He did have a letter of authority to appear in court. He testified that In the year 2002 they laid the foundation for the University. That was before they had signed the letter of offer.

He knew that all the heads of the family and University did sign the letter of offer. He did not know who were the heads of Wakf. He thought Naaman was the sole head. He had not brought to court any building plan obtained from the County Government, NEMA, Land Control Board – letter of consent.

23. DW – 1 stated that he was aware that on January 11, 2018 there was a court injunction orders to stop the construction of the building. The letter of offer issued in the year 2009 to 2016. There was no transfer. He was not aware, if the letter of offer was time barred. It was drawn by Swaleh & Co Advocates. DW – 1 testified that he had no board resolution to appear in court. That is all.

Re - examination of DW – 1 by Mr Khalid Salim Advocate

24. DW -1 did not pay any money for the suit property. It was for the community. The university was not benefiting in any way. He was testifying on behalf of the Islamic foundation. The letter of offer was



signed after the foundation had been laid down because the donors insisted on formalizing the project. It's the Trustee who approached the defendant for the land. The construction of the foundation was done in a transparent manner and it went on to its completion.

IV. The Submissions

25. On January 27, 2022, upon the closure of their cases, the parties herein were granted time to file their written submissions pursuant to that they all complied and each of them on May 18, 2022 were accorded a brief opportunity to highlight their written submission which they executed the said legal profound mandate with great resilience, devotion and dedication. The honorable court was extremely grateful to their subsequently the honorable court reserved a date for the delivery of the judgment and which I am sure they have been rather anxiously awaiting for.

A. The written submissions by the 1st, 2nd and 3rd plaintiffs

26. On February 4, 2022 the learned counsel for the 1st, 2nd and 3rd plaintiffs, herein the law firm of Messrs KA Kasmani and Co Advocates filed two sets of written submissions dated February 3, 2022 and February 16, 2022. Mrs Tasneem Kasmani Mooraj Advocate commenced her submission that she would be relying on the following documents amended plaint dated October 4, 2017 and filed on October 10, 2017, Reply by the plaintiff to the amended defence and counter claim dated February 8, 2019 and the list of documents by the plaintiffs dated November 23, 2018. She provided the honorable court with detailed background of this case whereby she held that the pith and substance of this matter was the suit property. On November 12, 1941 the then owner of the property created a Muslim charitable trust deed, known as "Wakf" over property. According to the learned counsel, "Wakf" is defined by the Wakf Commissioners Act to mean "the religion, charitable or benevolent endowment or dedication of any property in accordance with the Muslim law".

27. The learned counsel submitted that on November 18, 1941 the Wakf was registered against the property, limiting any action on the land to the terms and condition laid out in the Wakf. It is her contention therefore that thereafter, no single person owned the property or could exercise any individual rights over the said property. She averred that the property had been consecrated as a wakf and its servants were the trustees of the Wakf. It was the contention of the learned counsel that as a Trustee, Mr Muses and any other trustees after him, were bound by the terms and conditions of Wakf deed, and simply had no authority to make decisions outside of the Wakf deed, she emphasized that their hands were effectively tied by the Wakf deed.

28. The Learned Counsel recounted the evidence adduced by the plaintiffs – commencing with of the PW - 1 – Aly Khan Aly Muses, who on February 12, 2019 and his witness statements dated January 22, 2019 informed court that he was a holder of a power of attorney from the Head Trustee – Mohamed Namaan Aly Muses to give evidence on his belief. PW – 1 informed court that the Wakf was a family run trust, - whereby the four (4) main heads were himself, Abdallah Mohamed Ali, Mohamed Namaan Ali and Ali Saleh Ali. The Counsel averred that PW – 1 had no knowledge of the said letter of offer dated March 23, 2009. She stated that PW – had stressed of not only not being aware of it but also having never appended his signature on it. Further, the Counsel held that PW – 1 stated that all the four (4) trustees of the Wakf never signed it. According to the PW – 1, the letter of offer only came to his attention in the year 2005. Immediately, on getting the knowledge of it the whole family rejected it is because it went against the provisions of the Wakf. Their main reason for rejecting it was because the Wakf did not allow a grant of a lease for more than three (3) years. The family could not concede to the letter of offer. The Counsel argued that, it was admitted by the defendant witness – Mr Mohamed Islam in cross examination, that the letter of offer was signed by only trustee and not the four (4) trustees as was required by the Wakf law. He further stated that the rest of the signatories to the letter of offer



were cousins and beneficiaries to the family. According to the Counsel, there was no effort made to contact the actual heads of the Wakf.

29. The learned counsel stated Mr Aly Khan Muses, the witness for the plaintiff gave additional evidence that he was not aware that the defendants were building on the suit land. Indeed, they were doing so without any permission and/or consent sought from them. She averred that in the year 2015, the plaintiff made efforts to stop the defendants from undertaking further constructions. But despite all that, the defendants failed to heed, as they still continued construction which led to the commencement of this suit. Indeed, she stated the plaintiffs filed and sought for an injunction order under the provision of order 40 rules 1,2 & 3 of the *Civil Procedure Rules, 2010*, to stop the defendants from constructing on the property. She informed court that on December 14, 2017 the court granted the orders in order to preserve the suit land accordingly.

On the query raised by court as to how the defendants managed to build a full-fledged structure now utilized for the University without any hindrance. The answer to it was that the plaintiffs did that without any legitimate documentation and with disregard to the already obtained injunctive orders issued by court, they still carried on building.

30. Additionally, the learned counsel submitted extensively on both the Wakf deed and the letter of offer as follows.

Firstly, on Wakf deed. She informed court that it was dated November 12, 1941. Its most important provisions were:-

- a. The Wakf was known as “the Wakf properties of Ali Mohamed alias Musee Mohamed”
- b. The income and outgoing to be utilized for the benefit of the Mosque known as “Naima” situate at Amkeni.
- c. The trustee shall not grant a lease of any of the premises for a period of more than three years at any one time.

Secondly, with regard to the letter of offer dated March 23, 2009. It was part of the supplementary list of documents filed by the defendants. As far as the Learned Counsel was concerned, on cross examination, the witness by the defendants confirmed that the letter of offer was neither a transfer, a lease nor a gift. She stated that the witness agreed that the letter of offer neither mentioned ground rent nor any consideration. It could not culminate into any grant of the property to the defendants. She argued that it had no legal effect at all.

She further contended that the witness for the defendants admitted in evidence that the letter of offer made no mention of any benefit to Naima mosque as required by the Wakf deed, Additionally, there was no mention for a lease for under three (3) years as required by the Wakf deed. The Counsel averred that the witness for the defendants during the cross examination admitted that the letter of offer was in contravention of the terms of Wakf and therefore an illegality.

31. The Learned Counsel submitted that the witness for the defendant during the cross examination further admitted that he had no authority from neither the person who signed the letter of offer as trustee nor a resolution from the Islamic foundation as a body, to appear in court and tender any evidence whatsoever on their behalf. She averred that no job card was shown by the defendant witness to show proof that he was employed by the defendant organization. Thus, in according to the provision of order 9 rule 9 of *Civil Procedure Rules 2010* the defendant witness could not be seen as a “recognized agent”. She stressed by reiterating that the defendant witness was not able to produce any permission authorizing them to build on the property, no building plans/permit, County Government approval



- NEMA approval were produced by the defendant, proving that any construction was carried out without the consent of the plaintiff's herein.
32. She opined that despite of the defendants claiming that they had invested a substantial amount into building the structure, no bank or financial statements were produced as evidence of this at all, she observed that it was notable that the defendant mentioned "laying of a foundation stone in 2002" before the letter of offer was allegedly signed an indication of their prior intent to carry on and build without the requisite authority and legal processes being followed.
33. In order to buttress her case, the learned counsel – held the letter of offer was a non-starter and had no legal effect at all. It was against the provisions of Wakf and the Land Act 2012 had no effect of conferring any interest in the land to the defendants. She cited the decision of "Rico Kinyariro Kariuki –versus- Renante Wolff & another (2018) eKLR pg 15 and the provisions of section 38(1) of the Registered Land Act (now repealed) and section 43 (1) and (2) of the Land Registration Act – hence the letter of offer had no standing of its own accord. For any disposition of land to be valid, transfer papers under the Land Act 2012, should have been executed and registered. The defendant had no right to the property at all. They had trespassed and hence liable to damages. She cited the decision of Eliud Njoroge Gachiri –versus- Stephen Kamau Ng'ang'a (2018) eKLR 24 on continuing trespass to indicate that the defendants trespassed into the plaintiff's land and built upon the same without any consent or authority. The plaintiff's had attached a valuation report by Wyco Valuers dated March 3, 2017 where annual valuation for ten (1) acres had been stated at Kshs 4,500,000/=. The valuation report was not disputed by the defendants. The defendants had admitted being on the land from the year 2002 when they allegedly placed a foundation stone there. This was done without the knowledge of the plaintiffs who discovered the building being constructed in the year 2015. The plaintiffs seek for general damages in the sum of Kenya shillings nine hundred thousand (Kshs 900,000/= per year for two (2) acres which they occupied from the year 2015 to 2022 being a total sum of Kenya shillings six million three thousand (Kshs 6,300,000/=).
34. The learned counsel contended that the defendants had counter claimed for sub-division and transfer of the 50 acres to themselves. The defendants had no interest beneficial or otherwise in the land. Beneficial interest was not created by trespassing on another's land and building on it without their consent. The learned counsel averred that any sub - division or transfer of the 50 acres would be against the mandatory provisions of the Wakf deed which the property was subject to. The counsel emphasized on the point that the letter of offer was a nullity. To buttress her point, she cited the case of "Joseph Kamau Kiiguoya – versus - Rose Wambui Muthike (2016) eKLR and the doctrine of "*ex - turpi causa non - oritur action*" to the effect that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligation alleged to arise out of a contract or transactions which is illegal and if the illegality was duly brought to the notice of the court and if the person invoking the aid of the court was himself implicated in the illegality.
- She further cited the provision of section 15 of "the Wakf Commissioners Act cap 107"
35. In conclusion, the learned counsel opined that the counter claim by the defendants, sought for enforcement of an illegal contract that was validly signed and went against the provision of the Wakf deed wo which the suit land was subject and the statutes. She urged court to grant the orders prayer for in the amended plaint dated October 4, 2017.

B.The written submissions by the defendant

36. On March 15, 2022 the learned counsel for the defendant the law firm of Messrs Khalid Salim and Company Advocates filed their written submissions dated March 15, 2022. M/s Nafula Advocate



commenced by providing court with a detailed background of the case filed by the plaintiff and defended by the defendant herein. The learned counsel re-produced the condition of the letter of offer as being: -

- a. A senior trustee of the Wakf was to be member of the Board of the Institution.
- b. The heirs pledged that during the subsistence of the University neither the parties who had signed the agreement nor their heirs evict or cause to vacate the foundation or their lawful agents or in any way interfere with the day to day running of the University.

She asserted therefore, it was on the strength of the said grant and the apparent condition thereof that the defendants took possession and continues in earnest, construction of an Islamic Institution. The defendant complied with the condition on the letter of offer and one of the Trustees of the Wakf – the plaintiffs herein in this suit (now deceased) was appointed a member of the appointed a member of the Board of the University. The 50 acres land was validly granted to court and thereby, the defendant filed a counter claim seeking specific orders thereof. The Learned Counsel contention the letter of offer nor from the evidence adduced has any consideration ground rent or transfer mentioned because the parties did not intend it to be. She averred that the plaintiffs were aware of when the defendant took possession of the parcel of land and started construction.

37. The Learned Counsel asserted that the plaintiff's claim that they only became aware of the clause in the Wakf deed prohibiting the leasing of the premises for more than three (3) years only after the letter of offer was signed was strange, given the fact the Wakf deed was in their possession all along. Indeed, the title contained in the plaintiff's list of documents under entry No 8 showed a lease to the plaintiff himself for a period of three (3) years from January 1982. Hence, she wondered how the plaintiff the head trustee who signed the letter of offer not be aware of this prohibition in the Wakf.

Nonetheless, the Learned Counsel argued that in as much as the Wakf deed may have prohibited the leasing of the suit land, for more than three (3) years, it did in anyway prohibit and restrict the sale, grant and/or transfer of the suit property and/or any part of it, she emphasized that the defendant proceeded to execute the terms of the letter of offer on the assurance given by the plaintiffs. She held that the suit instituted by the plaintiffs much later on was based on malice, and ill will having waited until the year 2016 and the defendants to have significantly constructed the University and invested heavily only to sue the Defendant for trespass.

The Learned Counsel has reputed the claim by plaintiff allegedly that they later on after realizing the provisions of the Wakf on lease they retracted the letter of offer. They had not provided any evidence of any retraction and when it was done. Therefore, the letter of offer still stood.

Further, the Learned Counsel contends that the assertion by the plaintiffs and evidence of PW - 1 that the four (4) Trustees never signed the letter of offer and that some of the signatories on behalf of the heirs were forged, are misplaced as no evidence of such forgery, coercion nor undue influence under duress at the time of signing has been produced by the plaintiffs.

38. Finally, the Learned Counsel averred that the court should not grant the orders sought in the plaint. The Counsel relied on the doctrine of proprietary estoppel, though it was vehemently opposed by the Counsel for the plaintiffs – taking that the defendants were and still on the property with the consent of the plaintiffs and their assurances that the 50 acres had been granted by the plaintiffs. Thus, the Counsel contended the plaintiffs only instituted the suit after the construction of the university was almost complete, hence an after thought. The defendant took possession and constructed on it while they were aware of the defendant incurred heavily on the property. To buttress on this point, she relied



on the decision of “[Titus Muiruri Doge – versus - Kenya Cannery Limited](#) (1988) eKLR where it held as follows: -

“If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, the other party stands by and does not stop him from so acting that other party is estopped from changing his stand. If one says to “A” “go ahead”, this is land, but you may build on it, spend money, we will go into formalities of transfer later and A does all that, the representor is estopped from denying the right accrued to and acquired by “A”. Hence they should be deemed as trespassers, she also cited cases of “[Onguso & 2 others – versus- Peter Mbugua & 4 others](#) (2020) eKLR . [David Waweru Mbugua – versus- William Adero Goga & 5 others](#) (2018) eKLR to the effect that the suit property was meant as a gift though no written agreement to that effect.

She contended that to deny the defendant witness to testify on the grounds that he had no authority from the defendant would be condemning the defendant unheard in total contrast to the principles of natural justice as stipulated in the provisions of articles 50 and 159 of the [Constitution of Kenya](#). To support this position, she sought refuge from the decision of “[Wines and Spirits Kenya Limited & another – versus- George Mwachiru Mwangi](#) (2018) eKLR.

She urged court to dismiss the suit filed by the plaintiff and for lack of merit. Instead, the learned counsel asked the court to allow the counter claim by the defendant.

C. Responses and closing submissions by the plaintiff on matters of law raised by the defendant

39. On March 16, 2022, the learned counsel for the plaintiffs filed a brief response on matters of law raised by the defendants in their written of March 15, 2022.

The Learned Counsel submitted on the following grounds.

Firstly, that the principle of estoppel had not been pleaded by the defendant and hence could not be raise at this juncture in their submissions. The authority of “[Titus Muiruri Doge – versus - Kenya Cannery Limited](#) (1988) eKLR was distinguishable due to the evidence in that there was correspondence between the parties about survey, valuation, excision and legal disposal of the property. On the contrary, she argued there was no such agreement or correspondences between the parties – there was no consent or acquiesces on the part of the plaintiff from the authority the court saw the doctrine of estoppel was applicable but here it was not. The suit property was under Wakf Trust deed and hence governed by the [Wakf Commission Act](#) which specifically prevented any person from acquiring rights by adverse possession. The principle of estoppel could not negate statute and could not override the [Wakf Commissioners Act](#).

40. Further the highlighted section of the decision of “[Evan Onguso & 2 others – versus- Peter Mbugua & 4 others](#) (2020) eKLR was not “the *ratio decidendi*” and hence could not be used as an authoritative. Additionally, the decision of “[David Waweru Mbugua – versus- within Adero Goga & 5 others](#) (2018) eKLR dealt specifically with evidence adduced in that matter. The circumstances could not apply across the board and hence not relate to this case. The plaintiffs in this case never did anything to encourage or assist the building as erected by the defendants.
41. Finally, she averred that the decision of “[Wines & Spirits Kenya Ltd & another – versus - George Mwachiru Mwangi](#) (2018) eKLR cited by the defendants supported the submissions by the plaintiff’s to the effect that the defendant witness Mohamed Islam had no authority to give evidence on behalf of the defendants and therefore his testimony was null and void. She emphasized that the defendant



witness admitted in his examination in chief that he was an employee of the defendant. He worked as the administrator of the Islamic Foundation. He was not a trustee and hence had unlike a director of a legal entity no implied authority to give evidence.

V. The Issues for Determination.

42. The honorable court has keenly accessed all the filed pleadings being the amended plaintiff, amended defence and counter claim, evidence adduced by the summoned witnesses for both the plaintiffs and the defendant, documentary evidence, the elaborate written submission, myriad authorities cited, the relevant provision of the Constitution and statutes.
43. For this honorable court to arrive at an informed, reasonable, just, equitable and fair judgment to this matter, it has condensed the following four (4) salient issues as a guide in making the final determination into this judgment. These are namely: -
 - a. Whether there existed any express or implied contracted arrangement and/or obligation terms and condition stipulated thereof entered and/or agreed upon between the plaintiffs and the defendant herein with regard to the suit property and its consequences thereof.
 - b. Whether the terms and provisions of the Wakf trust deed as provided for under the Wakf Commission Act – covered the passing off of the suit property or by the plaintiffs to the defendant.
 - c. Whether the parties herein were entitled to the reliefs sought – the plaintiffs granted vacant possession & for general damages and the defendant to the legal ownership of the suit property as pleaded in the counter claim.
 - d. Who is to bear the costs of the suit?

VI. Analysis and Determination.

Issue No (a) Whether there existed any express or implied contracted arrangement and/or obligation terms and condition stipulated thereof entered and/or agreed upon between the plaintiff and the defendant herein with regard to the suit property and its consequences thereof.

Brief Facts:-

44. Prior to embarking on the analysis of the issue framed for this sub-heading, the honorable court strongly feels it imperative, first and foremost to extrapolate on the facts of the case though briefly. From the filed pleadings, on August 11, 2016 the plaintiff instituted this suit vide a plaint dated even date before this honorable court against the 1st, 2nd and 3rd defendants herein. On October 10, 2017, the plaintiff filed an amended plaintiff dated October 4, 2017. The plaintiff pleaded that they brought these proceedings as the trustees of the Wakf Properties of Ali bin Mohamed alias Muses Mohamed which was a Wakf Trust Consecrated over all that parcel of land known as Land Reference numbers CR 57292/5 and Plot No 9 section III located at Kikambala Coast Province (suit land) and measuring one hundred and Sixty Two (162) acres. The said Wakf was a family run trust for the benefit of the Naima Mosque situated at Amkeni. There were four (4) trustees namely the 1st plaintiff, Mr Moza who died in the year 1957 and his place was taken up by Mr Naaman Ali Mohammed Muse appointed in the year 1981. PW – 1 was not a trustee but a beneficiary. It is alleged that in or about March 2009, the defendant entered into a discussion with Mr Mohamed Namaan Ali Musee – the 1st plaintiff seeking a grant of fifty (50) acres of land. Upon holding a discussion of the proposal at a meeting of all the trustee and heirs of the Wakf it was discovered that the deed, did not provide for any such grant and that the same would have been illegal and against the provisions of the Wakf trust. The plaintiff held that



the letter of offer dated March 23, 2009 was illegally and erroneously issued to the defendant. Thus, it was retracted and no further documents were executed giving rights to the defendants over the land. According to the plaintiff the letter of offer was null and void as it was against the provisions of the Wakf deed. The plaintiff further averred that the letter of offer was not effective to transfer any interest under the law to the defendant. However, later on the plaintiff found out that despite the retracements of the letter of offer, the defendant proceeded to encroach into approximately two (2) acres of the land and constructed a building without the consent nor knowledge of the plaintiff. The defendant had no approval plans from the County Government of Kilifi NEMA. The plaintiff sought for the orders as set out from the filed plaint. Through a notice of motion application dated May 12, 2017, the plaintiff under the provision of order 40 rules 1, 7 sought and were granted injunction orders to stop any further construction by the defendant. Despite of the orders, the defendant continued to build on the land hence trespassing and encroaching.

45. On the other hand, on November 15, 2017 the defendant filed an amended defence and counter claim dated even date. It confirmed and conceded that Ali Bin Mohamed Alias Muses Mohamed who was the registered proprietor of the properties herein created a Wakf over it for the benefit of the Mosque known as Naima situated at Amkeni for the purposes of encouraging the worship of Islam in the year 1995. The defendant stated that were approached by the plaintiff to build a university and upon along discussion and agreeing they entered into a letter of offer granting them 50 acres for purposes of constructing an Islamic Institution. The defendant argued that the institution was in consonance and accordance with the terms of the Wakf. The same is and still was valid and legal. The defendant held that the letter of offer was never retracted as alleged nor erroneously issued. On the contrary, it was properly issued and executed by the Trustee of the Wakf and other heirs and beneficiaries of the estate. That they obtained all the pre requisite approach for the building of the university on the 50 acres parcel of land granted on it. They had not trespassed.

They prayed to be granted all the orders sought in the counter claim. That is adequate on the facts.

46. Now turning to the issues under this sub-heading based on the detailed facts herein. The crux of this matter is that the plaintiffs sued the defendants seeking vacant possession of the suit property and general damages for alleged illegal possession of it from the year 2015 onwards. They hold that the defendant despite of injunction orders, obtained on January 11, 2018, they have continued to build. To enable the court proceed further there is no doubt that Ali Bin Mohamed alias Muses Mohamed was the registered proprietor of the suit land and it created a Wakf over the said properties for the benefit of a Mosque known as Naima situate at Amkeni for the purposes of encouraging the worship of Islam.

The provisions of the later aforesaid Wakf deed is dated November 12, 1941 are:-

- a. The Wakf is known as “the Wakf properties of Ali Mohamed alias Muses Mohamed
- b. The income and outgoing to be utilized for the benefit of the Mosque known as “Naima” situated at Amkeni
- c. The trustee shall not grant a lease of any of the premises for a period of more than three (3) years at any one time.

Nonetheless, critically speaking, there were a few grey areas with regard to the Wakf trust. After the demise of the four appointed Trustees to the trust, what exactly was the identity and legality of the four appointed Trustees. Apart from the issues of Lease for three years, whether could be transferred, granted or gifted to other third parties. In my own view, the trust was silent on these legal aspects.



Issue No b) Whether the terms and provisions of the Wakf trust deed as provided for under the Wakf Commission Act – covered the passing off of the suit property or by the plaintiffs to the defendant.

47. Under this sub – heading, taking that the plaintiffs have disowned and attempted rescinding the letter of offer dated March 23, 2009, it is significant that the court critically assesses the said letter and the circumstances that led to it upto the ostensible execution and thus implementation. I have noted that the letter of offer was duly executed by the plaintiffs as a beneficiary but acting on behalf of the trustees and the defendant. Court was informed that it’s the plaintiff who approached the defendant for this transaction and a long discussion was held between the parties as stated from the said letter. Resultantly, the letter was executed. For ease of reference, I wish to hereby re – produced it verbatim, *inter alia*”:

“Letter of offer grant of 50 acres of land being a portion of the Masjid “naima Waqf”

“We the heirs of the Late Ali Bin Mohamed Alias Muses Mohamed refer to the various discussions on the above mentioned subject matter and are pleased to advise that we are agreeable to the availing the above mentioned portion of the Masjid Naima Waqf as detailed herein under subject to your acceptance and completion of all appropriate documentation in accordance with the following terms and conditions.

It is hereby agreed by and between the heirs of the Late Ali Bin Mohamed alias Muses Mohamed (the heirs) and the Islamic foundation of PO Box 30611 (the foundation) that the terms and conditions set out in this letter of offer constitutes the legally binding terms upon all the parties.

- a. Facility being granted– 50 acres of land being a portion of Masjud Naima Waqf.
- b. Purpose – the facility to be strictly for construction of a University and/or learning institution which would include Islamic teachings and studies, which University will be run and wholly maintained by the Islamic foundation.
- c. Condition precedent
 - i. Without prejudice to the above, the Senior Trustee of the Waqf of Masjid Naima will be a member of the Board of Trustee of the University.
 - ii. The heirs pledge that during the subsistence of the University neither the undersigned nor heirs will evict or cause to vacate the Foundation or their lawful agents or in any way interfere with the day to day running of the University.
 - iii. All sums of money needed to realize the completion of this transaction shall be payable by the foundation under the terms of this letter of offer including Advocates costs and any other charges, levies, taxes that may become necessary to realize the creation of the University.
- d. Severability of terms and conditions
 - i. Each of the clauses in the letter of offer are severable and distinct from the others and if at any time one or more of the said clauses



become invalid, illegal and unenforceable the validity, legality and enforceability of the remaining clauses herein shall not in any way be affected.

- ii. It is hereby agreed and declared that if Islamic foundation fails to meet and abide by their obligations in this letter of offer, the whole transaction shall be deemed rescinded and null and void for all intents and purposes.

e. Governing law

The letter of offer will be governed by and construed in accordance with the laws of the Republic of Kenya.

Acceptance of offer

Should the above mentioned terms and conditions be acceptable to you, kindly signify your acceptance by signing and returning the attached copy of this letter of offer within ten (10) days or within such time as may be extended by us from the date hereof at the expiry of which, this approval shall become void.

Further to the above, the foundation must initialize each page of this letter of offer and return to us for due attention thereof.

Yours faithfully,

The heirs of the Late Ali Bin Mohamed Alias Muses Mohamed

Mohammed Naaman Aly Identity card No xxxx (His signature appended)

Naaman Mohamed Naaman Identity card No xxxx (His signature appended).

Ahmed Naaman Aly– Identity Card No xxxx (His signature appended)”

Dalla Naama Ali Muses Identity card No xxxx (His Signature appended).

Mohamed Abdalla Muses Identity card No xxxx (His Signature appended).

Abdalla Mohamed Ali Identity Card No xxxx (His Signature appended)”

48. From the very onset, based on the terms and conditions of the duly executed letter of offer, this court discerns that legitimate expectation was created upon the defendant by the plaintiffs. The defendant has averred that it was from the long discussions held with the plaintiffs and the executing this letter of Offer that granted them 50 acres from the 162 acres of land known as CR 57292/5 Plot No 9 Section III Kikambala Coast province which formed part of the property of the Wakf of Ali Bin Mohammed alias Muses Mohamed. It is from that expectation created by the Plaintiffs that the Defendant proceeded on with the construction of the Islamic University. They had 8 blocks with 90 students in occupation. The learning program had already commenced to completion. They invested substantially to a tune of Kenya Shillings Two Million (Kshs 200, 000, 000.00) on the project which had it not been for the said Transfer and/or Grant of the land to it by the Plaintiffs and the heirs herein they would not have proceeded to invest and/or built a University on the said parcel of land.
49. Arising from this and relying on the provisions of Article 159 (1) and (2) of the *Constitution* and Sections 1A, 1, 3 and 3A of the *Civil Procedure Act*, Cap And Sections 3 and 13 of the *Environment and Land Act*, No 19 of 2011, it is my view that the Court has the power to invoke and apply and which I hereby do the Doctrine of proprietary Estoppel here. Upon leading the Defendant to this level of belief and making them commit so much resources, its unacceptable for the Plaintiffs to turn around



and state ignorance, lack of consent and authority for the transactions and the development graphically undertaken by the Defendant on the suit land on day broad light. I am persuaded by the citation relied on by the Learned Counsel for the Defendant in the case of “*Titus Muiruri Doge (Supra)*.”

Additionally, the main issue here is, whether there a valid agreement set the Plaintiffs and the Defendant herein. Under the provisions of Section 38 of the [Land Act](#) No 6 of 2016 of the Laws of Kenya provides as follows: -

“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
- b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

50. It is my own view that the Letter of Offer dated March 23, 2009 legally constitutes a legal and enforceable agreement terms and conditions stipulated thereof as per the definition of the [Laws of Contract](#) Cap 23 of Laws of Kenya. The Letter of Offer provides the following terms and conditions being legal ingredients of a legal contract. These are:

- a. The rule on enforceability:- It is enforceable by law. Any clause that becomes invalid, illegal and unenforceable the validity, legality and enforceability of the remaining clauses herein shall not in any way be affected.
- b. There is an offer and acceptance. This is of a grant of land measuring 50 acres of land to be apportioned from Masjud Naima Waqf. The offer is between the Trustees and/or heirs of the Late Ali Bin Mohamed Alias Muses Mohamed of Waqf on one hand and the directors of the Islamic Foundation on the other hand are all enshrined thereof.
- c. There is a purpose. It is strictly for construction of a University and/or Learning Institution which would include Islamic teachings and studies.
- d. There are conditions - to have the Senior Trustee of the Waqf of Masjid Naima will be a member of the Board of Trustee of the University.
 - i. The heirs pledge that during the subsistence of the University neither the undersigned nor heirs will evict or cause to vacate the Foundation or their lawful agents or in any way interfere with the day to day running of the University.
 - ii. All sums of money needed to realize the completion of this transaction shall be payable by the Foundation under the terms of this Letter of Offer including Advocates costs and any other charges, levies, taxes that may become necessary to realize the creation of the University.
- e. There is a default clause. If Islamic Foundation fails to meet and abide by their obligations in this Letter of Offer, the whole transaction shall be deemed rescinded and null and void for all intents and purposes
- f. Laws governing it. It is governed by and construed in accordance with the Laws of the Republic of Kenya.



g. The parties and execution. The offer is in writing. It is voluntarily and without any duress or undue influence duly executed by all parties. From the face value, the signatures of these parties was attested/and witnessed by the Kadhi of the Mombasa Kadhi's court.

51. This Honorable court has noted the evidence of PW-1 demonizing the Letter of Offer and holding that it was never signed by all the four (4) Trustees of the Wakf. This court finds that rather difficult to fathom. It is instructive to note apparently all the four Trustees died and two of them were appointed to replace them. From the evidence adduced, it was not clear who these four (4) Trustees were. It is stated that all the signatories of the Letter of Offer were all beneficiaries and heirs of the late Ali Mohammed Muses. Therefore, this court concludes the agreement grant and transfer to the Defendant the 50 acres of land from Wakf property was valid and effective. It was in furtherance of this agreement that the Defendant proceeded to comply with the fundamental term of the agreement.

Indeed Mr Mohamed Naaman Aly, though he has denied it, was made a member of the Board of the University under a trust Deed created on November 26, 2014. This Court has noted that the 1st Plaintiff who resided in the United Kingdom until the year 2009 but who would be frequently be visiting the Country is one person whose testimony the Court has take with a pinch of salt. For instance, though he would be coming to the County and back but still refuted having any knowledge of the construction by the Defendant on the land. The Defendant's structure is mammoth with students and learning taking place. How couldn't one fail to see it. Besides, the Plaintiffs filed a civil suit against it. Therefore, even for him to say he was never made a member of the Board of the Islamic University is skeptical arising from the 1st Plaintiff's character.

For these reasons, I find that the Defendant is not a trespasser at all on the suit land. On the contrary, the Defendant was an owner with proprietary interest, title and/or beneficial interest vested in them by effluxion of time. At this juncture, it is instructive that this court expends a little bit of time on certain concepts pertaining to trespass. According to the provision of Section 3(1) of Trespass Act Cap 294, it provides: -

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence”

From the book “Clark & Lindsell on Torts 12th edition” Paragraph 113, defines trespass as follows

“trespass to land consists in any unjustifiable infusion by one person upon land in the possession of another”

Thus trespass is an intrusion by a person into the land of another who is in possession and ownership. In the case of “Lutaaya – Versus- Sterling Civil Engineering (Supra) the court stated as follows regarding the tort of trespass to land:-

“ Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he parted with possession of land” ... where trespass in continuous, the person with the right to sue ..subject to the law on limitation



of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

Therefore, in simple terms and based on these definitions, the Defendant was not a trespasser at all.

52. The argument advanced by PW – 1 to the effect that when the family met in the year 2005 and were informed of the offer, they rejected it and gave condition that the construction stops can only be taken as a matter of conjecture and jest. This would be such a serious family deliberation with resolution to boot. One would have expected some record in form of proceedings or minutes to have been kept for that matter. This was a family with a penchant for record keeping. For instance, they retained the Wakf Trust Deed which was duly executed on November 12, 1941 and the Title Deed of the [land Titles Ordinance](#) of 1908 dated September 3, 1976. So what would have been difficult in retaining minutes of the year 2005. Additionally, this court finds it rather unbelievable that PW - 1 although he resided at the United Kingdom but would be making frequent visits to the Country, testifying that he was not aware that the Defendant were construction on the land and that it was happening without the consent nor knowledge of the Plaintiff. The court has taken cognisance to the fact that following a joint meeting held on 2015, and agreeing with the Defendant they stop construction they declined which compelled the Plaintiff to institute an application seeking for injunction orders. On November 11, 2017 orders were granted where my sister Hon Justice Komingoi ordered

“That on or about March 2009 the Defendant entered into discussion with the 1st Plaintiff seeking grant of 50 acres of land since the Wakf deed prohibited a lease for more than 3 years, no sale agreement could be entered into. The Defendant gained no legitimate rights over the land. Despite this, the Defendants have carried on and occupied the Plaintiff’s land by putting up building and erecting construction” (Empasis is Mine)

53. From the above observation by this court three (3) things come to fore after the full trial being held by this court:-

Firstly, this court while granting the injunction orders under Order 40 Rules 1 and 2 of the [Civil Procedure Rules, 2010](#), it noted, and rightfully so that about March 2009 the Defendant entered into discussion with the 1st Plaintiff seeking grant of 50 acres of land since the Wakf deed prohibited a lease for more than 3 years, no sale agreement could be entered into. The Defendant gained no legitimate rights over the land. There has been no lease nor sale agreement discussed in the matter.

The Court then proceeded to grant the following injunction orders. to wit:-

“The Defendant’s then employees, servants or agents or any other persons acting or their behalf and upon their mandate or instructions be restrained from constructing on the property, developing the property extending their building or otherwise in any manner whatsoever interfering with the title No 57292/5 until the hearing and determination of this suit’.

The Plaintiffs testified, without adducing any empirical evidence whatsoever, that despite of the above injunction orders the Defendants continued trespassing on the land and construction. The court finds this assertion not convincing as from the year 2017 to date the Plaintiffs never bothered to invoke the provision of order 40 Rule 3 on the consequences of the breach of injunction orders by this court which include imprisonment for a period not exceeding Six (6) months or attachment of the property.

In court’s views that the claim for general damages for the alleged trespass by the Defendant being a sum of Kenya Shillings Six Million Three Thousand (Kshs 6,300,000/-) as assessed



by a valuation firm trading in the names and style of “Wyco Valuers” was farfetched. The Plaintiffs allowed and/or permitted the Defendant to enter into the land and cause the elaborate construction going on while they watched comfortably. They have to be estopped. They provided an implied consent and full knowledge.

54. Secondly, on the allegation meted by the Plaintiff that there was no agreement entered between the Plaintiffs and Defendant has no basis nor foundation at all. There is nowhere that the term “Lease” has been referred to from the Letter of Offer. The Letter of offer refers to a grant. Precisely, the expression used is to wit:- “The facility being granted is 50 acres”. Therefore, this issue of lease for more than 3 years as envisaged in the Wakf Deed nor sale agreement being entered and thus consideration as envisaged in any conventional conveyancing transaction, does not arise at all. The Court fully concurs with the Learned Counsel for the Plaintiff and Wakf Deed that it only limits a Lease upto a period of three (3) years and from sale, and/or transfer of the suit property. But the Letter of Offer gives a grant of a land for 50 acres and not specifies the period.

In the given circumstances this court is persuaded by the submissions of the Learned Counsel for the Defendant that the Doctrine of Estoppel is applicable. The authority of “Titus Muiruri Doge (Supra) comes to their aid for a building to have been constructed from the foundation to its completion and causing the Defendant to incur such a colossal sum of Kenya Shillings Two Million (Kshs. 200, 000, 000.00), the Plaintiff is estopped from denying them from construction in tandem with the provisions of the Registration of Titles Act to wit:-

“It is trite law that Equity follows the law equally that equity will not be set up against a statute, equally that equity will not be used as a vehicle of fraud.

55. In a nut shell, this honorable court finds the assertion of the applicability of Wakf Deed, and Wakf Commission Act rather misplaced for the following grounds:-

Firstly, although the property was created under Wakf trust deed in the year 1941 and therefore governed by the Wakf Commissions Act the same was never leased off to the Defendants. They were only given as a grant for 50 acres for purposes of constructing an institution for teaching Islamic knowledge which was purely in conformity with the terms of the Wakf Deed. It was not sold off as there was no consideration. Besides one of the Trustees was incorporated as a Board of Director to the Islamic Foundation University.

Secondly, as a quick follow up to the above assertions, this court keeps on wondering why the Plaintiffs would take all these years from 2009 when the Defendant acquired the land until the year 2016 – close to seven (7) years to have filed this suit – and realized that there were serval illegalities and wrongfulness created by the terms and condition of the duly executed Letters of Offer against the provisions of the Wakf Trust Deed and the Wakf Commission Act – making it a nullity and void. In my own view, this was purely an afterthought and needs to be disregarded altogether.

Issue No c) Whether the parties herein were entitled to the reliefs sought – the Plaintiffs granted vacant possession & for General damages and the Defendant to the legal ownership of the suit property as pleaded in the Counter claim.

56. All the surrounding facts and inferences in this case remaining constant, the Honorable Court perceives this case from this prism glass. Undoubtedly, there exists the Wakf Trust created on November



12, 1941 by the late Ali Bin Mohammed Alias Muses Mohammed the legal registered owner of the two suit properties. Its terms and conditions are well stipulated thereof. In particular it provided that:-

“From the time of this presents shall be utilized for the benefit of Mosque known as “Naima” situate at Amkeni and encouraging the worship.....”

With the passage of time, the original four Trustees pass on and are replaced, though not on clear methods or known records. By and large the Wakf Trust seem to be operated by the beneficiaries and heirs most of whom are great grand children of the late Ali Bin Mohammed Alias Muses Mohammed. It is still not yet clear from the year 2003 or 2004 or thereabout somehow the Defendant appears on the ground, takes vacant possession from one of the two parcels and commences construction of an education institution, indeed a University with several blocks on it upto completion.

In the year 2005 the Plaintiffs convene a family meeting to deliberate on the matter and where the Letter of Offer date March 23, 2009 was tabled. The Defendant claimed to have incurred a colossal sum on the suit premises. It is alleged that the family declined the offer on the ground that it was against the terms of the Wakf Trust. They agreed that the construction to be stopped but they continued with construction. As a result, they sought Court indulgence where they were granted the injunctive orders. It has not been clear how comes despite of the Court order the construction still continued to its completion. There has been no evidence of any contempt of Court order or application for demolition or eviction of the Defendant from the suit premises. The allegation of forgery of signatures is far fetched as no police report were made nor any arrests. According to the provision of Section 107 of the Evidence Act, Cap 80, provides for he who alleges proves. This never happened.

57. Additionally, there was an argument that the witness summoned by the Defendant was not legally competent and with no authority to represent the Defendant in any way on its behalf. This being a Land matter with its sensitivities, I fully concur with the Learned Counsel for the Defendant that to deny the Defendants witness to testify on the grounds that he had no authority from the Defendant would be condemning the Defendant unheard in total contrast to the Principles of Natural Justice as stipulated in the Provisions of Articles 50 and 159 of the Constitution of Kenya, 2010. To support this position, she sought refuge from the decision of “Wines and Spirits Kenya Limited & Another – Versus- George Mwachiru Mwangi (2018) eKLR.

Therefore, in a nutshell, the Honorable Court holds that the Plaintiffs are not entitled to the reliefs sought from their filed pleadings. On the contrary, the Defendant succeeds from the prayers sought from its Counter Claim hereof.

Issue No d) Who will bear the Costs of the suit.

58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the Civil Procedure Act, Cap 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company – Versus – Joseph AIR 1918 cal 717 & Myres – Versus – Defries (1880) 5 Ex D 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”



- i. The Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

59. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is the Plaintiff fully succeeded in his cases. For that very fundamental reason, therefore, the costs of this suit will be borne by the Plaintiff.

VII. Conclusion & Disposition.

51. Consequently, after causing an elaborate and indepth analysis of all the framed issues herein, this Honorable Court is fully satisfied that the Plaintiffs have failed to prove its case while Defendants have adequately established its case in the Counter Claim on preponderance of probability. For avoidance of doubt I direct and/or order as follows: -

- a. That Judgment be and is hereby granted against the Plaintiffs and in favour of the Defendants in accordance with the filed Amended Defence and Counter Claim while the suit by the Plaintiff is hereby dismissed.
- b. That a declaration be and is hereby made that the Plaintiffs had the legal capacity authority and/or mandate to grant the Defendant the acres of land from the Wakf property created by Muses Mohamed.
- c. That an order be and is hereby made that the 50 acres parcel of land granted to the Defendants pursuant to the Letter of Offer/Agreement dated March 23, 2009 be annexed and sub-divided from the large portion of the Plot No 9 Section III Measuring 162 acres being CR No 5792/1 and subsequently the same be transferred to the Defendant.
- d. That an order directed to the Land Registrar, Mombasa with the next Sixty (60) days of this Judgement to hive off and/or excise a portion measuring fifty (50) Acres parcel from the larger portion of Plot No 9 Section III measuring one hundred and Sixty two (162) acres being CR No, 572/1 and subsequently transfer it to the Defendant at their own Costs on the required statutory dues.
- e. That the Costs of this suit to be borne by the Plaintiff.

It is ordered Accordingly.

JUDGEMENT DELIVERED & SIGNED AND DATED AT MOMBASA ON THIS 18TH DAY OF OCTOBER OF 2022.

HON. MR. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA



In the presence of:-

- a. M/s. Yumna Hassan, Court Assistant
- b. M/s. Nafula Advocate for the 1st, 2nd and 3rd Plaintiff.
- c. Mrs. Moolraj Advocate for the Defendants

