



REPUBLIC OF KENYA



**Mwenda & 8 others (Suing on their behalf and as the officials of Bombolulu Coast Workshop for the Handicapped (BCWH)) v Association for the Physically Disabled of Kenya alias APDK & 6 others (Environment & Land Case 74 of 2014) [2022] KEELC 15279 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 74 OF 2014**

**LL NAIKUNI, J  
NOVEMBER 22, 2022**

**BETWEEN**

**MORIS MWENDA ..... 1<sup>ST</sup> PLAINTIFF  
SWALEH MBOVOKO ..... 2<sup>ND</sup> PLAINTIFF  
RASHID KALU NGOME ..... 3<sup>RD</sup> PLAINTIFF  
EIZABETH KARISA ..... 4<sup>TH</sup> PLAINTIFF  
STEVEN OTIENO ..... 5<sup>TH</sup> PLAINTIFF  
CELINA KAUCHI ..... 6<sup>TH</sup> PLAINTIFF  
PATRICK MAKALU ..... 7<sup>TH</sup> PLAINTIFF  
MKALA SHANGA ..... 8<sup>TH</sup> PLAINTIFF  
ABDALLA KHAMADI ..... 9<sup>TH</sup> PLAINTIFF  
SUING ON THEIR BEHALF AND AS THE OFFICIALS OF BOMBOLULU  
COAST WORKSHOP FOR THE HANDICAPPED (BCWH)**

**AND**

**ASSOCIATION FOR THE PHYSICALLY DISABLED OF KENYA ALIAS  
APDK ..... 1<sup>ST</sup> DEFENDANT  
OFFICIALS OF ASSOCIATION FOR THE PHYSICALLY DISABLED OF KENYA  
ALIAS APDK ..... 2<sup>ND</sup> DEFENDANT  
HURBERT SEIFERT ..... 3<sup>RD</sup> DEFENDANT  
GEDION MUGA ..... 4<sup>TH</sup> DEFENDANT  
FRANCIS KIVULI ..... 5<sup>TH</sup> DEFENDANT**



## JUDGMENT

### I. Preliminaries.

1. This judgment pertains to a suit filed on April 3, 2014 – which is close to eight (8) years ago from the time of its institution - by the 1<sup>st</sup> to 9<sup>th</sup> plaintiff s *vide* a plaint. It is against the 1<sup>st</sup> to the 7<sup>th</sup> defendas herein. From the case, the plaintiff s sought for the following reliefs:-
  - a. A permanent injunction restraining the defendas from dealing with the suit property, cancellation of the title deed in the 1<sup>st</sup> defendant 's name and the registration of the plaintiff s as the owners of plot No 118 section 18 Mainland North also known as Bombolulu Coast Workshop for the Handicapped.
  - b. Any other remedy that the court deems just and equitable.
2. Based on the filed plaint, the plaintiff s claim that at all the material times of instituting the case, they were the absolute, legal and registered owners of all that property known as land reference No plot No 118 Section Mainland North also known as the Coast Workshop for the Handicapped (hereinafter referred to as “the suit property”). Briefly, the plaintiff s averred that in the year 1971, they appointed Mr Morris Mwenda and one Mr Jaganath Pandya (now deceased) as the Trustees of an organization registered as the Bombolulu Coast Workshop for the Handicapped (hereinafter referred to as “the B.C.W.H”). Ideally, the trustees were to hold the suit property in trust of the organization. On or around the year 1974 the plaintiff s who were all relatively persons who were physically and bodily challenged bought the parcel of suit land at a sum of Kenya shillings forty thousand (Kshs 40,000/=). The purchase was undertaken through the two appointed trustees. Primarily, they bought the land with the sole aim of utilizing it as source of earning a livelihood for its membership rather than causing them into resorting to begging commonly associated with such persons. As fate would have it, in the course of time, one of the duly appointed trustee Jagannath Pandya passed away.
3. Legally speaking, the land owned by the B.C.W.H was left in the hands of the Surviving Trustee – Mr Morris Mwenda – whose appointment was never revoked. It is stated that he was also ailing and aging too. In the year 1986, the plaintiff s experienced some management problems as dispute over numerous issues arose among its members.

It is alleged that in the year 2005, some of the members of the Association of the Physically Disabled of Kenya (hereinafter referred to as “The A.P.D.K”) – 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendas approached the surviving sole trustee – Mr Mwenda. It is further alleged that they deceived and caused him to sign some documents which eventually illegally transferred the suit land from B.C.W.H. to A.P.D.K. The plaintiff s have claimed that these people tricked Mr Mwenda on pretext that the documents pertained matters of the management of the assets for the B.C.W.H. The facts are that Mr Mwenda obliged by signing all the transfer documents and thence in stroke of a pen, the land was transferred from B.C.W.H to A.P.D.K.
4. Arising from this, the plaintiff s were agitated and as a result they decided to institute this suit. The plaintiff s have averred that the suit land was fraudulently, irregularly and wrongfully transferred to the A.P.D.K. In the long run, the plaintiff s want the suit property to revert back to them - B.C.W.H.



5. Upon being served, on April 10, 2014, the defendant entered appearance and filed the defence dated April 24, 2012. The defendant refuted that the plaintiff's being neither members of the B.C.W.H. nor the registered owners to the suit land. According to them, it was the 1<sup>st</sup> defendant who was the registered owner to the suit property. They denied the allegations of fraud ever having taken place as they claimed all the documents for the transfer of the land were done legally, regularly and without duress meted upon the sole Trustee of B.C.W.H. - Mr Morris Mwenda. To them he voluntarily, freely and without duress gave his consent by signing all the transfer documents. Hence, that forms the main substratum of this case before the honorable court.

## **II. The 1st, 2nd, 3rd, 4th, 5th, 6th 7th & 8th plaintiff s' Case.**

6. The plaintiff s' case commenced hearing on June 27, 2018. They summoned three (3) witnesses – the 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> plaintiff s as PW – 1, PW – 2 and PW – 3 respectively. They testified as follows:-

### **Examination in Chief by PW - 1: Mr Swaleh Bovoko alias Kamata**

7. PW – 1 was sworn and testified in the swahili language. He stated being the 2<sup>nd</sup> plaintiff in this case. He confirmed having signed the witness statement filed in court. He informed court that Mr Morris Mwenda was a trustee to the plaintiff s' association and the suit land. PW – 1 did not know whether Mr Mwenda was still alive or not. Also, PW – 1 did not know where he was. He informed court that he was a member of Bombolulu Coast Workshop for the Handicapped. PW – 1 averred that the dispute was over land No 118. He stated knowing that, although the land was registered in the name of the 1<sup>st</sup> defendant but it belonged to Bombolulu Coast Workshop (B.C.W.H.) for the Handicapped. We never gave 1<sup>st</sup> plaintiff authority to transfer the land to 1<sup>st</sup> defendant . He had no capacity to do the transfer without out the authority of the association.

8. He did not know whether he was given any money. He urged court to assist in returning suit land to B.C.W.H. It was situated at Mazeras. He informed court that initially, the organization was run by Holland Mills and Bi. Ada Matilda from Norway. They were the ones who would bring volunteers to work.

In January, 1972, Holland told them to take over the running of the workshop. He informed court that they would be making artifacts. In 1975, Holland called a meeting and told them that the money for building equipment had been paid for the work. There was a balance in the bank and he asked them what to propose what was to be done with the money. They proposed that on buying of parcel of land. He agreed with this proposal. Mr Holland said he was to come to Mombasa to look for land. This was how they identified the land at Kisauni from an Asian.

9. He returned and informed them that they had paid the purchase price for the land. Some of their members were in Mombasa to work on the land. CARE came and build for them some structures on the land. Mr Holland told them to protect the land as it was theirs.

They got into the land in the years 1980 -1981 or thereabout. There were caretakers on the land who were being paid for their services. The caretakers told them that they were tired others had to be looked for.

10. One of the members suggested that they approach the 4<sup>th</sup> defendant to help them in taking care of the property. The 4<sup>th</sup> defendant was working with A.P.D.K. (1<sup>st</sup> defendant ). He agreed and came to the land in the year 1986. After coming to the land, he chased all the other members from the land (people who had gone to see him). It was later that he brought A.P.D.K. to the land. PW – 1's position was that A.P.D.K. never owned the suit land.



B.C.W.H. had a registration certificate. He also knew that they were given the title when they bought the land. He had a copy of the said title which was also filed in court.

**Cross Examined of PW – 1 by Hamisi for 1st – 6th defendant :-**

11. PW – 1 testified and stated that he was among the founder members of B. C.W.H. He did not have a document to show but he worked with them. When they left Mazeras, they were twenty (20) but now they were many. PW -1 stated that he had authority to bring this suit on their behalf. He did not have a letter appointing him as an official but he was elected by members. They are the ones who invited the 4<sup>th</sup> defendant but did not know whether the government was informed. PW – 1 confirmed being an employee and was being paid salaries and allowances. He confirmed there were leaders of the organization before 4<sup>th</sup> defendant who began creating problems from the year 1985 when he came on the plot. They never reported that 4<sup>th</sup> defendant was disturbing them. Before the 4<sup>th</sup> defendant came, they had sought permission of the other members.

Cross examination of PW – 1 by Mr Kiti Advocate.

Nil.

Re - examination of PW – 1 by Mr Abubakar Advocate.

Nil.

**Examination in Chief of PW – 2 - Rashid Kalu Ngome**

12. Sworn and testifies in swahili language.

He was the 3<sup>rd</sup> plaintiff . He lived near the B.C.W.H. He adopted his statement filed in court on September 1, 2016 as his evidence. He knew the 1<sup>st</sup> plaintiff as he was sole Trustee. The 1<sup>st</sup> plaintiff was in Mazeras. He was not in court as he very old. PW – 2 informed court of being one of the founders of the B.C.W.H. He knew it was registered. The organization was still running as they were the members. It was still running/working. Their claim was that B.C.W.H. was for the disabled persons. They would appoint abled persons to help them run the organization. In this process, they appointed 4<sup>th</sup> defendant . After he came, PW – 2 was given a retirement letter and paid up a sum of Kenya shillings one hundred and eighteen thousand (Kshs 118,000.00). He also decided to transfer the land to A.P.D.K. PW – 2 prayed for the land to be returned to them so that they may work on it and not beg.

13. PW – 2 informed court knowing that Mr Morris Mwenda signed the transfer documents for the land to A.P.D.K. They never knew this happened. They had never authorized him to transfer the land. They only learnt of the transfer of the land at the time of retirement.

**Cross Examined of PW – 2 by Hamisi Advocate.**

14. He brought this suit on my behalf and behalf of others. The others had not given them the authority to bring this case to court. He was an employee being paid a salary. He was elected through voting but he had not come to court with the minutes. He was a leader during the time of Solomon Anampiu. PW – 2 was among those who approached the 4<sup>th</sup> defendant to take leadership of the organization. He was present in the meeting whose minutes had been annexed. PW – 2 stated that before agreeing to come over, the 4<sup>th</sup> defendant gave as a pre – condition that the people involved in the strike, first and foremost be removed from the organization. These people were removed. PW – 2 anticipated that he would at some point he would retire. He was not paid as per agreement.



15. Currently, there were people who were working at B.C.W.H under A.P.D.K. If the land was returned to B.C.W.H, he would return to the leadership to take care of the welfare of his colleagues. By the year 2014 he was not in leadership of B.C.W.H.

Cross examination of PW – 2 by Mr Kiti Advocate.

PW – 2 confirmed that there were meetings that agreed that A.P.D.K. to represent them. They never agreed to the transfer the land.

**Re - Examination of PW – 2 by Mr Abubakar Advocate.**

16. PW – 2 refuted that they had agreed that the land be given A.P.D.K. He was a founder, a member and an employee of B. C.W.H. To bring this case, although they were never given authority to sue but they filed this case as a matter of right. PW – 2 stated that it was the defendas who were not happy with this case. The people currently working there joined membership of B.C.W.H. because they found it running.

**Examination in Chief of PW - 3: Patrick Makalu.**

17. He was sworn and testified in swahili language. He lived at Kisauni the County of Mombasa. He was the 7<sup>th</sup> plaintiff in this case. He confirmed preparing and signing a witness a statement filed in court which he adopted. By the time of joining B. C.W.H. he had not known Mr Morris Mwenda. However, with time and after joining, he got to know him joining. He worked and was elected as secretary of the Workers Committee. PW – 2 confirmed that Mr Morris Mwenda was unwell. He lived in Mazeras.

18. PW – 2 informed court that their claim concerned the land taken away from B.C.W.H. by A.P.D.K. The understanding was that A.P.D.K was to run B.C.W.H. but not to take its property. PW – 2 confirmed knowing that indeed Mr Morris signed the transfer documents of the land to A.P.D.K. There was no documents we signed authorizing Morris to sign the transfer documents to A.P.D.K.

He stated that he was no longer at B.C.W.H. having removed out. The previous committee called them as the Workers Committee and assigned them the responsibility to take up the running of the B.C.W.H. from them. It was Mr Kassim, Mr Swaleh, Mr Rashid and himself who approached the 4<sup>th</sup> defendant . After the 4<sup>th</sup> defendant came, they were all sacked. PW – 2 stated that he did not know why they were sacked and removed.

He knew the B.C.W.H. had a registration certificate. He also knew the plot had a title. He produced all the documents of the exhibits for the plaintiff .

**Cross Examination of PW – 2 by Mr Hamisi Advocate.**

19. PW – 2 stated that the suit was brought on behalf of many others. There were minutes which authorized them to bring the suit. He was last in the leadership in year 1986. In the year 2014, he was not in leadership of B.C.W.H. The B.C.W.H. was started by Holland and Matilda. Mr Solomon Anampiu was the Chairman Executive Committee. The strike was in the year 1986 which made operations not to go on for one day. He did not hear the 4<sup>th</sup> defendant say that he wanted the people engaged in the strike to be sent away. The 4<sup>th</sup> defendant required that before coming other members had to consent. The members sat and agreed that the 4<sup>th</sup> defendant takes over the caretaker role of B.C.W.H. But immediately after the 4<sup>th</sup> defendant took over, they were all sacked. Thereafter, PW – 2 did not know what took place. All the plaintiff's were not currently working for B.C.W.H. The people currently working there were also members of B.C.W.H. They were removed from the place by force.



**Cross Examination of PW – 2 by Mr Kiti Advocate.**

20. PW – 2 stated that he had never seen the transfer documents showing that Mr Morris Mwenda had signed. He never informed them. They followed him to ask why he had signed the transfer forms. He swore an affidavit stating that it had not been explained to him before signing the transfer forms.

**Re - Examination of PW – 2 by Abubakar Advocate.**

21. PW – 2 stated that they held meetings with members before filing of this suit. PW – 2 never thought there were any founder members still working at B.C.W.H.

**That Was The Close Of Theplaintiff S Case.**

III. The 1st, 2nd, 3rd, 4th, 5th, 6th & 7thdefendas' case.

22. Thedefendant 's case commenced on November 26, 2018. Two (2) witnesses testified as follows.

Examination in chief of DW – 1, Mr Hubert Seifert by Mr Hamisi Advocate

23. DW – 1 worked for an organization called the Global Live Hood Advisor for the Christian Blind Mission Germany. He lived in Kenya for thirty six (36) years. He also worked for A.P.D.K. He was involved in the transaction of the land in dispute. He had the authority to give testimony in this case on behalf of 1<sup>st</sup>defendant . He was also sued as the 3<sup>rd</sup>defendant herein. He recorded a witness statement dated October 10, 2018 and filed in court on October 12, 2018 which he relied on. He also referred to the to documents filed by thedefendas in evidence. The 1<sup>st</sup> list was filed on April 24, 2014 and supplementary list filed on June 18, 2014. Out of these, the following documents by thedefendas were objected to by theplaintiff s. These were:-

- a. Page 24
- b. Page 28-34 (35 & 36)
- c. Page 39
- d. Page 41-42
- e. The document annexed in the supplementary list dated June 17, 2014.

These documents were marked for identification as follows:-

- a. Page 24 MFI D14
- b. Page 28-36 MFI D15 (a) –(g)
- c. Page 41 MFI D16
- d. Supplementary list document – MFI D17.

24. The documents that were not contested, were produced by DW – 1 and marked asdefendas exhibits in this case.

DW – 1 stated that 1<sup>st</sup>plaintiff was the sole surviving trustee of B.C.W.H. He informed court that the 2<sup>nd</sup> – 10<sup>th</sup>plaintiff s were employees of 1<sup>st</sup>defendant . They were never owners of trustees of A.P.D.K. The A.P.D.K was for the people with disabilities i.e. they empowered them. For instance, by providing therapy and economic empowerment.



DW – 1 stated that all the founder members were of A.P.D.K. They were not differently able. Two of them were from the Asian Community. He urged the court to find the suit was without any merit and dismiss it.

### **Cross Examination of DW – 1 by Aboubakar Advocate**

25. DW – 1 stated that he first came as a volunteer in September, 1982 to manage the Likoni Furniture Workshop in the facility at Port Reitz. The furniture was started in the year 1972. He was posted as G.S.O. but later on he was appointed as a Manager of the Likoni Furniture Workshop. He did not have any letter of appointment before the court. Further, he did not have the letter seconding him to the Likoni workshop. He was referred to the document at page 6. It indicated that the organization was registered on March 25, 1986.
26. DW – 1 stated that he was not involved in its registration (B.C.W.H.) as it was an independent entity. His last duty to A.P.D.K. was on December 31, 2011. He stated that he never carried the letter of termination or resignation from A.P.D.K. He stated that the document on page 1 was dated September 17, 1993. He testified that the certificate on its face never stated it was a renewal. The previous certificate of registration was not included in the bundle presented to the court. He was aware of the fact that B.C.W.H. got into relationship with A.P.D.K. He was not aware of any formal document signed between B.C.W.H. and A.P.D.K. DW – 1 informed court that A.P.D.K. had a board of Trustees. He had no documents signed by the trustees in regard to their relationship with BC.W.H. Page 16 (document of transfer) dated May 3, 2005. There were only minutes before the execution of the transfer. He did not see the agreement signed before the transfer of the land. There was no signature of A.P.D.K. in the transfer form. Mr Morris Mwenda signed the transfer form as the transferor as he was the sole surviving trustees. There was no money consideration. The Constitution of A.P.D.K. was not included in the list of the defendas. He stated having seen the plaintiff s' documents filed in support of the case. He saw the affidavit sworn by the 1<sup>st</sup> plaintiff dated January 27, 2009. He said having responded to it in his statement filed in court. He stated that he was only asked to record a statement this year. He was referred to paragraphs 8 - 10 of the affidavit dated January 27, 2009. From it, he affirmed that Mr Mwenda denied having willingly transferred the suit property to A.P.D.K. He retracted this affidavit by another dated February 20, 2009.
27. The commissioner for oaths in both affidavits were different. The advocates for A.P.D.K. were Messrs Anjarwalla & Khanna while the Representatives of A.P.D.K. Coast branch was Mr Kizito. DW – 1 had not attached a letter appointing Kizito as Chairman of A.P.D.K. Coast Branch. The minutes of June 11, 1985 had no resolution to transfer the suit property to A.P.D.K. He could not see any of the minutes which resolved the transfer to A.P.D.K. the suit property amongst those filed. He did not know who appointed Anjarwalla & Khanna Advocates to act for A.P.D.K. DW – 1 did not know if B.C.W.H. had advocate acting for them in the transaction.
28. He was personally involved during the transactions. He could not recall being present when Mr Mwenda signed the documents – the transfer or affidavit. The Affidavit of February 20, 2009 was signed by Mr Mwenda and commissioned by Mr Anil Suchak. Mr Hajith of A.P.D.K. accompanied the DW – 1 to the home of Mr Mwenda.

Examination in chief of DW – 2, Mr Melkezedek Osore by Mr Hamisi Advocate.

29. DW – 2 was a researcher scientist and the interim chair of A.P.D.K (MSA). He lived in Mkomani, the County of Mombasa. He had the authority to testify by virtue of his position. He prepared a witness statement on October 18, 2018 filed on the same. He wished to adopt the same as his evidence. He wished to produce the documents from Pages 24 to 41 (MFI D13 - D24) in evidence. Before A.P.D.K



Coast was formed, B. C. W. H was the one running the project. He stated that how A.P.D.K. Coast came into existence was contained from Paragraph 15 of his statement. The documents from pages 24 - 41 were in custody of A.P.D.K. Coast as a result of the handover. As the chairman, he had authority to produce the documents in question. The documents initially marked for identification as MFDI – 13 to 24 were now produced as defence exhibit numbers 13 - 24.

### **Cross Examined of DW – 2 by Mr Aboubakar Advocate**

30. DW – 2 confirmed that his witness statement was made or recorded four (4) years after the case was filed. DW – 2 stated that all whatever he had stated was from the records. He had no personal knowledge. On the averments made out under paragraph 7, he had not produced any documents to support the same. He believed in the information given by Swaleh, Rashid and Elizabeth who were also plaintiffs in this case.
31. He was not involved in the registration of B.C.W.H. He admitted that he was speculating when he said that B.C.W.H. was for the disabled not of the disabled. Page 6 had the names. He did not know any of these persons. He did not have records of trainees or employees of B.C.W.H. The source of information on trainees and employees were not produced before court. On reference to the averments of paragraph 13, DW 2 stated that he did not have documents of purchase or transfer done on December 27, 1974. Paragraph 14: the document did not have reference of funds from Methodist Church. According to the DW – 2, the minutes at page 7 was the handover of B.C.W.H. From the minutes, there was no handover resolution. Paragraph 16: he never met Mr Paul Skogmo.
32. He got the information of threats from the archives of A.P.D.K. but he never brought them to court. Paragraph 19: referred to the handing over of the project. The resolution of handing over did not appear in their documents. The letter of September 10, 1986 referred to valuation of land not handover. Under paragraph 22, he showed the transfer was a free gift. He was not involved in the transfer since he was not in office then. He did not have resolution by B.C.W.H. transferring the land as a free gift. He had a letter which stated that he was the interim chairman though he never had it in court. Under paragraph 23 was not properly worded as he had never been an executive officer of A.P.D.K. Coast. He stated that in year 1987, he was not an officer. He had not tendered a copy of the Constitution of A.P.D.K., Coast. Page 15 of defence bundle, the letter was not signed. There was no letter dated January 31, 1987.
33. The context of paragraph 27, DW – 2 he was not involved in the transfer apart from what was in the records. On page 16, the transfer dated May 3, 2005 signed by Morris Mwenda as a trustee. The transfer did not give the consideration. Paragraph 28: DW – 2 stated that he was not involved when Morris swore the affidavit. Paragraph 29: he confirmed that B.C.W.H. changed its name to B.W.C.C. which was operational today. He agreed that there were officers of B.W.C.C. that could produce the documents initially held by B.C.W.H. he did not know what was handed over by B.C.W.H. to A.P.D.K. Under paragraph 30: DW – 2 stated that there was no record of property acquired by A.P.D.K. Coast or records of a sum of Kenya shillings one hundred million (Kshs 100, 000, 000.00). DW – 2 testified that a trustee stood for the well - being of an organization, for the benefit of the organization. He confirmed that Morris was a trustee of B.C.W.H. He stated that he had not seen Constitution of B.C.W.H. The objectives of B.C.W.H. would be in Constitution. He confirmed that the plaintiffs were employees of A.P.D.K. Coast. He had annexed their letters. The letter found on page 20 referred to retirement by Mr Swalehe. The letter at page 19 was the application directed to A.P.D.K. He did not have the letter appointing Mr Swalehe.
34. On page 24: the letter dated May 14, 1997, he did not know why this letter was written when handover ought to have taken place. Similarly, this was the case to letters on pages 26, 27, 29, 31, 32, 34. DW –



2 wondered why Bombolulu A.P.D.K. would write letters on behalf of B.C.W.H. when B.C.W.H. was still existing. DW – 2 confirmed that there was nothing regarding the agreement transferring the land from B.C.W.H. to A.P.D.K. Coast or any property.

Cross examination of DW – 2 by Mr Kiti Advocate Nil.

#### **Re - Examination of DW- 2 by Mr Hamisi Advocate.**

35. DW -2 confirmed he had been the interim chair from May, 2018 to June 30, 2019. His statement was made based on the documents he saw. He averred that these documents had been produced in court. The name of the project where A.P.D.K. Coast was called B.W.C.C. (paragraph 29) That was the close of 6<sup>th</sup>-7<sup>th</sup> defendas' case.

#### **IV. Submissions**

36. On February 25, 2019 upon the closure of the cases by both the plaintiff s and the defendas herein, and subsequent dates of February 22, 2022 the parties were directed to file their written submissions. Pursuant to that, all parties di comply with the directions of the court and judgement date was reserved accordingly.

##### **A. The Written Submission by the 1st to 9th plaintiff s**

37. On August 27, 2021 the learned counsel for the 1<sup>st</sup> to 9<sup>th</sup> plaintiff s the Law firm of Messrs. Aboubakar, Mwanakitina & Company Advocates filed their written submissions dated August 26, 2021. Mr Aboubakar Advocate submitted that had proved the 1<sup>st</sup> to 9<sup>th</sup> plaintiff s had proved their case on a balance of probability and were entitled to the prayers sought in the filed plaint. He argued that the plaintiff s were members of Bombolulu Coast Workshop for the Handicapped which was a legal entry registered under the *Factories Act* chapter 514 of the Laws of Kenya. The 1<sup>st</sup> defendant was a non Governmental Organisation whose officials were the 3<sup>rd</sup> and 4<sup>th</sup> defendas who were the officials.
38. The counsel submitted that the plaintiff s filed a listed of witnesses and document's support their pleadings and testimony in court. He held that the 1<sup>st</sup> plaintiff was unwell and unable to testify. Instead, PWs - 1 to 3 testified respectively. He stated that the plaintiff s' produced a certificate of registration of the plaintiff s under the *Factories Act* cap 514 Laws of Kenya. It was registered on February 28, 1973 under number F/2101 under Bombolulu Coast Workshop for the Handicapped. The counsel stated that the plaintiff s produced a certificate of ownership dated December 27, 1974 which showed that the suit property was transferred to Anant Jaganmath Pandya and Morris Mwendwa as the trustees of coast workshop for the Handicapped as joint tenants for a sum of Kenya shillings fourty thousand (Kshs 40,000.00). Clearly, the counsel averred that it was proof that that plaintiff's owned the suit property as from December 27, 1974.
39. The counsel informed court of the following factors:-
- a. That entry No 7 of the title deed showed that on June 20, 2013 provincial certificate was issued most likely on the basis that the original title was lost.
  - b. That entry No 8 of the title deed confirmed that a certificate of death of Anant Jagnath Pandya was issued on November 29, 2006.
  - c. That entry number 9 of the title deed showed that a transfer to APDK was registered on November 29, 2006;



- d. Document number 4 was the letter of intent dated 3<sup>rd</sup> October probably in 1986 confirming intention to take over management of Coast workshop;
  - e. Document No 6 proved takeover of APDK as the new employer;
  - f. Document No 7 was the affidavit of 1<sup>st</sup> plaintiff denying he willingly transferred suit property to APDK; and
  - g. Documents No 8 and 9 showed proof of dispute among the parties.
40. The counsel submitted that all the documents by the plaintiff's supported their pleadings and testimony adduced in court. The counsel argued that the evidence produced by the defendant's corroborated the assertions made by the plaintiff's in many material aspects. For instance, despite of the fact BCWH was registered under the Factories Act on February 28, 1973, when APDK in 1986 took over management it registered BCWH again on March 25, 1996 under the registration of Business Name Act with new officials showing that there was an intention for taking over management of B.C.W.H and not ownership. A.P.D.K had also undertaken major construction of housing units and other developments but the bona fide members of B.C.H.W were not part of the meeting. The letter dated September 10, 1986 by Joseph Musembi illustrated the understanding between A.P.D.K and B.C.H.W to have the 'association' that ran that project wind it up and hand over it over to the Ministry of Culture and social services who in turn would hand it over to A.P.D.K. plaintiff submit that the hidden intention to wind up B.C.H.W was to own it.
41. It was the plaintiff's submission that transfer of suit properties was done 20 years later, and presented to 1<sup>st</sup> to 5<sup>th</sup> defendant's on May 3, 2005 and registered on November 29, 2006 and this was well explained in the affidavit of Morris Mwendwa. The 20-year gap was to ensure that all BCWH members who understood terms of the takeover were gone.
42. It was the counsel for the plaintiff's submission that section 34 of the *Land Titles Act*, chapter 282 (repealed) as read with section 82 of the Act; section 23(1) of the *Land Registration Act* cap 281 empowered plaintiff's to recover suit that has been deprived on the basis of fraud. Reliance was placed on "ELC No 63 of 2017 *Kibiro Wagoro Makumi v Francis Nduati Macharia & another*; ELC No 51 of 2014 *Alice Chemutai Too v Nicso Kipkunii Korir & others*."
43. The counsel for plaintiff's submitted that the claim is not time barred in reference to section 7 of the law of *Limitations Act* as the transfer was done in November 29, 2006 and suit was instigated in 2014 before the expiry of the 12 years' limitation period. He submitted that the matter was not "res judicata" as claimed by the defendant's as plaintiff's in the lower court are not similar to those in the High Court and matter is still in court as per the defendant's. Inter alia the defendant's have not met the requirements of sections 6 and 7 of the *Civil Procedure Act*. It was further submitted that it was too late in the day to raise preliminary objections and defendant's should have done so before the hearing, failure to do so means that there is presumption under section 120 of the *Evidence Act* that they abandoned said objections and are estopped from raising them.

#### **B. The Written Submission by the 1st to the 5th defendant's.**

44. On December 16, 2019, the learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant's the Law firm of Messrs. Anjarwalla & Khanna Advocates filed their written submissions dated even date. M/s. Onesmus Advocate indicated it would be relying on the filed pleadings filed by the defendant's being the defence, the testimony of DW – 1 and DW – 2 and their adopted witness statements dated October 10, 2018 and October 17, 2018 respectively. The counsel also indicated they would be relying on the filed lists of documents which were adopted and admitted as part of the defendant's exhibits.



45. She observed that although the plaintiff's had authorised the 1<sup>st</sup> plaintiff's to plead and testify on behalf of all them, the 1<sup>st</sup> plaintiff never did so. In fact he never attended court at all and instead it was the 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> plaintiff's who testified. From the very onset, the counsel raised a preliminary objection to the effect that the suit was time barred. The counsel argued that the plaintiff's cause of action was founded on fraud. The plaintiff's claim that they were the rightful owners of the suit property and that in the year 2005, the defendant fraudulently transferred it to A.P.D.K. The Counsel's contention was that the provision of under section 4 (2) of the Limitation of Actions Act, provided that an action founded on tort cannot be brought after the end of three (3) years from date on which the cause of action accrued. Fraud is alleged to have occurred in year 2005 hence the cause of action was time barred and the court has no jurisdiction to determine the same. Even in the event that the provision of section 26 of the Limitation of Actions Act, cap 22 were to extend the limitation period to three years the suit would still be time barred as plaintiff's had discovered fraud by year 2008 as per the minutes of meetings convened and held to discuss and resolve the dispute attached to the plaintiff's list of documents and case filed by them in SRMCC No 2921 Mr J.N. Kuria & Manaseh Samuel and others v Hubert Seifert & APDK, in the year 2008.
46. The Counsel held that the defendant pleaded that this suit was "res judicata" as there was a pending suit "SRMCC No 2921 Mr J.N Kuria & Manaseh Samuel and others v Hubert Seifert & APDK involving the same parties and filing a similar suit in a different court is an abuse of court process. Indeed, the counsel noted that the plaintiff's never filed any response to this issue. To date there was nothing to show that that suit was compromised or settled. The counsel castigated the filing of multiple and parallel suits which was a contravention against the provision of section 7 of the Civil Procedure Act, cap 21. To buttress her point, she relied on the case of: - "Niazsons (K) Limited China Road & Bridge Corporation Kenya [2001] eKLR.
47. In addition to the above submissions, the counsel advanced her arguments under the following four (4) prong issues. Firstly, the counsel submitted on whether the plaintiff's were the lawful owners of the suit property. She submitted that the suit property was purchased on or around December 27, 1974 by the B.C.W.H committee, and registered in the names of Anant Jaganath Pandya and Mr Morris Mwenda as the trustees of B.C.W.H. At all material times the registered members of B.C.H.W were Mr Solomon M'Anampiu, Mr Alarkhia Khamisa Aboo Mr Uma Krishnachandra and Mr Samuel Tezi Bongo in reference to the certificate of registration of B.C.H.W at page 6 of the 1<sup>st</sup> – 5<sup>th</sup> defendant's list of documents. B.C.W.H was a project started by Holland and Adam Matilda to help person with disabilities such as the plaintiff's. The plaintiff's joined as beneficiaries, they were trainees and later on employees and that is why none of the registered members of B.C.W.H are disabled people and plaintiff's admitted to this in the witness statement of Swaleh Mbavoko dated August 31, 2016. It was therefore false and misleading for the plaintiff's to allege to be owners / founders of B.C.W.H. The suit property was purchased by Methodists Church and Asian Community and B.C.W.H trainees and employees including plaintiff's used to earn small allowances paid out of profits if and when achieved. The sale revenue were minimal as location of the project was in Mazeras and could not cater for all expenses for the plaintiff's allowances or even enable them to buy land.
48. The counsel contention was that the plaintiff's contradicted themselves in regards to the true owners of the suit property. At paragraph 9 of the plaint they alleged that the registered owners are them yet at paragraph 21 of the plaint, they alleged the rightful owners were B.C.W.H. The counsel argued that there already existed a contradiction on the ownership. She argued that it was well settled law that any contradictory pleadings ought to be struck out.
49. The counsel further submitted that the certificate of ownership of suit property in page 3 of the plaintiff's bundle of documents showed that plaintiff's were not registered owners and had no right, interest,



link, claim or overriding interests. Additionally, the counsel averred that the plaintiffs were also not registered on the certificate of registration of B.C.H. Was members as per page 6 of the 1<sup>st</sup>- 5<sup>th</sup> defendants list of documents. This inter alia meant that plaintiffs lacked “the *locus standi*” to institute and prosecute the suit and the suit ought to be struck out in limine with costs.

50. Secondly, the counsel submitted on the issue whether B.C.W.H was handed over to A.P.D.K as a going concern. It was her argument that there was a mutual agreement between B.C.H.W and A.P.D.K that B.C.H.W be wound up and be handed as a going concern to A.P.D.K. This was elaborated in the testimony of Mr Hubert Seifert and Dr. Melckzedek Osore. Vide a letter dated January 13, 1987 to Mr Solomon Mworira M’Anampiu, the then executive chairman of B.C.W.H informed workers that the ownership had changed as approved by the Ministry of Culture and Social Service. However, on this point, the plaintiffs claimed that Mr Hubert Seifert was only invited to assist in managing B.C.H.W for a fixed period of time and a contract existed to this effect that the plaintiffs failed to produce. On his cross examination, Mr Seifert admitted to the fact that there were resolutions to wound up the company supported by the following documents; Minutes of meeting held on August 25, 1986 attached to the unpaginated plaintiff’s list of documents; Letter dated September 10, 1986 from B.C.W.H to the District Land Officer, Mombasa attached to the unpaginated plaintiff’s list of documents; Letter dated October 23, 1986 from A.P.D.K addressed to the Chairperson of B.C.W.H attached to the plaintiff’s list of documents.
51. Thirdly, the Counsel submitted on whether the suit property was lawfully registered in the name of A.P.D.K. The Counsel averred that that following the takeover of B.C.W. H from A.P.D.K the movable and immovable assets were handed over by former B.C.W.H operations Administrator, Mr Joseph Musembi to Mr Seifert Executive officer of A.P.D.K Coast Branch. No purchase price was paid for the transfer of the suit property as it was merely a transfer from trustees of B.C.W.H to trustees of A.P.D.K as a gift and once the suit property was registered in the name of A.P.D.K, whereby they legally became the absolute and indefeasible owner of the suit property and title is not subject to challenge except on grounds of fraud and misrepresentation as held in the case of:- “Shimoni Resort v Registrar of Titles & 5 Others [2016] eKLR. It was submitted that plaintiffs have not produced cogent evidence to prove allegation of fraud to the required standard, and only provided hearsay evidence and Mr Morris Mwenda the only person with first hand knowledge of matters in question was never called to give evidence. Further to this two conflicting affidavits signed by Mr Mwenda were produced. It was submitted that standard of proof in an allegation of fraud is higher than in ordinary civil cases and was reinstated in the Court of Appeal Cases of “*Kinyanjui Kamau v Geroge Kamu Njoroge* [2015] eKLR and *Vija Morjaria v Nansiggh Madhusingh Darbar & another* [2000]. It was submitted that the plaintiffs failed to prove allegations of fraud because; Item No 29(a) of the Plaint was not proved as suit property did not belong to the plaintiffs in the first place; Further, Item 29(b) was not proved as there was no evidence of how Mr Mwenda was tricked to sign transfer instrument and how Mr Ndegwa was misled and the issue of fraud is tortious and time barred.
52. On whether the suit is merited, it was submitted that the suit is not merited as plaintiffs have failed to prove their interest in ownership of the suit property hence a permanent injunction cannot be issued. plaintiffs are neither registered owners/ representatives or trustees of B.C.W.H and B.C.W.H was wound up a long time ago and plaintiffs and have no link or connection to the project anymore. Finally, the defendants urged the court to dismiss the suit and award them costs accordingly.



## V. Issues For Determination.

53. I have keenly taken into account all the filed pleadings, the affidavits, the oral and documentary evidence adduced during the full trial, the written submissions and the cited authorities by both the plaintiff s and the defendas herein, the relevant provisions of Constitution of Kenya, 2010 and the statutes.
54. In order for this honorable court to arrive at an informed, reasonable, just, equitable and fair decision, this honorable court has condensed all the subject matter into the following salient four (4) framed issues for its determination. These are:-
- a. Whether the plaintiff s herein are entitled to the order of permanent injunction sought to restraining the defendas from interfering with the suit property.
  - b. Whether the suit property was properly and legally transferred from B.C.W. H. to the trustees of A.P.D.K as a gift and now registered in their names.
  - c. Whether parties herein were entitled to the reliefs sought.
  - d. Who is to bear the costs of this Suit.
- Issue No a). Whether the plaintiff s herein are entitled to the order of permanent injunction sought to restraining the defendas from interfering with the suit property.

## Brief facts

55. Before embarking on the elaborate analysis of the framed issues, the honorable court feels it imperative to first of all extrapolate on the brief facts of this case. From the filed pleadings, on April 3, 2014 the plaintiff s herein instituted this suit against the defendas. The plaintiff s claimed that at all material times they were the legal and registered owners of the plot No 118 Section Mainland North also known as Coast Workshop for the Handicapped. The plaintiff s averred that on or around the year 1971 they appointed Mr Morris Mwenda and Mr Jagannath Pandya (deceased) as the Trustees of B.W.C.H. That on or around the year 1974 the plaintiff s who were all bodily challenged (handicapped) persons through the said Trustees from their savings bought the suit property at a cost of Kenya shillings fourty thousand (Kshs 40,000/=). It was with the sole aim of utilizing the land as a source of earning a living rather than resorting to begging in the streets which ordinarily and commonly associated with persons with disabilities. Indeed, they established an organization a called Bombolulu Coast Workshop for the handicapped. After one of the Trustees died, there was left one surviving Trustees – Mr Morris Mwenda. In the year 1986, the plaintiff s' trust experienced management problems and they got a German called Mr Hubert Seifert to assist them in managing the organization. It is alleged that in the year 2005 the members of the A.P.D.K, the defendas herein took advantage of the illiteracy disability and illness of the plaintiff s and got Mr Morris Mwenda to append his signature into some documents which they had stated were meant for the management of the assets of the Trust. He agreed to do so.
56. However, according to the plaintiff s, it later on turned out that some of these documents happened to be for the transfer of the suit land from B.C.W.H to A.P.D.K. The plaintiff s held that Mr Mwenda was ailing at the time. They averred that he had not been aware of the documents he was signing. The plaintiff s held that the documents he signed illegally transferred the suit land to themselves. According to them Mr Mwenda was not authorized to transfer the suit land from its original and bona fide owners to anyone at all. This was because he only held the property in trust for the whole membership. The plaintiff s argued that there was neither an agreement, consent nor memorandum of understanding entered with the defendas to transfer or deal with the land. Therefore, they pleaded that these were acts of fraud, irregularity and/or illegality committed by the defendas. In the long run,



they sought for the cancellation and rectification of the registration of the records having the defendas as the registered owners to the suit land. On April 8, 2014 this honorable court granted the plaintiff s “ex parte” interim injunction orders restraining the defendas from making any claims, trespassing, disposing, demolishing, alienating, charging or interfering on the suit property

57. On the other hand, the defendas on being served with summons they entered appearance. They filed a defence dated April 24, 2012 where they denied that the plaintiff s were the legal nor the beneficial owners of the suit property. Indeed, they refuted that at no one time had the plaintiff s ever been members of the B.C.W.H but employees of the 1<sup>st</sup> defendas. The defendas averred that the plaintiff s never got any authority to file the case nor to represent the others in this suit. They held that on May 3, 2005 the transfer documents for the suit lands were legally and regularly duly executed between the 1<sup>st</sup> plaintiff and the defendas. Subsequently, on November 29, 2006 a certificate of title deed at entry No 9 was issued and registered in the names of the defendas. The defendas argued that the plaintiff s were not able to prove any fraud, irregularities or illegalities allegedly committed by the defendas. Furthermore, the defendas held there had been a mutual agreement between A.P.D.K. and B.C.W.H. to have B.C.W.H. wound up and it be handed over to A.P.D.K. as a going concern.

For these reasons, they affirmed that they were the legal and bona fide owners of the suit property and hence according to the defendas the suit ought to be dismissed for lack of merit. That is adequate on the facts of the case.

58. Now turning to the issue under this sub heading. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> plaintiff s were entitled to be granted the orders of Permanent Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendas from interfering with the suit property in whatever form on the grounds that the land was registered in plaintiff s names. While making this claim, the plaintiff s relied on a certificate of registration and allegation that the defendas took advantage of the innocence of the sole trustees who was ailing as they tricked him to sign a bundle of documents purporting that they were meant for the management of the assets of the B.C.W.H only to realize later on that some of those documents were for the illegal, irregular and wrongful transfer of the suit land to the defendas. They pleaded that this was an act of fraud meted by the defendas to irregularly acquire the suit property.

Unlike of the orders of temporary injunction which are granted only to be in force for a specified time or until the issuance of further orders from court, permanent injunction orders are rather different. They are perpetual and issued after a Suit has been heard and finally determined as it is in the instant case.

59. Permanent Injunction orders fully determine the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the defendant in order for the rights of the plaintiff to be protected. It is now well established that this Court has the powers to grant the Permanent Injunction under the provisions of articles 22 and 23 of *ion Constitution* of Kenya, 2010, sections 1A, 3 & 3 A of the *Civil Procedure Act*, cap 21 and order 40 of the Civil Procedure Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened. The Honourable Court cannot just seat, wait and watch under these given circumstances.
60. It’s the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “*Malier Unissa Karim – Versus - Edward Oluoch Odumbe* (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions.



The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

61. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Limited –Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

62. In the instant case, from the Certificate of Title Deed under Entry No 9 produced by both the plaintiff and defendant shows that the suit property was registered in the names of A.P.D.K on 29<sup>th</sup> November, 2006. According to the defendant, on 3<sup>rd</sup> May, 2005, the 1<sup>st</sup> plaintiff voluntarily, freely and without any duress executed all the transfer documents from B.C.W.H. to A.P.D.K. He was not coerced to do it. Although the plaintiff emphatically hold that the transfer was fraudulently done and hence illegal and irregular, this Court finds this argument rather misplaced, unfounded and baseless. In saying so, this Court bases its assertion from the following observations. Firstly, Mr Mwenda, the Trustee who duly signed the documents in essence causing the transfer swore an eleven (11) Paragraphed affidavit under the Oaths and Statutory Declaration Act, cap 15 of the Laws of Kenya dated February 20, 2009 before a Commissioner for Oaths where under Paragraph No 9 he stated verbatim:

“That as the Sole surviving trustee of B.C.W.H, I agreed to execute a transfer of the said Plot No 118/MN/I to A.P.D.K. I annex hereto a true copy of the Transfer dated 3<sup>rd</sup> May, 2005 marked as “MM – 2” Although there was a second affidavit produced by the plaintiff with rather conflicting contents, this averments were never controverted nor recanted by the plaintiff s. The Honourable Court was verbally informed without any empirical documentary medical report that Mr Mwenda was undergoing undisclosed and allegedly critical health condition, the facts is that he is still alive and residing at Mazeras within the County of Mombasa. No effort was even made to have the Court, which is very flexible on access to Justice, go to him in accordance with the English saying:- “If the Mountain cannot go to Mohammed, then Mohammed should go to the Mountain” come to play here. cannot go to the Secondly, although the plaintiff s had authorised the 1<sup>st</sup> plaintiff s to plead and testify on behalf of all them, the 1<sup>st</sup> plaintiff for whatever unclear reasons, never saw it suitable to testify. In fact he never attended court at all and instead it was the 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> plaintiff s who testified. This was such a daring mistake and risk taken by the plaintiff s as a strategy on proving their case on the issue of fraud. As it is now established that fraud is a criminal offence and the standards are too high being beyond any reasonable doubt. Without any prejudice, the evidence of these witness are merely tantamount to hearsay as none of them



testified having been present when the 1<sup>st</sup> plaintiff appended his signature on the transfer documents. The Honourable Court is not amused at all. It feels the plaintiff's were too casual and lethargic on how they tackled such a serious matter. It is incredible.

Thirdly, the cause of action being fraud, as per the provisions of Section 107 of the *Evidence Act* cap 80 holds that it is he who alleges who proves. Apart from generally and wildly making the allegations, the plaintiff's never demonstrated that indeed the offence took place. For instance, there was no involvement of the police, a statements recorded by Mr Mwenda or witnesses who saw him signing the transfer documents, an affidavit of him recanting this action. The plaintiff's have failed to provide tangible particulars of the occurrence of fraud if at all meted by the defendas. The list is endless of the appropriate and plausible steps they would have taken in the given circumstances.

Finally, the only action that the plaintiff's took was instituting this suit in Court, in the year 2014 for an incident that took place in 2005 – close to nine (9) years done the line is absurd. Apart from this, the plaintiff's ought to have caused the Land Registrar to place restrictions, Caution or Caveat forbidding any transaction from taking place against the suit land. There is no such evidence in place.

63. Therefore, the Honorable Court concludes that it is fully satisfied that the registered persons for the land are the A.P.D.K. They have a “Prima facie” conclusive evidence for being the bona fide owners of the suit land herein. On the other hand, this Honorable Court is of the view that the plaintiff's have failed to demonstrate their case. They have failed to meet the fundamental threshold on being granted Permanent Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendas from dealing with the land. For this ground alone this suit ought to fail in totality.

ISSUE No b). Whether the suit property was properly and legally transferred from B.C.W.H. to the trustees of A.P.D.K as a gift and now registered in their names.

64. Now turning to the issues for the analysis under this sub – heading. From the very onset, the Honorable Court wishes to point out on the Land legal system in Kenya. First and foremost, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or



- ix. Any other manner prescribed in the Act of Parliament.
65. In Kenya, the effect of the Registration of Lands is founded in the provisions of Section 24 of “The [Land Registration Act](#)’ which provides as follows:-

“Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of “The [Land Registration Act](#)” No 3 of 2012 provides as follows:-

“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.....”

66. This fact is strengthened by the following decisions - “ELC (Nku) No 272 of 2015 (OS) – Masek Ole Timukoi & 3 others v Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No 110 of 2017 – M’Mbaoni M’Thaara v James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok v Justice Moiwo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

In order for this Honorable Court to effectively deal with the stated issue that the transfer of the suit land was caused by fraudulent means by the defendas, I wish to cite the provisions of Section 26 (1) of the [Land Registration Act](#) Verbatim:-

“(1) 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, un-procedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

In the case of “Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of [Land Registration Act](#), the Provisions of Section 80 (1) & (2) of [Land](#)



Registration Act for the cancellation and rectification of the title comes to play – “Peter Njoroge Nganga v Kenya Reinsurance Corporal Limited & Others” ELC (Kjd) No 204 of 2017.”

67. As stated herein, while applying these principles to the instant case, the court notes that although the plaintiffs had authorised the 1<sup>st</sup> plaintiff to plead and testify on behalf of all them, the 1<sup>st</sup> plaintiff never did so. In fact he never attended court at all and instead it was the 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> plaintiffs who testified. The Court fully concurs with the Learned Counsel for the defendants in that the plaintiffs cause of action was purely founded on fraud. The plaintiffs claim that they were the rightful owners of the suit property and that in the year 2005, the defendants fraudulently transferred it to A.P.D.K. Under the provision of Section 4 (2) of the Limitation of Actions Act, provides that an action founded on tort cannot be brought after the end of three (3) years from date on which the Cause of action accrued. Fraud is alleged to have occurred in the year 2005 hence the cause of action was time barred and the Court has no jurisdiction to determine the same. Even in the event that the provision of Section 26 of the Limitation of Actions Act, cap 22 were to extend the limitation period to three years the suit would still be time barred as plaintiffs had discovered fraud by year 2008 as per the minutes of meetings convened and held to discuss and resolve the dispute attached to the plaintiffs List of documents.
68. Furthermore, This Court takes cognisance of the fact that, initially the plaintiffs were the lawful owners of the suit property having purchased it on or around December 27, 1974 by the B.C.W.H committee, and registered in the names of Anant Jagannath Pandya and Mr Morris Mwenda as the Trustees of B.C.W.H. At all material times the registered members of B.C.H.W were Mr Solomon M’Anampiu, Mr Alarkhia Khamisa Aboo Mr Uma Krishnachandra and Mr Samuel Tezi Bongo in reference to the Certificate of registration of B.C.H.W at page 6 of the 1<sup>st</sup> – 5<sup>th</sup> defendants list of documents. B.C.W.H was a project started by Holland and Adam Matilda to help person with disabilities such as the plaintiffs. The plaintiffs joined as beneficiaries, they were trainees and later on employees and that is why none of the registered members of B.C.W.H are disabled people and plaintiffs admitted to this in the witness statement of Swaleh Mbavoko dated 31<sup>st</sup> August, 2016. It was therefore false and misleading for the plaintiffs to allege to be owners / founders of B.C.W.H. The suit property was purchased by Methodists Church and Asian Community and B.C.W.H trainees and employees including plaintiffs used to earn small allowances paid out of profits if and when achieved. The sale revenue were minimal as location of the project was in Mazeras and could not cater for all expenses for the plaintiffs allowances or even enable them to buy land.
69. Another very critical issue to ponder is who according to the plaintiffs who exactly is the legal owner to the suit land? Clearly, from the filed pleadings, the plaintiffs contradicted themselves in regards to the true owners of the suit property. At Paragraph 9 of the Plaint they alleged that the registered owners were the plaintiffs yet at Paragraph 21 of the Plaint, they alleged the rightful owners were B.C.W.H. Certainly, there already existed a contradiction on the ownership by which stand-alone issue would easily lead to having the suit or pleadings by the plaintiffs to be stuck out.
70. The Court has further noted that the Certificate of ownership of suit property in page 3 of the plaintiffs’ bundle of documents showed that plaintiffs were not registered owners and had no right, interest, link, claim or overriding interests. Additionally, it is noted that the plaintiffs were also not registered on the Certificate of registration of B.C.W.H. as members as per page 6 of the 1<sup>st</sup>- 5<sup>th</sup> defendants list of documents. One is left to conclude and I fully concur with the Counsel for the defendants to the effect that the plaintiffs lacked “the locus standi” to institute and prosecute the suit and the suit ought to be struck out in limine with costs.
71. Accordingly, the Court has observed from the filed pleadings and the evidence adduced in Court, it was mutually agreed that B.C.W.H be wound up and handed over to A.P.D.K as a going concern. This was



elaborated in the testimony of Mr Hubert Seifert and Dr. Melckzedek Osore. Vide a letter dated 13<sup>th</sup> January 1987 to Mr Solomon Mworira M'Anampiu, the then executive chairman of B.C.W.H informed workers that the ownership had changed as approved by the Ministry of Culture and Social Service. However, on this point, the plaintiff s claimed that Mr Hubert Seifert was only invited to assist in managing B.C.H.W for a fixed period of time and a contract existed to this effect that the plaintiff s failed to produce. On his cross examination, Mr Seifert admitted to the fact that there were resolutions to wound up the company supported by the following documents; Minutes of meeting held on August 25, 1986 attached to the un-paginated plaintiff s' list of documents; Letter dated September 10, 1986 from B.C.W.H to the District Land Officer , Mombasa attached to the un-paginated plaintiff 's list of documents; Letter dated October 23, 1986 from A.P.D.K addressed to the Chairperson of B.C.W.H attached to the plaintiff s' list of documents.

72. In conclusion, there has been nothing tangible placed before this Court to prove otherwise that the defendants are not the legally and absolute owners to the suit land. They have legally and regularly acquired the Certificate of title and certainly it cannot be by fraud, mistake or omission as envisaged under the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No 3 of the Laws of Kenya. For that matter the provision of section 80 (1) and (2) of the *Land Registration Act* for the cancellation of the indefeasible title deed as conclusive "prima facie" evidence held by A.P.D.K P does not arise at all. It is inapplicable in the given circumstances.

ISSUE No c). Whether parties herein were entitled to the reliefs sought.

73. As clearly deliberated on in this Judgement, the plaintiff s sought to be granted permanent injunction restraining the defendants from the use and dealing of the suit land in any way on the ground that the title deed held by the defendants was acquired through fraudulent means. Additionally, that there should be cancellation and rectification of the Register reverting the title to the plaintiff s.
74. Be that as it may, this Judgement has exhaustively and robustly demonstrated that the plaintiff s have failed to establish that they warrant being granted the orders sought. For that reason, without belaboring the point, the Court holds that the suit must fail while the defendants be assured of that they hold an indefeasible title, rights and interest on the suit land as vested in them by law.

ISSUE No d). Who is to bear the costs of this Suit.

75. The issue of Costs is at the discretion of the Honorable Court. 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".
76. 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 v Joseph AIR 1918 cal. 717 & Myres v 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....."



77. The Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others v 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.

78. Based on 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 that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> plaintiff s herein have failed to establish their case. For that very fundamental reason, therefore, the costs of this suit will be borne by the plaintiff s to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> defendas.

## **V. Conclusion & Disposition.**

79. Conclusively, upon conducting an intensive and elaborate analysis of all the framed issues herein, the Honorable Court based on the principles of preponderance of probability is fully satisfied and finds that the 1<sup>st</sup> to 9<sup>th</sup> plaintiff s have failed to establish their case herein.

Thus, Judgement herein is hereby entered against the plaintiff s and in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendas jointly and severally herein. For avoidance of doubt, the Court proceeds to make the following orders. These are:-

- a. That suit filed by the plaintiff s herein and all the prayers sought be and is hereby dismissed.
- b. That the allegations of the suit property having been acquired by A.P.D.K from B.C.W.H by fraud have not been proved and also barred by limitation of action and hence dismissed.
- c. That a declaration be and is hereby made to the effect that all that suit property is properly and legally registered in the names of the Association for the Physically Disabled of Kenya (A.P.D.K) the 1<sup>st</sup> defendant herein with all the indefeasible rights, title, interest vested with them having it been legally handed to them by Bombolulu Coast Workshop for the Handicapped (B.C.W.H) as a going concern.
- d. That the costs of this Suit to be borne by the plaintiff s as it is awarded to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendas herein.

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 22ND DAY OF NOVEMBER, 2022**

**HON. JUSTICE Mr L.L NAIKUNI,  
ENVIRONMENT & LAND COURT AT,  
MOMBASA**

**In the presence of:**

- a. M/s. Yumnah, the Court Assistant.
- b. None Appearance for the 1<sup>st</sup> to 9<sup>th</sup> plaintiff s.
- c. M/s Onesmus Advocate for the 1<sup>st</sup> to 5<sup>th</sup> defendas.



d. M/s. Kiti Advocate for the 6th to 7thdefendas

