Nzioki & 53 others v Export Processing Zone Authority,Athi River & another (Environment & Land Case 227 of 2017) [2024] KEELC 5268 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5268 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 227 OF 2017

A NYUKURI, J

JULY 10, 2024

(FORMERLY KAJIADO ELC CASE NO. 96 OF 2017)

BETWEEN

KELVIN NZIOKI ..... 1ST PLAINTIFF

RAPHAEL K. MUTISO ..... 2ND PLAINTIFF

MONICAH NZUKI ..... 3RD PLAINTIFF

DAVID K. MASILA ..... 4TH PLAINTIFF

JACKSON WAMBUA MUTUA ..... 5TH PLAINTIFF

MAURICE KIMEU ..... 6TH PLAINTIFF

MUSYOKI NZIOKA ..... 7TH PLAINTIFF

DAMARIS KALUNDE ..... 8TH PLAINTIFF

SAMUEL WAMBUA ..... 9TH PLAINTIFF

ESTHER KAVULYA ..... 10TH PLAINTIFF

ANNAH JOHN ..... 11TH PLAINTIFF

FRANCIS MATHEKA SYIMA ..... 12TH PLAINTIFF

CHARLES KITHUKA ..... 13TH PLAINTIFF

JOSEPH KANYOTU ..... 14TH PLAINTIFF

MAGDALINE MBITHE ..... 15TH PLAINTIFF

JOHN MUTISO ..... 16TH PLAINTIFF

MARY NDUKU KALUNDE ..... 17TH PLAINTIFF

MAY MUNINI ..... 18TH PLAINTIFF

ANNASTACIA SYOKAU MULI ..... 19TH PLAINTIFF

BONIFACE WAMBUA ..... 20TH PLAINTIFF

ELIZABETH MUSANGI KAVINYA ..... 21ST PLAINTIFF

ALEX KATUMO ..... 22ND PLAINTIFF

EUNICE WAMBUA ..... 23RD PLAINTIFF

EVANS NYANGA JUNIUS ..... 24TH PLAINTIFF

BOSCO MUTISYA ..... 25TH PLAINTIFF

MUSAU KIMULI ..... 26TH PLAINTIFF

JOSEPH KYALO NZOVI ..... 27TH PLAINTIFF

JUSTUS MULI NDANDI ..... 28TH PLAINTIFF

JANET MBITHE NYAGA ..... 29TH PLAINTIFF

SUSAN KALEKYE ..... 30TH PLAINTIFF

JOHN MULA ..... 31ST PLAINTIFF

ESTHER NTHENYA ..... 32ND PLAINTIFF

FRANCIS MUTURA NJAU ..... 33RD PLAINTIFF

LINUS MWANGI KAMAU ..... 34TH PLAINTIFF

JACKLINE WAMBUI NJAU ..... 35TH PLAINTIFF

ALICE MUTHONI JUSTIN ..... 36TH PLAINTIFF

DAMARIS KALEKYE WAMBUA ..... 37TH PLAINTIFF

SUSAN KANINI MUSEMBI ..... 38TH PLAINTIFF

GEOFREY MUTESA MUTEI ..... 39TH PLAINTIFF

REUBEN MUENDO MUIA ..... 40TH PLAINTIFF

ANTHONY MUTUA MBALUKA ..... 41ST PLAINTIFF

ESTHER MWIKALI KIAMBA ..... 42ND PLAINTIFF

STEPHEN NZIOKA ..... 43RD PLAINTIFF

EMMANUEL MBITHI ..... 44TH PLAINTIFF

JAMES MWAKA NTHENGE ..... 45TH PLAINTIFF

JONATHAN MANTHI MULA ..... 46TH PLAINTIFF

FELIX MULUNGYE ..... 47TH PLAINTIFF

GIFT KYULE ..... 48TH PLAINTIFF

JOSEPH MUSYOKI KYALO ..... 49TH PLAINTIFF

MUNEE KILONZO ..... 50TH PLAINTIFF

EMMANUEL MWONGELA ..... 51ST PLAINTIFF

MARY MUTINDA ..... 52ND PLAINTIFF

EVANS MUTHAMA ..... 53RD PLAINTIFF

RHODA KAVIKU KYALO ..... 54TH PLAINTIFF

AND

EXPORT PROCESSING ZONE AUTHORITY,ATHI RIVER .... 1ST DEFENDANT

KENYA MEAT COMMISSION ..... 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs instituted this suit against Export Processing Zone Authority (also referred to as EPZA) and Kenya Meat Commission (also referred to as KMC) the defendants by way of a plaint dated 9th February 2017, seeking the following orders;

    a. A declaration that the property as particularized in the schedule attached herewith and marked "A" belong to the plaintiffs as the legally registered owners.

    b. An order of permanent injunction do issue restraining the defendants/respondents whether by themselves, agents, employees, servants and or anybody acting on their behalf or on their instruction from evicting, demolishing houses, selling, charging, transferring or in any manner interfering with the applicants' access to, occupation of and or quiet enjoyment of the applicants plots within the settlement scheme known as KMC PHASE III as more particularized in the schedule marked "A" attached herewith.

    c. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.

    d. The cost of this suit.

2. The plaintiffs averred that since the year 1997, they have collectively been living on the settlement scheme known as KMC PHASE III situated in Mavoko in Machakos County (hereinafter referred to as the suit property), which they particularized in an attached schedule marked "A". That they have over the years openly exercised acts of ownership over the suit property by constructing houses where they live with their dependants; developed farms by growing crops and keeping livestock; built primary and secondary schools for their children and planted both exotic and indigenous trees.

3. They stated that in 2005, they applied to the Municipal Council of Mavoko for formal allocation of the plots they occupy so as to regularize their occupation. That the council in its Town Planning, Housing and Markets Committee meeting held on 7th May 2005 approved the application by the plaintiffs and subsequently issued them with letters of allotment on 6th August 2007, hence regularizing their occupation.

4. The plaintiffs further stated that they were shocked when in August 2016 people claiming to be acting on instructions of the 1st defendant came on the suit property and began fencing some parts thereof without the plaintiffs' consent, which the plaintiffs objected to. Further that in December

2016, private security guards were deployed on the suit property at the instance of the 1st defendant, thereby intimidating and threatening the plaintiffs.

5. They also stated that in January 2017, the 2nd defendant placed two notices on the suit property claiming ownership thereof, which is an illegal scheme to dispossess the plaintiffs of the suit property. They stated that any intended demolition and eviction will be illegal as no notices have been served on the plaintiffs.

6. The suit was opposed. The 1st defendant filed a statement of defence and counterclaim dated 10th March 2017. They denied the plaintiffs claim and specifically denied the existence of any settlement scheme known as KMC PHASE III situated in Mavoko, Machakos County.

7. The 1st defendant averred that it is the lawful registered owner of all that parcel of land/leasehold known as LR No. 18474 situated in Mavoko in Machakos County measuring 454.4 Hectares. Further that it has held title to that property since the year 1991 and has exclusively occupied and used the same. It stated that it has always secured its aforesaid land with a fence and the same is lawfully guarded by the 1st defendant against trespassers and land grabbers.

8. It maintained that the plaintiffs do not and have never lived on the 1st defendant's aforesaid land and have no houses thereon. It stated that the plaintiffs' allegations of having been allocated some temporary plots by the Municipal Council of Mavoko in 2007 has no legal effect on the 1st defendant's title to its aforesaid land. It stated further that the plaintiffs' suit was incompetent and fatally defective as no written authority by the 2nd to the 5th plaintiffs has been filed contrary to Order 3 rule 2 (2) of the Civil Procedure Rules. The jurisdiction of the court was challenged, whereof the 1st defendant maintained that this suit ought to have been filed in the Environment and Land Court at Machakos.

9. It stated that while the plaintiffs purport to claim the ownership of the 1st defendant's parcel LR. No. 18474, the plaintiffs have deliberately and with intention to mislead the court referred to the defendants' land as a settlement scheme known as KMC PHASE III. It stated that the plaintiffs have never lived on the 1st defendant's aforesaid land and have no right, legal or otherwise in the 1st defendant's land.

10. The 1st defendant counterclaimed for the following orders;

    a. A permanent order of injunction restraining the plaintiffs, their agents and/or servants from entering or trespassing on to the 1st defendant's land LR. No. 18474 situated in Mavoko within Machakos County and measuring 454.4 hectares, and constructing illegal structures thereon, cultivating or in any other way interfering with the said land.

    b. Costs of the suit and interest.

11. The 2nd defendant on its part filed a statement of defence dated 23rd May 2018. It denied the plaintiffs' claim, and averred that it is the registered proprietor of Grant No. I.R. No. 20302 registered at the Land Titles Registry Nairobi in respect of the piece of land known as Land Reference Number 10281 measuring 164 acres less road reserve of 4 acres, which parcel with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the grant and more particularly on land survey plan Number 73889 deposited in the Survey Records Office at Nairobi. It stated that by virtue of the aforesaid plan, it holds a leasehold interest of 85 years and 8 months commencing from 1st July 1964.

12. It stated that by virtue of a legal charge created over its aforesaid parcel of land in favour of National Bank of Kenya Limited on 6th May 1985, its original grant continues to be held by the chargee. Further,

that its debt was liquidated by the National Treasury of the Republic of Kenya which adviced the chargee to hold on to the grant for safe keeping.

13. The 2nd defendant asserted that it has not diminished its interest in its parcel of land and the chargee has not foreclosed on the same as the debt was repaid. Further that the 2nd defendant has done improvements on the suit property including erection of the plant and equipment, offices, stores, residential houses, a social hall and a school. That it also permitted the area District Officer to occupy one of its developments.

14. It asserted that in the year 2011, some unknown squatters came into the suit property with a view to settling thereon but the 2nd defendant in an advertisement dated 13th April 2012 in the Daily Nation, and sign posts erected on the property for over 20 years duly notified the squatters. It stated that by virtue of it being the bona fide holder of a leasehold interest in the said property, it was not possible for any local authority or central Government to grant any other person an interest in the said land. It stated that the plaintiffs do not have any interest whether absolute or overriding or at all in the land known as Land Reference Number 10281.

15. The 2nd defendant counterclaimed for the following orders;

    a. An order of eviction against all the persons brought by the plaintiffs on the parcel of land known as LR. No. 10281, Athi River whether as their employees, servants, agents, tenants, relatives or at all;

    b. An order of permanent injunction to be issued against the plaintiffs restraining them whether by themselves, their servants, and/or their agents from entering onto the 2nd defendant's parcel of land known as LR. No. 10281, Athi River and erecting any structures, cultivating, grazing their livestock or in any other way interfering with the 2nd defendant's quiet possession of the said land;

    c. Costs of the suit and interest.

16. The matter proceeded by way of viva voce evidence. Both the plaintiffs and the defendants presented three witnesses on each side.

Plaintiffs' evidence

17. PW1 was Kelvin Nzioki who adopted his witness statement dated 9th February 2017 as his evidence in chief. His testimony was a word for word copy and paste of paragraphs 4 to 19 of the plaint which is captured above. It was his evidence that since 1997, they have lived on the property known as settlement scheme known as KMC PHASE III situated in Mavoko in Machakos County, where they have constructed houses, grow crops and keep livestock and have built schools and planted trees.

18. She stated that in 2005, they applied to the Municipal Council of Mavoko for allocation of the said property to them so as to regularize their occupation. That subsequently on 6th August 2007, they were issued with allotment letters by the aforesaid council whereof they have been paying rates.

19. The witness further stated that in August 2016, people acting on the 1st defendant's instructions came on the suit property and began fencing it but upon the plaintiffs' objection, they abandoned the fencing. Further, that in December 2016, the 1st defendant placed guards from a private security firm to the property who have been threatening and intimidating the plaintiffs. They accused the 2nd defendant of placing two notices on the suit property claiming to be owners thereof in January 2017.

20. He stated that the intended demolition and eviction is unlawful as no notices were served on the plaintiffs.

21. He produced documents attached to the plaintiffs' list of documents dated 22nd February 2022. He produced authority to plead dated 24th September 2017; subdivision report; grants for IR 6266 in the name of 1st defendant; grant IR. No. 20302 in the name of the 2nd defendant of original register of Mavoko Municipal Council for the plots KMC PHASE III; letter dated 6th December 2012 being surveyor's report by Esteem Surveyors and Associates Ltd; certificate of registration of Self Help Group Project; certificate of registration of schools; Mavoko Municipal Council minutes of 17th May 2005; photographs; Mavoko Municipal Council letters and rates payment documents for Phase III.

22. On cross-examination, he stated that they applied for allotment to the council verbally and that on allotment of the plots, they were not told to pay standard premium. He stated that the minutes from the council allocating them land were signed by the Town Clerk but that Mr. Tubman was not in that meeting. Regarding the surveyor report he produced, he conceded that there was no name in the report. He confirmed that the documents produced by the defendants showed a complaint by the 1st defendant to the council and a letter by the council stating that it did not allocate the land. He stated that several groups want the suit property but that it is their group that is on the land. He confirmed that one Samuel Wambua who is the 9th Plaintiff sought permission from the 1st defendant to access the suit property. He claimed that they do not have the number of the suit property. Further, that they built a school on the suit property which is a public school.

23. The witness maintained that the suit property is Government land which has no registration number. He stated that they got a private surveyor to subdivide the land in accordance to their respective allotment letters and that the document by the surveyor refers to numbers. He further stated that he did not know the registration number of the land held by the 1st defendant. On being referred to the map filed by the plaintiff, he stated that it is their surveyor who prepared the map and that the same shows that the client is KMC PHASE III Self Help Group. He stated that their proposed subdivision was prepared by their surveyor in respect of LR. No. 18474/217. He also stated that the second map by their surveyor shows proposed subdivision of LR. No. 10281, dated 6th December 2012.

24. PW1 conceded that the suit property is LR. No. 10281 and 18474/17 as the new plots were subdivisions of the above titles. He stated that the schedule filed by the plaintiffs shows that he has plot numbers 169 and 408 and that plot No. 169 is from the subdivision of LR. No. 10281 while Plot No. 408 is from LR. No. 18474. He insisted that the land they were claiming was Government land and did not belong to the defendants. He stated that they were issued with temporary allotment. Regarding the plaintiffs' temporary allocation letters, he testified that the same referred to unsurveyed plot and that it had no rubber stamp of the Council. He stated that the plaintiffs had no title because of land of funds.

25. He informed court that in 2016, some of their houses were destroyed and that although they had not interfered with the 2nd defendant's land, the latter was chasing them away from their land. He also claimed that he did not know where LR. Nos. 10281 and 18474/217 were and in whose name the same were registered. He stated that as their land was Government land, and that the defendants herein had no claim over it.

26. In re-examination, he stated that the minutes he got from the council were signed by Tubman Otieno. He denied receiving letters dated 16th February 2005 and 24th March 2005. He stated that they had three portions of land. He stated that their land was not in the map for LR. No. 10281.

27. PW2 was Benedict Mulwa a surveyor by profession who stated as having studied Geospatial Engineering having graduated from the University of Nairobi in 2009. He stated that his client, one Kevin Nzioka (PW1) and others asked him to identify some land in Mavoko Sub-County. He stated that he visited the property and obtained a map FR. No. 81/95 which shows LR. NO. 10021/2. He stated that he saw a vacant land next to the wall that separates his clients' land from that of the 1st defendant. He stated that the adjacent land is Government land and that LR. No. 10281 is located near the factory of Kenya Meat Commission. He further stated that there is a school in the parcel of land known as LR. No. 10021/2.

28. He stated that he was not able to identify the number of the land belonging to his client and that he only visited parcel LR. No. 10021/2. He stated that the land he visited had four parts; namely part A which lies in LR. No. 10281, where KMC factory is; that part B is contained in LR. No. 10021/2 and between part B and D there is C. He stated that part C is below Canaan Secondary School, and is within LR. No. 10021/2. He maintained that part D was not in any particular parcel. He stated that his clients' land was between land belonging to the 1st defendant and the 2nd defendant, and that parcel No. 18474/217 was not in his map. Further, that his clients' land encroached into the land of EPZ by 1.5 meters. He produced the map as an exhibit supporting the plaintiffs' case.

29. On cross-examination, he stated that his clients were not on the land in dispute. He stated that part A was in parcel No. LR. No. 10281; part B in LR. No. 10021/2 and parts B, C and D were on parcel LR. No. 10021/2. He stated that the wall on LR. No. 18474/217 belonged to the 1st defendant. He stated that the FR. No. for his map was No. 131/90 and the date of the map was 1st March 1976. He stated that the same was in regard to LR. Nos. 10021/1 and LR. No. 10021/2; while FR No. 87/95 was in respect to LR. No. 100281.

30. He stated that the survey plan filed by the 2nd defendant was in respect to FR. No. 87/95 regarding LR. No. 10281, registered on 18th July 1959 and that LR. No. 10281 was not subdivided. He also stated that the land abutting LR. No. 10281 is LR. No. 10021 without /1 or /2. He conceded that the plaintiffs were claiming part of LR. No. 10281 and stated that from the particulars on the grant made to the 2nd defendant, the same is a leasehold of 85 years from 1st July 1964 and that therefore that grant is still valid. He stated that if the lease to the 2nd defendant is still valid, then the plaintiffs cannot claim the land, but if they have lived there for 12 years, they can claim it. He maintained that parcel LR. No. 10281 cannot be claimed by another person other than the 2nd defendant.

31. On re-examination, he stated that his clients' land is from the wall of the land owned by the 1st defendant to the end of Canaan Secondary School and that portions B, C and D are not within land fenced by the 1st defendant. He stated that he visited land measuring 82.3 acres yet the report by the Government surveyor only mentioned an encroachment of 1.5 meters.

32. PW3 was Tubman Otieno. He stated that between 2006 and 2008, he was the Town Clerk of Mavoko Municipal Council with the responsibility of taking council minutes and advising the Mayor. He adopted his witness statement dated 26th November 2020 as his evidence in chief. He referred to the council minutes dated 17th May 2005. It was his testimony that when he took over from the former Town Clerk one Gideon Muinde, he found out that in 2005, the Town Planning Housing and Market Committee of the former Mavoko Municipal Council had passed a resolution that occupation by people in Kanaan, numerical, KMC, Kwa Mangeli and Kwa Nzomo be regularized.

33. He claimed that his duty was to instruct the surveyor to identify plots as allocated and he issued allotment letters. He alleged that every allottee was required to pay rates and fees for survey plan. He asserted that members allocated the plots were registered in a register of the council. He maintained that

the land owned by the defendants is properly demarcated. He stated that Kanaan Secondary School was situated in land owned by the plaintiffs and that construction work in the suit property was done through approval of the Assembly of the Council and that the defendants herein never raised any objection. He stated that the council system allowed the plaintiffs to pay rates because they are the owners of the suit property.

34. On cross-examination, he stated that the process of regularization was to allocate land to those who were in occupation and that he did not sign the minutes allocating the suit property to the plaintiffs. He stated that he followed the proper procedure in allocation of the suit property to the plaintiffs, and that it was not necessary to issue a notice to the public regarding the allotments. He stated that at the time of the allotment, he was not aware that someone else was claiming the suit property.

35. The witness further stated that the decision to allocate ought to have been the decision of the full council and that the minutes before court are from a committee and not the full council. He stated that he had been a Town Clerk since 1995 to 2013 and from 2013 to 2015, he was a Clerk to the County Assembly and that he had dealt with allotment of Municipal land which does not need ministerial approvals. He stated that as the land was not vacant but already occupied, there was no need for ministerial approval. He conceded that the council could only allocate land that belongs to it; and could not allocate private land.

36. He confirmed that the grant held by the 2nd defendant in regard to LR. No. 10281 had not expired. He maintained that the land allocated to the plaintiffs did not belong to the defendants. He stated that the proposed subdivision for LR. No. 10281 dated 5th December 2012 was done after they had done the regularization and stated that it is the owner of land that submits a proposed subdivision but that the client shown in the subdivision scheme was KMC Phase III Self Help Group. He also alleged that the plaintiffs were given letters of temporary occupation in August 2017 which was to last until allocation. He stated that the allocated land belonged to the council. He confirmed that the letter from Mavoko Municipal Council in 2005 was signed by the former Town Clerk Mr. Muinde, in regard to the land belonging to the 1st defendant. He maintained that the land that the council allocated to the plaintiffs was Government land.

37. In re-examination, he stated that the suit property was within the council's jurisdiction and that they did not allocate them the defendants' land. He stated that at the time of allocation, the 2nd defendant was not in occupation. That marked the close of the plaintiffs' case.

1st defendant's case

38. DW1 was Andrew Njuru, the Assistant Manager of the property department of the 1st defendant. He adopted contents of his witness statements dated 17th May 2021 and 6th April 2022 as his evidence in chief. His testimony was that in 1990, the Government identified land in Athi River to be used as Export Processing Zone and the land between Namanga Road and railway line was earmarked for development; land between Export Processing Zone and Kenya Meat Commission factory earmarked for staff housing and land west of Namanga road was for future expansion.

39. He further stated that in 1991, the Government allocated land known as LR. No. 10021 to EPZA, which land had previously belonged to Kenya Meat Commission, which allocation was approved by a Cabinet Sub Committee, which decision was communicated to KMC. He stated that on 14th March 1991, a letter of allotment Ref. No. 6407/142 was issued to EPZA for LR. No. 10021 whereof the 1st defendant paid Kshs. 620 for conveyancing, stamp duty and registration fees. He stated further that the plan to subdivide LR. No. 10021 was approved on 22nd October 1992 subdividing the said land into LR. No. 18474 located in Athi River and LR. No. 18474/217, which titles are in the 1st

defendant's name. He maintained that the 1st defendant's claim over the said land was indefeasible and that the 1st defendant has since registration been paying land rates and land rent. He denied the plaintiffs' allegation that they had been living on the said property.

40. It was his further testimony that EPZA has never approved or been consulted in relation to the settlement scheme known as KMC Phase III allegedly created by Mavoko County Council. He emphasized that the council had no authority to create KMC Phase III Settlement Scheme to benefit the plaintiffs. He stated that a survey done by the survey section confirmed that the plaintiffs had encroached on the 1st defendant's land which encroachment was 1.5 meters on LR. No. 18474. He stated that the illegal encroachment by the plaintiffs could not be accorded legal protection.

41. DW1 averred that the 1st defendant being the registered owner of the parcels stated above, the plaintiffs are under duty to prove that the 1st defendant acquired the property by illegality, corrupt scheme, unprocedural process, fraud or misrepresentation which they have neither pleaded or proved.

42. He termed the plaintiffs' allotment letters and subdivision report, as fictious and a sham, on grounds that although the report is alleged to have been done in 2005, it refers to the *Urban Areas and Cities Act* of 2011, which Act had not been enacted in 2005. He added that despite being a 2005 report it refers to *the Constitution* of Kenya 2010, which was not in existence in 2005.

43. He stated that an allotment is only transient and is not evidence of title. He stated that EPZA was allotted the land under Section 117 of the repealed Constitution and that at that time local authorities were allowed to set a part trust land for the benefit of people residing in the area on condition that the setting aside was to be done in accordance with the law and prompt and full compensation to the residents of the land prejudicially affected by the setting aside.

44. He asserted that at the alleged time of allotments to the plaintiffs, there was a mandatory statutory procedure to be followed when setting aside, which include; issuance of a notice of the proposal to the people of the area and information on the day and time when the request is to be considered; conduct a hearing and record in writing of all persons concerned who attend the meeting; publication of the notice of setting aside in the Kenya Gazette; and compensation for persons prejudicially affected.

45. It was also DW1's testimony that regarding grants made under the Local Government Act (now repealed), the consent from the Minister responsible for local government was a mandatory prerequisite for all grants exceeding 7 years. He stated that as the plaintiffs allege to have been on the land since 1997, then the 7 year period had lapsed necessitating the Minister's consent, which was not given in this case.

46. He faulted the plaintiffs' claim for reasons that; the purported allotment letters did not make reference to the nature of interest allegedly conferred on the plaintiffs; there is no pleading or proof of the Minister's consent; no search was provided to show earlier indefeasible interests of the 1st defendant whose interest would be prejudiced by the alleged allotment; there is no proof of payment of consideration by the plaintiffs in terms of rent payment or stand premium as required in law; there is no evidence of notice of proposal of allotment, hearing of the proposal, notice or setting apart of trust land and compensation of EPZA or other persons prejudicially affected.

47. He maintained that there was no way Mavoko County Council not being the owner of the 1st defendant's land, could allot the same to the plaintiffs without first lawfully acquiring title from the 1st defendant.

48. The witness pointed out that the plaintiffs had not attempted to explain the basis upon which they were allegedly occupying the suit property between 1997 and 2005 before applying for allotment and have

not also explained why they did not acquire title for 15 years from the date of allotment. He asserted that the plaintiffs' letters were incurably defective both in substance and process and cannot be the basis for sustaining their claim. He stated that Mavoko County Council has no legal obligation to issue the plaintiffs with a certificate of title and that this court lacks authority to compel the council to do so.

49. Regarding the plaintiffs' claim based on the doctrine of adverse possession, DW1 stated that the same had not been proved. He stated that no permission for development plans were exhibited by the plaintiffs. He maintained that as of 1997, the suit property was registered in the name of EPZA a state corporation and that therefore no person can acquire title or easement on such land as the claim is statute barred and adverse possession cannot be claimed on public land.

50. He stated that the plaintiffs' case is baseless and that the court ought to uphold their counterclaim. He claimed he was aware that the suit property had a squatter problem prior to the subdivision and that the District Commissioner of Machakos evicted them before the 1st defendant's occupation vide his letter of 9th March 1993. He stated that after subdivision, the Ministry of Lands submitted an evaluation report regarding LR. No. 18474. Further that on 23rd April 2002, a parliamentary question number 132 arose in the National Assembly as to whether LR. No. 18474 had been allocated to individuals, which question was answered by the 1st defendant in the negative.

51. He further alleged that around 2005, the 1st defendant noticed illegal structures on its land by persons alleging to have been allocated the land by Mavoko Municipal Council, prompting the 1st defendant to write to the council on 16th February 2005, whereof the council responded via its letter dated 17th February 2005, denying ever allocating the land to any person and denying the minutes presented by the plaintiff and advising the 1st defendant to demolish the illegal structures.

52. He asserted that on 24th March 2005, the 1st defendant issued a notice to all squatters on the land requiring them to vacate immediately, but that despite the notice, the plaintiffs continue to occupy the 1st defendant's land. He maintained that on 23rd June 2015, some of the plaintiffs wrote to the 1st defendant seeking an entry gate to the suit property and to continue farming a section thereof undertaking to move out when required by the 1st defendant. That this request was declined by the 1st defendant who served them a 90 day notice of eviction and that therefore the plaintiffs have been aware that the suit property belongs to the 1st defendant.

53. Regarding Kanaani Intergrated Primary School and Kanaani High School, the witness stated that these are public schools built by public funds on the 1st defendant's property. Further that on 9th April 2018, the head teacher of Kanaani Intergrated Primary School requested the 1st defendant to facilitate issuance of allotment to the school but that the 1st defendant responded on 13th April 2018 advising that the status of the school had not been regularized.

54. The witness produced the following documents; records of the plan for acquisition of land by EPZA; letter of allotment dated 14th March 1991; letter to KMC; letter dated 22nd October 1992 approving plans; letter of no objection from Department of Physical Planning; certificates of title for LR. No. 18474 and LR No. 18474/217; deed plan and official searches; copies of evidence of payment of land rates and clearance certificate; letter dated 5th May 1992 and payment receipt; letters dated 19th March 1993 and 5th May 1993; forwarding letter and evaluation report dated 6th September 1999; letters dated 23rd April 2002 and 30th April 2002 in respect of the parliamentary question No. 132; letters dated 16th February 2005 and 17th February 2005 regarding the denial by Mavoko Municipal Council of the plaintiffs' allotment; letter dated 24th March 2005 being eviction notice to squatters; letter dated 23rd June 2015 by plaintiffs seeking entry gate to the suit property; letter dated 1st October 2015 by plaintiffs seeking 1st defendant's permission to farm the suit property; letter dated 15th October 2015

by 1st defendant declining plaintiffs' request; documents of registration of schools on the suit property; letters dated 9th April 2018 regarding ownership for Kanaani Intergrated Primary School.

55. On cross-examination, he stated that at the time of acquisition of the land by the 1st defendant, the school had already started on the basis of social responsibility and that the 1st defendant allowed the school to continue as most of the children attending the school belonged to the workers of the 1st defendant. He stated that Mavoko Municipal Council cannot award land registered under the repealed Government Lands Act as it could only grant or allocate Trust Land. He maintained that the 1st defendant had no claim over LR. No. 10281. He stated that in the defence, he referred to LR. No. 18474 and not 18474/217. Further that the acreage of their land was 454.4 hectares.

56. He further stated that he cannot remember the date Kanaani School was constructed and has no letter from the 1st defendant to allow construction of the school. He stated that LR. No. 10021 belonged to KMC and the same was subdivided into LR. No.10021/1 and 10021/2 and that the latter resulted in LR. No. 18474.

57. He stated that upon acquisition of the land from KMC, they established a boundary on 21st June 1993. He stated that the encroachment was more than 1.5 meters and that their perimeter wall was demolished and vandalized. Further that the school was within their perimeter wall and that there is no land between EPZA and KMC. He stated that as at the time title for LR. No. 18474/217 was issued, the plaintiffs had trespassed on the land.

58. In re-examination, he stated that when the 1st title was issued to the 1st defendant on 21st October 1993, the plaintiffs were not on the land as they only came there in 2005. He stated that the plaintiffs were on their land and that they wanted them to vacate as it is public land but not available for allocation.

59. DW2 was John M. Nyagah who adopted the contents of his statement dated 21st June 2021 as his evidence in chief. It was his testimony that he was the survey section head in the State Department of Public Works in the Ministry of Infrastructure, Transport, Housing and Urban Development in Kenya. He stated that in 2017, his Ministry was identified to re-establish beacons on the EPZA's housing area in LR. NO. 18474/217 located in Mavoko Municipality. That on 21st of September 2017, his team re-established missing beacons LR. RLI. K10, K9 and K8 in accordance with the *Survey Act*. He stated that during this process, all existing beacons stone 6 and JR 1 were found to be firm and insitu.

60. According to him, the survey team reviewed Survey Plans FR Nos. 353/14, 239/16 and 87/95. Further that this team liaised with the County Planning Officers and accessed other existing data on the Part Development Plans. He maintained that all dimensions depicted in the plans were commensurate with ground measurements. He stated that the survey report that he produced in court was authored by his colleague Mr. Mwangi Gikonyo who had since retired from service. He stated that the survey report confirmed that there were pockets of encroachments in respect of LR. No. 18474/217 and to the north of LR. No. 10281 registered in the names of the defendants respectively. He also stated that the surveyors made a drawing to a scale which produced a graphical representation of the encroachment. Regarding LR. No. 18474/217, he stated that the encroachment was by 1.5 meters. He produced the survey report as evidence.

61. In cross-examination, he stated that LR. No. 10281 was owned by the 2nd defendant. Further that the re-establishment of boundaries was pursuant to a request made by the 1st defendant. He stated that encroachment was between parcels LR. No.10281 and 18474/217. According to the witness, Kanaani School is on LR. No. 18474/217 and that they found beacons inside that parcel of land.

62. He stated that on the west and north side, there were other parcels belonging to the 1st defendant.

63. DW3 was Anthony Ademba the Corporate Secretary of the 2nd defendant. He adopted contents of his witness statement dated 12th April 2022 as his evidence in chief. His testimony was that parcel LR. No. 10281 belongs to the 2nd defendant by virtue of the Grant No. IR. 20302 being a leasehold of 85 years and 8 months from 1st July 1964 measuring 164 acres less road reserve of four acres. That the 2nd defendant's principal factory is erected on the aforesaid land and that its boundaries are indicated in survey plan number 73889. He maintained that the said parcel is not subdivided as confirmed by the survey records in Nairobi.

64. Regarding the proposed subdivision plan produced by the plaintiff, he stated that the 2nd defendant was not aware of the same, the same having indicated that the client of the subdivision was KMC Phase III Self Help Group. He alleged that on 6th May 1985, the 2nd defendant caused a legal charge to be created on the aforesaid land in favour of the National Bank of Kenya Limited and the same was duly registered. It was his testimony that although the debt in regard to the charge was duly settled, the chargee continues to hold title thereto on the instructions of the National Treasury of Kenya. He stated that besides the factory, the 2nd defendant also erected residential houses; a social hall and donated land for a school for its employees' children.

65. He took the position that the plaintiffs' claim was false and based on convoluted lies because the alleged minutes allocating the land to the plaintiffs are riddled with inexplicable and culpable inconsistencies. Further that the minutes are not certified and therefore a forgery. He stated that the letters of temporary allotment are a nullity and they don't exist in law. Further that the allotment letters precede the subdivision plans of 5th December 2012 by over 5 years; that the same do not mention the kind of interest conferred whether leasehold or freehold; that no consideration is disclosed therein; and that no building plans were submitted to the council although the allotment letters made that a requirement.

66. He stated that although the plaintiffs allege to be in occupation of the 2nd defendant's land since 1997, yet only a small portion thereof measuring 5 acres was invaded by squatters. Further, that the 2nd defendant published a public notice in the Daily Nation of 13th April 2012 claiming ownership of the suit property and cautioning trespassers. That the plaintiffs confirmed in their pleadings and evidence existence of prominent sign boards by the 2nd defendant's stating that they owned the suit property.

67. He further stated that no application for allocation was provided by the plaintiffs; they did not provide evidence of standard premium being a basis for allocation and that the plaintiffs have not built permanent houses, schools or planted trees on the suit property.

68. He emphasized that the 2nd defendant's land was not available for allotment to a third party and that the 2nd defendant's consent was not sought to allocate the land to the plaintiffs. He pointed out that four out of 54 plaintiffs, namely Kelvin Nzioki, David K. Masila, Jackson Wambua Mutua and Bosco Mutisya were being housed at the 2nd defendant's staff houses and therefore their allegation that they were allocated the 2nd defendant's land was false and misleading.

69. It was also his evidence that in June 2021, the 2nd defendant instructed the Department of Survey to undertake a resurvey and reestablish boundaries and beacons for LR. No. 10281. That upon the resurvey, it was established that there was encroachment of the 2nd defendant's land by 11.25 Hectares.

70. On cross examination, he stated that initially, the whole land belonged to the 2nd defendant but that the same was subdivided and part thereof given to the 1st defendant herein. He stated that he did not have documents to show LR. No. 10021 belonged to the 2nd defendant. He stated that encroachment is on the lower part of the 2nd defendant's land. He stated that at the time of filing suit, there were semi permanent structures but after the suit was filed, the plaintiffs began putting up permanent houses

despite the 2nd defendant's objection. He alleged that the 2nd defendant did not demolish the plaintiffs' houses.

71. In reexamination, he stated that he was aware that LR. No. 10281 has never been surrendered to the Government. That marked the close of the defence case.

72. Parties filed written submissions in support of their respective cases. On record are submissions filed by the plaintiffs on 30th March 2023 and submissions filed by both defendants on 13th September 2023.

Plaintiffs' submissions

73. Counsel for the plaintiff submitted that the dispute herein raised two issues, namely who between the plaintiffs and the defendants were the lawful owners of the suit property; and whether the Commissioner of Lands had power to allocate the land. On the first issue, counsel submitted that Section 107 of the *Evidence Act* placed the burden of proof on the person asserting existence of a legal right or liability. Counsel argued that the plaintiffs had demonstrated clearly that they were the rightful owners of the suit property, having been allocated by the County Council of Mavoko on 6th August 2005 as demonstrated in the allotment letters. Further, that the plaintiffs had proved payment of land rates and construction on the suit property.

74. It was submitted for the plaintiff that the evidence of PW2 who was a surveyor demonstrated that the suit property's number could not be ascertained but it was the land between EPZA and KMC. Counsel argued that the evidence of PW3 who was a former Town Clerk of Mavoko Municipal Council demonstrated the manner in which the suit property was allocated to the plaintiffs. Counsel also submitted that the plaintiffs' occupation of the suit property was confirmed by DW1 and that the report of the 1st defendant's surveyor stated that the encroachment was only 1.5 meters.

75. Reliance was placed on the cases of James Muigai Thungu v. County Government of Trans – Nzoia & 2 Others [2022] eKLR and Leah Magoma Ongai v. Attorney General [2015] eKLR to argue that since the 1st defendant did not accept the offer made to it within the stipulated period of 30 days, the offer lapsed and therefore the land was not available to the 1st defendant. Further that the land was therefore available for allotment to other persons.

76. On the second issue framed by the plaintiff, it was submitted that before the enactment of *the Constitution* of Kenya 2010, land was classified as Government land, Trust Land and private land. Counsel argued that Section 7 of the Government Lands Act only vested the power to alienate Government land to the President and therefore the Commissioner of Lands had no powers to allocate the suit property to the 1st defendant. Reliance was placed on the case of Kenya Anti-Corruption Commission v. Online Enterprises Limited [2019] eKLR. Counsel further referred to the case of James Joram Nyaga & Another v. Attorney General & Another [2007] eKLR to argue that Section 3 and 7 of the repealed Government Lands Act limited the power of Commissioner of Lands to executing leases or conveyancing on behalf of the President.

77. Counsel contended that as the defendants were allocated the suit property by the Commissioner of Lands and not the President, the allocation was null and void, hence the land remained unoccupied and unalienated and therefore subject to being classified as trust land within the jurisdiction of Mavoko County Council as provided in Section 115 (1) of the repealed Constitution. Counsel argued that under Section 117 of the repealed Constitution, County Councils had power to set apart an area of trust land for use and occupation by any person for a purpose that would benefit the residents of the area.

78. Counsel argued that the plaintiffs therefore benefited under the provisions of Section 117 of the repealed Constitution. Counsel referred the court to the case of Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others [2014] for the proposition that parties are bound by their pleadings and argued that the 1st defendant referred to parcel LR. No. 18474 and not 18474/217. On the question of costs, counsel submitted that costs follow the event and that the plaintiffs ought to be awarded costs.

1st defendant's submissions

79. Counsel for the 1st defendant submitted that the evidence presented demonstrate that the 1st defendant is the registered proprietor of LR. No. 18474 and LR. No. 18474/217 which titles were registered under the Repealed Registration of Titles Act. Reliance was placed on Section 26 (1) of the *Land Registration Act* 2012 for the argument that a certificate of title is proof of indefeasible ownership unless fraud, misrepresentation, illegality, lack of proper procedure and a scheme of corruption is shown.

80. Reliance was placed on the cases of Joseph N. K. Arap Ng'ok v. Moijo Ole Keiwa & 4 Others [1997] eKLR and Marcus Mutua Muluvi & Another v. Philip Tonui & Another [2012] eKR. Counsel argued that the plaintiffs failed to demonstrate that they followed the relevant authorities for issuance of title upon issuance of temporary allocation letters.

81. The court was referred to the case of Disa Enterprises Ltd v. Kenya Power & Lighting Co. Ltd [2013] eKLR for the proposition that allotment letters do not confer proprietary right but only a right to receive property on complying with terms of allotment. Counsel submitted that the land that the plaintiffs allege to have been allocated by the County Council belongs to the defendants and the council denied allocating the same to the plaintiffs. Counsel submitted that under Section 3 of the repealed Government Lands Act, the Commissioner had delegated powers from the President to allocate unalienated Government land and therefore, the Commissioner was right in allocating the suit property to the 1st defendant. Counsel relied on the case of Ali Mohammed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v. Hakar Abshir & 3 Others [2021] eKLR on the process of allocation of Government land.

82. It was contended for the 1st defendant that the 1st defendant paid ground rent and was granted title to land. Counsel argued that the plaintiff failed to prove their claim as the land they claim has not been identified in their pleadings. Counsel relied on Section 144 (5) of the Local Government Act (repealed) and argued that allocation of land required a consent from the Minister to enable grant, but that this consent was not sought nor issued.

83. In addition, counsel relied on the case of Chevron (K) Ltd v. Harrison Charo Wa Shutu [2016] eKLR to submit that there cannot be a claim of adverse possession against public land. On costs, counsel urged the court to award costs to the 1st defendant.

2nd defendant's submissions

84. Counsel for the 2nd defendant submitted that all the three witnesses for the plaintiffs admitted that the plaintiffs had no interest in LR. No. 10281 and that in paragraph 15 of the plaint, the plaintiffs admitted that the 2nd defendant had placed notices on the suit property claiming interest in LR. No. 10281 Athi River.

85. Regarding admissions, counsel relied on Sections 17 and 18 of the *Evidence Act* as well as Order 13 Rule 2 of the Civil Procedure Rules and submitted that the plaintiffs admitted that they had no claim over the 2nd defendant's property.

86. On the burden of proof, reliance was placed on Sections 107 and 108 of the *Evidence Act* and the case of Mbuthia Macharia v. Annah Mutua Ndwiga & Another [2017] eKLR for the proposition that the 2nd defendant had discharged its evidentiary burden of proof.

87. The 2nd defendant's counsel also submitted that the plaintiffs did not plead the doctrine of adverse possession but raised this matter in their submissions. Counsel relied on Section 7 of the *Land Act* and the cases of Titus Mutuku Kasuve v. Mwaani Investment Limited & 4 Others [2004] eKLR and Richard Wefwafwa Songoi v. Ben Munyifwa Songoi [2020] eKLR for the conditions to be proved in adverse possession. Counsel argued that the 2nd defendant had placed notices in its land yet the plaintiffs purported to have been allocated the land in 2005.

88. On indefeasibility of title, counsel relied on Sections 24, 25 and 26 of the *Land Registration Act* and submitted that the plaintiffs had not met the threshold of land ownership and that the 1st defendant having proved ownership of LR No. 10281 was entitled to orders of eviction against the plaintiffs. Regarding costs, counsel relied in the cases of Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another [2016] eKLR and argued that costs are at the court's discretion and that as they were dragged to court, the 2nd defendant is entitled to costs.

Analysis and determination

89. The court has carefully considered the pleadings, evidence and parties' rival submissions. In my considered view, the issues that arise for determination are as follows;

    a. What is the identity of the disputed land?

    b. Who between the plaintiffs on one hand and the defendants on the other hand are the lawful owners of the suit property?

    c. Which orders should the court grant?

90. While parties raised many matters and or issues that were never raised in their respective pleadings, I will address issues arising from the pleadings as parties are bound by their pleadings and submissions are not substitutes for pleadings.

91. Land claimed as being owned privately whether by individuals or state organs is land which can be identified. Even where land is yet to be surveyed, where the same is due for allocation, unsurveyed plot numbers are given to such property pending registration that would culminate in a registration number. The numbering or issuance of registration numbers is a formal process done by Government entities and therefore making the process of identifying any particular parcel of land verifiable, because official records for the same are kept.

92. In this case, the first issue is the identification of the disputed property. While the plaintiffs referred to the same as a settlement scheme known as KMC PHASE III, the defendants referred to it as LR. Nos. 18474 and 10281 which titles abut each other respectively. The plaintiffs did not present any official record supporting their claim that the suit property is called KMC PHASE III. The plaintiffs' witness PW2 who was a surveyor, produced a survey report which is at page 52 to 69 of the plaintiffs' bundle, was clear that the land he surveyed on behalf of the plaintiffs was LR. No. 18474/217 and LR.

No. 10281. There is nothing in that report to show that the identity of the surveyed land was KMC PHASE III.

93. On the other hand, the defendants produced grants and titles for LR. Nos. 18474 and LR. No. 10281 to show that the disputed property was already registered in their respective names and therefore the identity thereof is documented in official Government records. Considering the evidence on the whole, the plaintiffs did not deny or rebut the defendants' evidence on the identity of the suit property. In the premises, I am satisfied that the suit property consists of parcel LR. No. 18474 and LR. No. 10281 which are adjacent to each other. I therefore find and hold that the suit property is not KMC PHASE III as there is no land known by that name.

94. Article 40 (1) and (6) of *the Constitution* of Kenya 2010 provides for protection to the right to acquire and own property in Kenya in regard only to lawfully acquired property.

95. The plaintiffs' claim is that they have openly occupied the suit property since 1997 and the same was allocated to them by the Municipal Council of Mavoko on 16th August 2007. It was therefore incumbent on them to prove that the alleged allocation of the suit property was lawful creating proprietary rights over the suit property in their favour, as Section 107 of the *Evidence Act* places the burden of proof on the plaintiffs.

96. As the alleged allocation occurred before *the Constitution* 2010, the plaintiffs were obligation to demonstrate compliance with the then applicable laws which are the repealed Constitution, the repealed Government Lands Act and the repealed Trust Lands Act.

97. The land that was vested in local authorities and or County Councils was trust land only and not Government land, which was vested in the Central Government. Section 115 of the repealed Constitution provided as follows;

    1. All Trust land shall vest in the county council within whose area of jurisdiction it is situated:

       Provided that there shall not vest in any county council by virtue of this subsection –

       i. Any body of water that immediately before 12th December 1964 was vested in any person or authority in right of the Government of Kenya; or

       ii. Any mineral oils.

    2. Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual:

       Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law.

    3. Notwithstanding subsection (2), provision may be made or under an Act of Parliament enabling a person to be granted a right or interest to prospect for minerals or mineral oils on any area of Trust land, or to extract minerals or mineral oils form any such area, and the county council in which the land is vested shall give effect to that right or interest accordingly:

       Provided that the total period during which minerals or mineral oils may be prospected for on, or extracted from, any particular area of land by virtue of any grant or grants while the land is not set apart shall not exceed two years.

4. Subject to this Chapter, provision may be made by or under an Act of Parliament with respect to the administration of Trust land by a county council.

98. County Councils had power to set apart trust land for use and occupation by among others; any person for the benefit of the residents of the area. Section 117 of the repealed Constitution provided as follows;

1. Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation –

    a. By a public body or authority for public purposes; or

    b. For the purpose of the prospecting for or the extraction of minerals or mineral oils; or

    c. By any persons or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof,

    And the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

2. Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

3. Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

4. No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who –

    a. Under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or

    b. Is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart,

5. No right, interest or other benefit under African customary law shall have effect for the purposes of subsection (3) so far as it is repugnant to any written law.

99. Therefore, where land was set apart by the County Council, any person adversely affected by the setting apart was entitled to compensation. The procedure for setting apart was provided for in Sections 13 (2), (3) and (4) of the Repealed Trusts Lands Act which provided as follows;

2. The following procedure shall be followed before land is set apart under subsection (1) of this section –

    a. The council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;

b. The council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

c. The Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

d. The recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council;

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

3. Where the council approves a proposal to set apart land in accordance with subsection (2) (d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.

4. Subject to this section, sections 7(3) and (4), 8 (1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this section, mutatis mutandis, and subject to the modification that the compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person).

100. In this case, there is no evidence that the Municipal Council of Mavoko set apart parcels LR. Nos. 18474 and 10281 or that the procedure for setting apart was complied with or that the defendants herein were duly compensated to enable the council set apart their land for the benefit of the plaintiffs.

101. Whether any land was Government land or trust land, it is the Commissioner of Lands who had the power to administer the same, and would be the one to issue allotment letter if at all. Section 53 of the repealed Trust *Land Act* provided as follows;

> The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may –
>
> a. Exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13 (2) (d) of this Act; and
>
> b. Execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient:
>
> Provide that –
>
> i. The Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and
>
> ii. The Minister may by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself.

102. Besides, under Section 5 of the repealed Government Lands Act, the administration of Government land was vested in the Commissioner of Lands.

103. I have considered the purported allotment letters allegedly issued to the plaintiffs on 6th August 2007, which were signed by Tubman A. K. O. Otieno, who testified for the plaintiff as PW3. He signed the alleged allotment letters in his capacity as Town Clerk of Mavoko Municipal Council. In view of the above provisions of the repealed Trust Lands Act and the repealed Government Lands Act, I find and hold that the Town Clerk of Mavoko Municipal Council had no authority to sign allotment letters.

104. For Government land to be allocated, the same must be unalienated Government land, for it to be available for allocation.

105. Section 2 of the repealed Government Lands Act defined unalienated Government land as;

> Unalienated Government Lands" means Government land which is not for the time being leased to any other person, or in respect of which the commission has not issued any letter of allotment.

106. Therefore, unalienated Government land referred to the land which has not been allocated or leased to anyone. This means that land in respect of which grants, dispositions or leases have been made was not unalienated Government land as such land is deemed alienated by the Government.

107. On the other hand, Section 2 of the repealed Government Lands Act referred Government land as follows;

> " Government land" means land for the time being vested in the Government by virtue of Sections 204 and 205 of *the Constitution* (as contained in Schedule 2 of the Kenya Independence Order in Council, 1963) and Sections 21, 22, 25 and 26 of *the Constitution* of Kenya (Amendment) Act.

108. In the case of Nelson Kazungu Chai & 9 others v. Pwani University [2014] eKLR, the court emphasized that it is only unalienated Government land that could be allocated. The court proceeded to elaborate the procedure for allocation as follows;

> ...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees. 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132.Apart development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...

109. Therefore, in land allotment and allocation, an allotment letter is accompanied by a PDP which has a specific number which is sent to the Department of Survey for purposes of survey. The Director of Surveys authenticates and approves the survey process and a land reference number is then issued.

110. In view of the evidence from both parties that the suit property is LR. No. 18474 and LR. No. 10281 already registered in the names of the defendants respectively, I hold and find that the suit property was not unalienated Government land and therefore the same was not capable of being allocated to the plaintiffs or any other person or entity.

111. I have also considered the purported allotment letters and no PDP has been attached to the same and neither do they have the nature of the interest conferred on allocation, whether it is absolute or a leasehold. There is also no requirement therein for payment of standard premium, and the same refer to a "temporary allocation" which in my view was not provided for under the then legal regime providing for allocation of Government land. There is also no evidence that the alleged allocations to the plaintiffs complied with the required procedure of allocation of Government Land. In the premises, I find and hold that the letters of temporary allocation issued to the plaintiffs and dated 6th August 2007, do not meet the threshold of an allotment letter and their issuance was not in compliance with the procedure of Government land allotment and allocation, and therefore the same are null and void and are not capable of conferring propriety interests to the plaintiffs. In any event, the suit property having been registered in the defendants' name, and having not been lawfully acquired by the Municipal Council of Mavoko, the latter had no authority or propriety interest in the suit property to enable it allocate the same to the plaintiffs as a person cannot give that which they do not own.

112. The plaintiffs also alleged to have obtained ownership of the suit property in view of their open and long occupation thereof. They seemed to suggest that they had acquired ownership of the suit property by prescriptive rights under the doctrine of adverse possession. Adverse possession is a doctrine where a person who has unlawfully, and without the owner's consent occupied land owned by another, openly, continuously and as of right for a period of over 12 years, obtains ownership thereto by claiming the right in court. This right is recognized and provided for under Sections 7, 13, 37 and 38 of the Limitations of Actions Act. However, under Section 41 of the said Act, no person can claim for adverse possession in respect of public land. In the case of Chevron K. Limited v. Harrison Charo Wa Shutu [2016] eKLR, the court held that a claim for adverse possession cannot be sustained against public land.

113. Article 62 (1) (b) of *the Constitution* of Kenya 2010 define public land to include land lawfully held, used and occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease. The suit property is registered in the names of the defendants who are statutory corporations incorporated under the Export Processing Zone Authority Act and the *Kenya Meat Commission Act* respectively and therefore all the land registered in their names is public land upon which the provisions of the *Limitation of Actions Act* do not apply. In the premises, the plaintiffs cannot claim for the suit property under adverse possession as such claim is incompetent.

114. The totality of the above and for the reasons given, I find and hold that the plaintiffs have failed to prove their claim over the suit property and therefore their claim is dismissed.

115. On whether the defendants proved ownership of LR. No. 18474 and LR. No. 10281, they both produced titles thereto. Section 26 of the *Land Registration Act* provides for conclusiveness of titles as follows;

    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, unprocedurally 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.

116. In the case of Funzi Development Limited & Others v. The County Council of Kwale [2014] eKLR, the Court of Appeal held as follows;

> ...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.

117. Therefore, where there is title, a registered proprietor thereof is the indefeasible and absolute owner thereof unless it is demonstrated that such proprietor obtained registration through fraud, misrepresentation, lack of proper procedure, illegality or a corrupt scheme.

118. I have considered the plaint and it is clear that there is nothing therein to point to any allegations of fraud, misrepresentation, want of procedure, illegality or corruption in the acquisition of LR. No. 18474 and 10281. In the premises, I hold and find that the plaintiffs have not challenged the legality of the defendants' titles, or faulted the acquisition of the same.

119. A registered propriety's interests and rights are protected under Sections 24 and 25 of the *Land Registration Act* as follows;

24. Interest conferred by registration

Subject to this Act—

a. 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 appurtenant thereto; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

1. The rights 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 interests and claims whatsoever, but subject—

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

120. Therefore, the defendants being the lawful owners of their parcels of land are entitled to quiet enjoyment thereof to the exclusion of everyone else including the plaintiffs. Having considered the defendants' respective counterclaims which sought for a permanent injunction to restrain the plaintiffs from interfering with LR. No. 18474 and LR. No. 10281 as well as an eviction order against the plaintiffs and their agents, I am satisfied that the defendants have proved their respective counterclaims and are entitled to the orders sought therein.

121. In the premises, I find no merit in the plaintiffs' suit and the same is hereby dismissed with costs to the defendants. I find that the defendants have proved their respective cases on the required standard and I enter judgment for them against the plaintiffs as follows;

a. A permanent injunction be and is hereby issued to restrain the plaintiffs whether by themselves, their servants, and/or agents from entering into, erecting structures, cultivating, grazing their livestock or in any way interfering with the defendants' parcels of land LR. No. 18474 and LR. No. 10281, Athi River. As the plaintiffs are already on the suit property, this order takes effect on 10th October 2024.

b. The plaintiffs, their employees, servants, agents, tenants and relatives are hereby ordered to vacate LR. No. 10281 Athi River within 90 days and in default, eviction to issue.

c. The costs of the counterclaims shall be borne by the plaintiffs.

122. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Langalanga for plaintiffs

Ms. Ngei for 1st defendant

Mr. Musami holding brief for Mr. Macharia for 2nd defendant

Court assistant – Josephine

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