



**Ukamba Agricultural Institute Limited v South Eastern University College & another  
(Environment & Land Case 136 of 2009) [2023] KEELC 17389 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17389 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 136 OF 2009  
OA ANGOTE, J  
MAY 11, 2023**

**BETWEEN**

**UKAMBA AGRICULTURAL INSTITUTE LIMITED ..... PLAINTIFF**

**AND**

**SOUTH EASTERN UNIVERSITY COLLEGE ..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide an Amended Complaint dated June 5, 2009, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
  - i. A permanent injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, employees, agents, assignees, successors, servants or otherwise howsoever from evicting or in any way whatsoever interfering with the possession enjoyed by the Plaintiffs over all that parcel of land or property known as LR 209/10350 situate in Upper Hill Nairobi.
  - ii. A permanent injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, employees, agents, assignees, successors, servants or otherwise howsoever from trespassing, occupying, alienating, selling, transferring and or dealing in any manner whatsoever with all that parcel of land or property known as LR 209/10350 situate in Upper Hill, Nairobi.
  - iii. An interlocutory injunction restraining the Defendants, their employees, agents, servants and/or officers from obstructing, interfering, trespassing and/or committing injury to the Plaintiffs' proprietary rights in respect of LR 209/10350 situate in Upper Hill, Nairobi.



- iv. An interlocutory injunction restraining the Defendant, its employees, agents, servants and/or officers from encroaching or in any way interfering with the quiet possession enjoyed by the Plaintiff over its property on LR No 209/10350 Upper Hill, Nairobi.
  - v. A mandatory injunction compelling the Defendants, its employees, agents, servants and/or officers to vacate from LR 209/10350 Upper Hill, Nairobi with immediate effect and restore the possession and ownership of the parcel of land to the Plaintiff.
  - vi. A declaration that LR 209/10350 situated in Upper Hill, Nairobi is the exclusive property of Ukamba Agricultural Institute and it's not subject to Legal Notice 102 of 2008 and therefore not transferred and/or vested in South Eastern University College.
  - vii. General damages.
  - viii. Costs of the suit and interest.
2. It is the Plaintiff's case that it is a limited liability company, limited by guarantee without share, duly incorporated under Cap 486 of the *Companies Act*; that the Plaintiff is a membership organization whose affairs are handled by the Board of Directors and was incorporated, inter-alia, for the purpose of provision of agricultural, scientific training and research facilities under the auspices of Ukamba Agricultural Institute and that the Plaintiff is the lawful owner of all that parcel of land known as LR 209/10350 measuring approximately 1.5 acres(hereinafter the suit property).
  3. It was averred in the Plaint that vide a Gazette Notice issued on July 18, 2008, Ukambani Agricultural Institute was established as South Eastern University College vide the South Eastern University College Order, 2008 as a constituent college of the University of Nairobi and that it was declared by the South Eastern University College Order that all rights and assets held by or on behalf of Ukambani Agricultural Institute were automatically and fully vested and/or transferred to South Eastern University College.
  4. According to the Plaintiff, it was registered as a distinct legal person from Ukambani Agricultural Institute and its properties are not subject to the legal notice.
  5. According to the Plaintiff, sometime in March, 2009, the Plaintiff's business structures erected on the suit property were demolished by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the basis of transfer of ownership pursuant to the Legal Notice and that the demolition was irregular and unlawful as the parcel of land was neither subject to South Eastern University College Order and/or the legal notice.
  6. It is the Plaintiff's case that the Defendants have unlawfully entered into and remained on the suit property and have interfered with its proprietorship rights thereof and that it is apprehensive that the Defendants will continue interfering with the enjoyment of their properties and cause them irreparable harm.
  7. In response, the 1<sup>st</sup> Defendant filed a Defence and Counter claim in which he denied the assertions in the Amended Plaint stating that the Plaintiff was incorporated for purposes of providing agricultural and scientific training and research facilities under the auspices of the Ukambani Agricultural Institute and that the Plaintiff's affairs are handled by the Governing Council of the Plaintiff and not a Board of Directors which is neither known nor specified in the Plaintiff's Memorandum and Articles of Association.
  8. It was averred in the Defence that while title to the suit property is in the Plaintiff's name, the Plaintiff is not the legal owner of the property; that the Plaintiff is put to strict proof of the allegations that it is a distinct legal person from Ukambani Agricultural Institute; that UKAI College is duly defined in



- the Plaintiff's Memorandum and Articles of Association and that the Plaintiff has not challenged the conversion of UKAI College into a constituent college of the University of Nairobi.
9. According to the Defendant, on September 17, 2008, a special meeting was held by the Plaintiff's Board of Directors where it was agreed, inter-alia, that the Board of Governors would make preparations to hand over all of its functions to the 1<sup>st</sup> Defendant's Council; that the Principal of UKAI and the secretary of the Board of Governors were to compile information on all the assets including title deeds as well as creditors and submit the same to the Board of Governors and that the title deeds for all the parcels of UKAI's land was to be given to the Board of Governors for onward transmission to the 1<sup>st</sup> Defendant.
  10. According to the 1<sup>st</sup> Defendant, on November 21, 2008, the Plaintiff's stakeholders held a meeting where it was agreed that the Board of Governors would manage the affairs of the 1<sup>st</sup> Defendant pending the appointment of the University College Council by the Government and that the Plaintiff's infrastructure was to be immediately improved and modernized.
  11. It was averred in the Defence that pursuant to Article 57 of the Memorandum and Articles of Association, the Plaintiff's assets are exclusively vested in the Board of Trustees; that the 1<sup>st</sup> Defendant is unaware of any resolution to institute the suit and if it exists, it is void as the Board of Directors of the Plaintiff does not exist and that it is the 1<sup>st</sup> Defendant who stands to suffer losses if the Plaintiff is allowed to use or sell the suit property contrary to the provisions of the Memorandum and Articles of Association of Ukamba Agricultural Institute Limited.
  12. The 1<sup>st</sup> Defendant, vide the Counterclaim, has sought for the following orders:
    - i. Amended Plaint dated June 5, 2009 be dismissed with costs.
    - ii. A declaration that the said property No 209/10350 Upper Hill, Nairobi is an asset of the 1<sup>st</sup> Defendant as per the Gazette Notice No 102 of 2008 dated July 15, 2008.
    - iii. An order be issued directing the Plaintiff to deliver the physical possession of the said property LR No 209/10350 to the 1<sup>st</sup> Defendant.
    - iv. In the alternative an order issued directing the Plaintiff, its agents/servants, tenants or whomsoever to vacate the property LR No 209/10350 forthwith.
    - v. Inquiry as to the damages be ordered on the commercial activities conducted on the said property by the Plaintiff and its agents from the July 15, 2008 to date of judgement.
    - vi. An order be issued to the Plaintiff, his servants, agents or assigns to deliver all books of accounts, balance sheets, bank accounts, schedules of assets and liabilities to the 1<sup>st</sup> Defendant.
    - vii. A mandatory injunction be issued to the Plaintiff, its servants, agents or whomsoever from charging, letting, interfering, alienating or any act whatsoever inconsistent with the terms of the Title no 209/10350 and Legal Notice 102 of 2008 dated July 15, 2008.
  13. The 2<sup>nd</sup> Defendant did not file a Defence. The Plaintiff filed a Reply to Defence and Defence to Counterclaim on September 16, 2009 in which it reiterated the averments in the Amended Plaint and further stated that the Governing Council, vide a resolution dated March 21, 2009, authorized Mr James Munywoki to institute civil proceedings against the Defendants and that the word 'Board of Directors' in the Amended Plaint was an oversight.
  14. According to the Plaintiff, contrary to the 1<sup>st</sup> Defendant's assertions, the Board of Governors is merely a managerial body created in the Memorandum and Articles of Association of UKAI and cannot



in any way deal with the suit property, which powers are vested in the Governing Council; that the Plaintiff has never held nor participated in the stakeholders' meeting of November 21, 2008 and that the Plaintiff has the right to enjoy the suit property.

### Hearing and Evidence

15. The matter proceeded for hearing on the January 24, 2019. PW1, the Chairman of the Plaintiff's company, testified that in March, 2009, the Defendant's officials demolished the market structures on the suit properties at night; that when confronted, the 1<sup>st</sup> Defendants officials gave them an order from the President containing a legal notice and that the body with the mandate to deal with matters touching on the Plaintiff is the Governing Council which was unaware of the Defendants actions and not a Board of Governors which does not exist.
16. It was the evidence of PW1 that there exists a Board of Trustees which cannot transfer property; that there are several suits touching on this issue being Petition No 11 of 2010 which was stayed pending the outcome of this case, ELC 456 of 2015 between UKAI and NLC which the Plaintiff instituted to stop NLC from inquiring into the property and that in its defence, NLC sought to revoke the Plaintiff's title.
17. PW1 informed the court that NLC in JR 57 of 2017, NLC was stopped from proceeding with the investigations; that the Court should nullify the legal notice and order for the payment of damages for the destroyed structures and that the suit property has about 250 market stalls which were occupied by tenants.
18. In cross-examination, PW1 stated that the title to the suit property is not held by Dubai Bank in liquidation as claimed by NLC; that the Plaintiff is a Private Company limited by Guarantee; that there is a resolution by UKAI Governing Council dated the March 19, 2010 authorizing the institution of the suit and that the stalls on the suit property were used as boutiques and various other businesses, none of which were educational.
19. It was the testimony of PW1 that there is a motor vehicle business and hotel from which the Plaintiff derives around Kshs 500,000 used to sponsor needy children in Ukambani; that UKAI's objectives don't include carrying out business for profit; that the title was given to UKAI to set up a social hall and nursery school but they applied for a change of user and that the documents relating to the change of user are not in the documents filed by the Plaintiff.
20. It was the evidence of PW1 that they had begun the process of selling the suit property to Dubai Bank but the sale did not succeed; that the Bank paid a deposit of 10% which was Kshs 38,000,000; that this case was instituted by UKAI whereas the articles provide that it is the Governing Council that should institute the proceedings and that the Memorandum and Articles of Association at page 4 of the 1<sup>st</sup> Defendant's bundle is an outdated document. PW1 stated that UKAI has no body known as stakeholders and any action by stakeholders does not bind the institute.
21. On further cross-examination, PW1 stated that he is the Chairman of UKAI and they primarily deal with dry land farming; that UKAI limited owns UKAI college but the college was forcefully taken over by South Eastern University College, which in collusion with the 2<sup>nd</sup> Defendant, demolished their structures in Upper-Hill at midnight and that they have challenged the legal notice vide a Constitutional Petition and that he does not understand why the 2<sup>nd</sup> Defendant is in these proceedings.
22. On re-examination, PW1 stated that they are seeking damages from the 2<sup>nd</sup> Defendant whose tractors demolished the properties at Upper Hill; that the Upper Hill property is still in the name of UKAI;



- that the Gazette Notice No 5696 was drawn by the National Land Commission; that apart from the Upper Hill Property, UKAI also took over UKAI college in Kitui.
23. DW1 was David Muoka Mutiso, an Architect and Physical Planner. He adopted his statement as his evidence in chief and adduced a bundle of documents as DEXB1. It was his testimony that it is the officials of the 2<sup>nd</sup> Defendant who requested the then President to have the properties by UKAI taken over by SEKU and that he is the one who introduced Stephen Muli to UKAI.
  24. According to DW1, the Upper Hill property was exchanged with a plot where Starehe Boys Centre is situated, which was owned by Ukamba New Union and that the properties owned by UKAI were donations by the County Council of Kitui and Machakos because they were going to put up an educational centre.
  25. On cross-examination, DW1 stated that the Starehe Boys Centre land was owned by New Akamba Union (NAU); that the land was exchanged with the Upper Hill property; that he is one of the founding members of UKAI; that the decision of the Board of Governors was subject to the approval of the Governing Council which had to sanction any sale of the property and that the Legal Notice refers to Ukambani but it should be Ukamba. It was the evidence of DW1 that they were aware that the suit property was in the name of UKAI when they went to see the President.
  26. On further cross-examination, PW1 stated that he was a pioneer of UKAI and their intention was to set up an institute to advance the concept of dry farming; that UKAI is affiliated to the University of Nairobi and that if the demolished structures were not related to education, the demolitions were okay.
  27. On re-examination, DW1 stated that the title for the suit property indicates that the Lease runs for 99 years with effect from May 1, 1985; that UKAI College has always been part of UKAI; that the notice refers to Ukambani Agricultural Institute in brackets UKAI; that UKAI appears in the Memorandum and Articles of Association and that other than the Plaintiff, there is no other entity that uses the initial UKAI. It was stated by DW1 that the land where UKAI sits is in its name and that if Legal Notice 102 of 2008 is revoked, the University will cease to exist.
  28. The Vice Chancellor of South Eastern KU, DW2, adopted his witness statement as his evidence in chief. He testified that Clause 4 of the Memorandum and Articles of Association provides for the purpose of the income received by UKAI; that the suit property was to be used for a social hall and nursery school but is now being used for the sale and storage of motor vehicles and that the Sale Agreement between UKAI and Dubai Bank was entered into after the Gazette Notice.
  29. It was the evidence of DW2 that there is no provision for a Director in the Memorandum and Articles of Association; that the purchase price for the land was Kshs 254,000,000/= and Kshs 38,100,000 being deposit was paid; that it is unclear where the monies went to and that the properties of UKAI are vested in the Trustees and Stephen Muli is not one of the Trustees.
  30. It was averred that the 1<sup>st</sup> Defendant filed a Counterclaim seeking to be compensated in terms of the income generated from the suit properties; that there is no other institute known as Ukambani Agricultural Institute; that the President was consulted before the Legal Notice was issued and that the same was in furtherance of the objectives of UKAI.
  31. According to DW3, there were minutes of January 27, 1994 where the role of the Governing Council and the Board of Trustees was discussed; that the suit was filed after the issuance of the Legal Notice; that the stakeholders proposed that UKAI be made a constituent college of the University of Nairobi and that there was no objection to the same.



32. During cross-examination, DW3 stated that the Certificate of Incorporation refers to Ukamba Agricultural Institute; that UKAI does not have Directors neither is there a provision for Directors in the Memorandum and Articles of Association; that he is unaware of the precise number of members of the Governing Council; that as the holder of the property, he has the powers to deal with it and that UKAI has at its apex a Board of Governors but they cannot overrule a decision by the Governing Council.
33. It was the testimony of DW2 that under the memorandum and Articles of Association, it is only 2/3 of members who can dissolve the institute; that the Government can only acquire land for a public purpose through compulsory acquisition; that the Government wanted to build a harambee annex on the land belonging to UKAI and that he is unaware of the Legal Notice which seeks to acquire Narok Teachers College.
34. On re-examination, DW2 stated that the Memorandum and Articles of Association did provide for Directorship of the Company; that the Directors ARE listed in the CR12 of March 5, 2009 and February 10, 2010 although they changed later and that the members who appeared in the CR12 of March 5, 2009 did not object to the transfer of the land during the stakeholders' meetings held in 2007 and 2008.
35. It was the evidence of DW2 that the impugned Legal Notice was issued by President Mwai Kibaki who was never enjoined in the proceedings; that the Governing Council was to manage the finances and assets of the institute while the Board of Trustees was to deal with the property; that he has never been a member of the Plaintiff's Company but a member of the Plaintiff and that the suit property is owned by the Plaintiff and he is unaware whether the 1<sup>st</sup> Defendant was given a letter of allotment.

### Submissions

36. The Plaintiff's counsel submitted that clause 3(1) of the Legal Notice No 102 of 2008, established the 1<sup>st</sup> Defendant; that clause 4 thereof provided that the assets held by Ukambani Agricultural Institute shall be automatically transferred to the University Council and that whereas the Plaintiff herein is Ukamba Agricultural Institute, the Legal Notice refers to Ukamba Agricultural Institute which is a different entity from the Plaintiff and has no legal consequence.
37. It was submitted by the Plaintiff's counsel that a Legal Notice is not a means of conveyance of property under the Kenyan legal regime as expressed by Section 36(1) as read with Section 37(1) of the [Land Registration Act](#) and Section 34 and 35 of the Registered Titles Act (repealed).
38. It was counsel's submission that the Plaintiff's right to the suit property is protected by Article 40 of the [Constitution](#) as well as Sections 24, 25 and 26 of the [Land Registration Act](#) and that the state can only deprive a person/entity of its property through the process of compulsory acquisition, which is not the case here.
39. It was submitted that as set out in the locus classicus case of *Salmon vs Salmon and Co Ltd(1897) AC*, a company is a distinct legal entity and has the capacity to hold and own property in its own name; that the Plaintiff has adduced a certificate of title as evidence of ownership and is therefore entitled to all the rights and privileges appertaining to the ownership as set out in Sections 24 and 26 of the [Land Registration Act](#) and that as discussed in [Margaret Njeri Wachira vs Eliud Waweru Njenga \[2018\]eKLR](#), a title is prima facie evidence of ownership which can only be challenged pursuant to the provisions of Section 26(a) and (b) of the [Land Registration Act](#).
40. Counsel submitted that the evidence by the 1<sup>st</sup> Defendant regarding the meeting of September 17, 2008 is of no value as none of the 1<sup>st</sup> Defendant's witnesses sat on the Board nor attended the meetings



alluded to and that the 1<sup>st</sup> Defendant's evidence with respect to the operation of the Plaintiff is concerned is heresy and inadmissible. According to counsel, contrary to the 1<sup>st</sup> Defendant's assertions, a stakeholder meeting cannot convey property.

41. The 1<sup>st</sup> Defendant's counsel submitted that as expressed by the Court in *Fina Bank Ltd vs Chandarana & Another [2004] eKLR*, if a company is incorporated beyond the scope set out in its Memorandum and Articles of Association, its actions are void even if incorporated by all the members and that pursuant to the Memorandum and Articles of Association, this suit could only have been filed by the Governing Council as the Plaintiff has no Board of Directors.
42. Reliance in this respect was placed on the case of *Jatin Shantilal Malde & 9 Others vs Transmara Investment Limited & 2 Others [2018] eKLR*; that the persons operating the Plaintiff have vide their evidence shown they are acting contrary to the purpose of the Plaintiff by running a commercial enterprise on the property and that the Memorandum and Articles of Association contemplated the dissolution of the Plaintiff and vesting of its property in another charitable educational institution, which action was discussed in two stakeholder forums in 2007 and 2008.
43. It was submitted that the Legal Notice and its gazettment were not challenged by the Plaintiff in the Amended Plaint; that subsequently, the 1<sup>st</sup> Defendant's rights, privileges and obligations thereunder are not challenged; that the fact that the notice refers to Ukambani and not Ukamba Agricultural Institute does not in itself render it defective and that the Plaintiff is not entitled to the equitable orders having come to Court with unclean hands for carrying out commercial activities contrary to its intended purpose.
44. The 2<sup>nd</sup> Defendant's counsel submitted that the 2<sup>nd</sup> Defendant does not lay claim on the suit property and has nothing to do with the demolitions; that the Plaintiff admitted to having no claim as against the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant's witness testified that he was unaware of any interference with the suit property by the 2<sup>nd</sup> Defendant.

### **Analysis & Determination**

45. Having carefully considered the pleadings, the evidence and submissions herein, the issues that arise for determination are:
  - i. Whether the suit is competent?
  - ii. Who between the Plaintiff and the 1<sup>st</sup> Defendant is the lawful proprietor of the suit property?
  - iii. What are the appropriate reliefs to issue?
46. In the present suit, the Plaintiff is seeking to assert ownership of the property known as LR 209/10350 (hereinafter the suit property) and to protect it from interference by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. According to the Plaintiff, it duly incorporated company, limited by guarantee and incorporated to provide agricultural and scientific research facilities under the auspices of the Ukamba Agricultural Institute.
47. It is the Plaintiff's case that it is the duly registered proprietor of the suit property; that sometime in March 2009, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered onto the suit property and destroyed the structures therein and that the destruction was done pursuant to Legal Notice No 102 of 2008 in which Ukambani Agricultural Institute was established as South Eastern University College, a constituent college of the University of Nairobi.



48. It is the Plaintiff's case that Legal Notice No 102 of 2008 was incapable of transferring the suit property to the 1<sup>st</sup> Defendant as first, the Plaintiff as registered company is a distinct legal person from Ukambani Agricultural Institute and its properties are not subject to the Legal Notice and secondly, that there was no authority by the Governing Council, the Plaintiffs supreme governing body, acquiescing to the transfer of the suit property and lastly, that the suit property was not capable of being transferred in the manner set out in the Legal Notice.
49. The 1<sup>st</sup> Defendant contends that it is the lawful owner of the suit property on account of the Legal Notice; that the Plaintiff is not a stranger to Ukamba Agricultural Institute erroneously referred to in the Legal Notice as Ukambani Agricultural Institute; that reference to Ukambani was actually a reference to UKAI College which is owned by the Plaintiff and that through several meetings, it was resolved that the Board of UKAI would ensure smooth transition and transmit, among others, the title deeds to the 1<sup>st</sup> Defendant.
50. The 2<sup>nd</sup> Defendant maintains that it has no interest in the suit property, and has not interfered with the same.
51. Before delving into the merits of the suit, it is noted that there is an objection as to the competency of the suit. The objection is two-fold, firstly, whether the suit was instituted without the requisite authority and secondly, whether the Amended Complaint contravened Order 4 Rule 4 of the Civil Procedure Rules.
52. It is the 1<sup>st</sup> Defendant's case that the suit is fatally defective for contravening Order 4 Rule 1(4) of the Civil Procedure Rules. The aforesaid order provides as follows:
- ' Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.'
53. In discussing this provision, the Court of Appeal in the case of Spire Bank Limited vs Land Registrar & 2 others [2019] eKLR stated as follows:-
- ' It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.'
54. In the present matter, the Amended Complaint was filed in 2009 and was subject to the Civil Procedure Rules, 2009. The 2009 Rules did not have a provision similar to Order 4 Rule 1(4) of the 2010 Rules. The 2009 Rules stated under Order VII Rule 1(2) that the Complaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments in the Complaint.
55. Nonetheless, this omission, which is indeed admitted, would not warrant a drastic action as striking out of the suit especially considering that it has not been alleged or demonstrated that the officer who swore the Verifying Affidavit was not authorized. The objection does not go to the root of the matter



neither does it prejudice the 1<sup>st</sup> Defendant in any manner. Acceding to this objection, especially at this late stage, would be to defeat the ends of justice by elevating procedure at the expense of justice.

56. According to the 1<sup>st</sup> Defendant, the Plaintiff did not have the capacity to institute the suit and that pursuant to its Memorandum and Articles of Association, the suit could only have been instituted by and in the name of the Governing Council or its Board of Trustees.
57. The Plaintiff, on its part, asserts that it is a company and a distinct legal entity capable of suing and being sued in its own name and further, that it has provided evidence of a resolution by the Governing Council authorizing the institution of the suit.
58. Looking at the evidence, there are two different Memorandum and Articles of Associations adduced by the parties. The 1<sup>st</sup> Defendant relies on the Memorandum and Articles of Association dated the June 7, 1983 and revised in May, 1993. The Memorandum and Articles of Association adduced by the Plaintiff states that it is an amendment of July 15, 2002.
59. Both Memorandum and Articles of Associations have been certified by the Registrar of Companies as true copies and in the absence of any evidence impugning any of them, the logical conclusion is that the one adduced by the Plaintiff, being the most recent is the relevant one. Nonetheless, both state the following with respect to the functions of the Governing Council of the Plaintiff:

' There is hereby established a Governing Council, a body corporate with perpetual succession and capable of suing and being sued on behalf of the Institute which shall be the Governing authority of the Institute and shall have the custody, control and disposition of all the property and finances of the institute.'

60. In the present circumstances, the suit has been instituted by the Plaintiff in its own name. While it is true that the Plaintiff as a Company is duly authorized to institute a suit, its memorandum grants this power to the Governing Council.
61. The Plaintiff has adduced into evidence a resolution by the Governing Council authorizing the institution of the suit. The resolution is dated March 19, 2010 and postdates the filing of the suit. Nonetheless, this together with the evidence of PW1, himself a member of the Governing Council sufficiently proves that the Governing Council is well aware of and acquiesced to the institution of the suit. In view thereof, the Court opines that the same is sufficient in this respect.
62. The dispute herein turns on the ownership of the suit property which both the Plaintiff and the 1<sup>st</sup> Defendant lay claim to. Each party is therefore obligated to prove its case on the required standard of proof, being on a balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the [Evidence Act](#). Section 107 provides as follows:

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'



63. Sections 109 and 112 of the same Act states as follows:

' 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

'112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

64. To begin with, it is important to set out the nature of the Plaintiff. The Plaintiff describes itself as a Limited Liability Company, Limited by Guarantee. Indeed, there is a Certificate of Incorporation Number C 9/83 which confirms that the Plaintiff's existence is pursuant to its registration under the repealed Companies Act on June 7, 1983 as a company limited by guarantee and not having a share capital.

65. As correctly submitted by the Plaintiff's counsel, the Plaintiff is a separate legal entity within the definition of the landmark decision in the case of *Salomon vs Salomon Co* [1897] AC 22, where the House of Lords held that 'the company is at law a different person altogether from the subscriber.'

66. It is also undisputed that there is a Legal Notice No 102 of 2008 which establishes the 1<sup>st</sup> Defendant as the successor of Ukambani Agricultural Institute and provides under clause 4 as follows:

' All rights, liabilities and assets held by or by anybody on behalf of Ukambani Agricultural Institute existing at the commencement of this Order shall be automatically and fully transferred to the University College'

67. While the Plaintiff has impugned the Legal Notice, it is noted that its propriety is not a subject of this determination. No orders have been sought in that respect. More importantly, there is a pending constitutional case dedicated to answering this question. This court will not therefore venture into the legality of the said Legal Notice.

68. The 1<sup>st</sup> Defendant has argued that clause 3 of the Legal Notice refers to Ukamba Agricultural Institute College, an entity created by the Plaintiff and as such, the Plaintiff cannot distance itself from it; and that the Legal Notice used the initials UKAI which are the same initials used by the Plaintiff.

69. It is factually undisputed that the Plaintiff is Ukamba Agricultural Institute Limited while the Legal Notice refers to Ukambani Agricultural Institute. On the face of it, these appear to be two distinct entities and the most direct finding would be that the notice does not apply to the Plaintiff.

70. However, it is clear that the 1<sup>st</sup> Defendant understood the notice to refer to the College as created by the Plaintiff and proceeded to take what it believed to be its properties, provoking the present suit. While the Plaintiff asserts that it is a distinct legal entity from the one referred to in the Legal Notice, it has not provided any documentation distinguishing it or showing the existence of Ukambani Agricultural Institute.

71. Several documents relied on by the Plaintiff shows that it refers to itself by the abbreviation UKAI and the College, UKAI College. The Plaintiff (UKAI) is a company while UKAI College established thereunder is an educational institution. That being so, it cannot have been contemplated that a University college will succeed a Company. For that reason, the Court is satisfied that the Legal Notice referred to UKAI College, and not the Plaintiff, which is a company.



72. It is undisputed that the Plaintiff is the registered owner of the suit property. The Certificate of Title adduced by the Plaintiff has not been impugned by any of the Defendants. While it is conceded that UKAI College is a creation of the Plaintiff, there is nothing to suggest or prove that the suit property belongs to the College and that the same was held by the Plaintiff for the College.
73. The title held by the Plaintiff was registered under the Registration of Titles Act (repealed) which provides as follows with respect to proprietorship;
- ' 23.
- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.'
74. The same principle is replicated in Section 24 of the [Land Registration Act](#), 2012 which provides as follows;
- ' Subject to this Act-
- i.
- (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'
75. One of the rights of a proprietor of land is the right to dispose off the same. As a company, the Plaintiff is guided by its Memorandum and Articles of Association, which is its constitution. Both parties agree that the Governing Council is the supreme decision making body of the Plaintiff. However, the 1<sup>st</sup> Defendant has argued that the properties of the Plaintiff were vested in the Board of Trustees and that the Legal Notice was the culmination of consultations between UKAI, its trustees and stakeholders.
76. What is missing, however, is evidence of a resolution, be it by the Governing Council or the Board of Trustees authorizing the transfer of the suit property. Apart from the missing authority, there is indeed no evidence of a transfer in the nature contemplated under Section 35 of the Registration of Titles Act (repealed) or pursuant to section 3(3) of the [Law of Contract Act](#) which mandates all disposition in land to be in writing.
77. In view of the foregoing, was the Legal Notice in itself sufficient? As aforesaid, the Plaintiff herein is a legal entity, registered under the [Companies Act](#), under the control and direction of its own Directors and Members, and capable of owning assets, rights and interests.
78. Any purported takeover of the Plaintiff's property by way of a Legal Notice, before winding up the Plaintiff, was tantamount to compulsory acquisition of property in a manner that contravened Section 70 (c) and 75 (1) of the retired Constitution. These provisions stipulate, inter alia, that no property of any description shall be taken over, or interest in or right compulsorily acquired unless compensation had been paid.



79. The Legal Notice did not also accord with the provisions of the Land Acquisition Act (repealed) that set out the mandatory procedures and processes for the compulsory acquisition of land by the government. In particular, section 8 of the repealed Act provided as follows:

' Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land.'

80. In *Attorney General vs Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment)*, the Supreme Court reiterated that the right to property is sacrosanct and can only be deprived under particular circumstance stating;

' The fact that the respondent was the registered proprietor of the suit property, has never been called into question, or challenged by the appellant. Indeed, during the proceedings at both the trial and appellate courts, the ownership status of the suit property was never in doubt. It remains an uncontroverted fact that the respondent acquired the suit property pursuant to a Grant of Lease by the Government. By the time the cause of action arose, the lease in favour of the respondent was still intact.

The main controversy, revolves around the legality or otherwise, of the manner in which the Government, went about acquiring portions of the suit property, and conferring title over the same, in favour of third parties. The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of the *Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time.'

81. It is the finding of this court that the impugned Legal Notice was not capable of transferring any interest in the suit property and the 1<sup>st</sup> Defendant cannot lay claim to the suit property on account thereof. The Plaintiff's title to the property remains unchallenged. However, the court finds that the Plaintiff did not prove its claim in respect to damages.

82. For those reasons, the Court finds that the Plaintiff has established its case on a balance of probabilities and proceeds to make the following determination:

- i. The 1<sup>st</sup> Defendant's Counterclaim be and is hereby dismissed.
- ii. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, employees, agents, assignees, successors, servants or otherwise howsoever from evicting or in any way whatsoever interfering with the possession enjoyed by the Plaintiff over all that parcel of land or property known as LR 209/10350 situate in Upper Hill Nairobi.
- iii. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, employees, agents, assignees, successors, servants or otherwise howsoever from trespassing, occupying, alienating, selling, transferring and or dealing in any manner whatsoever with all that parcel of land or property known as LR 209/10350 situate in Upper Hill, Nairobi.
- iv. A mandatory injunction does hereby issue compelling the Defendants, their employees, agents, servants and/or officers to vacate from LR 209/10350 Upper Hill, Nairobi within 60 days and restore the possession and ownership of the parcel of land to the Plaintiff.



- v. A declaration be and is hereby issued that LR 209/10350 situated in Upper Hill, Nairobi is the exclusive property of the Plaintiff and it's not subject to Legal Notice 102 of 2008 and therefore was not transferred and/or vested in South Eastern University College.
- vi. Each party will cater for its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Ndolo for Ms Kilonzo for 1<sup>st</sup> Defendant

Mr. Karige holding brief for Nyakoe for 2<sup>nd</sup> Defendant

Mr. Omari for Plaintiff

Court Assistant - Tracy

