Trans-Nzoia Teachers Housing Cooperative Society Limited v Kenya Prisons Service & another (Environment & Land Case 153 of 2016) [2023] KEELC 20604 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20604 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 153 OF 2016

FO NYAGAKA, J

OCTOBER 6, 2023

BETWEEN

TRANS-NZOIA TEACHERS HOUSING COOPERATIVE SOCIETY LIMITED ..... PLAINTIFF

AND

KENYA PRISONS SERVICE ..... 1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

JUDGMENT

1. The suit was instituted by way of a Plaint dated 20/9/2016 filed on 21/10/2016. Before the close of pleadings, the Plaintiff amended them and filed an Amended Plaint dated 12/6/2018 on 9/7/2018. The Plaintiff sought the following reliefs:

    a. A mandatory injunction requiring the 1st Defendant, its servants, agents and or any other persons acting though the 1st Defendant to remove itself or themselves from the land parcel number Kitale Municipality Block 6/93, restore the beacons uprooted by Prison officers from Kitale Medium prison and or a permanent injunction restraining the 1st Defendant, its servants, agents and/or any other persons acting through the 1st Defendant from trespassing and/or entering, wasting or interfering with land parcel number Kitale Municipality Block 6/93 and or in whatever other manner interfering with the Plaintiff's quiet possession thereof.

    b. Costs and interest of this suit.

    c. Any other relief this Honourable court may deem fit to grant.

2. The Defendants entered appearance on 14/8/2018 and filed its Statement of Defence and Counterclaim on 17/9/2018. It sought the following reliefs:

i. The Plaintiff's suit be dismissed with costs.

ii. Judgment be entered against the Plaintiff in terms of the counter-claim as follows;

a. A declaration that Kitale Municipality Block 6/93 or any other title in Plaintiff's name arising from the prison land was unlawfully, irregularly and fraudulently hived out and or excised from a gazetted prison land.

b. A declaration that the Plaintiff's acquisition of Kitale Municipality Block 6.93 is illegal and fraudulent and the Plaintiff's title documents are null and void ab initio.

c. An order cancelling title and all entries made in the register of Kitale Municipality Block 6/93, suit parcel of land herein and all titles obtained in a similar fashion.

d. A declaration that 1st Defendant and by extension Kitale Medium Prison is entitled to peaceful and quiet possession and use of all land forming suit parcel land.

e. An order of permanent injunction restraining the Plaintiff, its servant, agents and or any other person acting under it from ever laying claim to, interfering with or in any other manner dealing with the suit parcel of land herein.

iii. Costs of the counter-claim and interest thereon at court rates.

3. After the close of pleadings, the suit proceeded by viva voce evidence whose hearing commenced on 7/3/2022.

The Plaintiff's Case

4. PW1, Wanjala Khisa Pantaleon, testified that he was the Chairman of the Plaintiff, having previously been its secretary. In support of this assertion he produced and marked as PExh. 1 the Minutes of the meeting held on 22/12/2017, confirming his appointment. It was his evidence that the Plaintiff was the registered proprietor of all that parcel of land namely Kitale Municipality Block 6/93 measuring 2.4 Ha, the same having being registered on 8/9/2016. He produced the Certificate of Lease and Official Search as PExh2 (a) and 2(b).

5. His further testimony was that the suit property was previously registered in the name of Trans-Nzoia Teachers Cooperative Savings and Credit Society Limited (Sacco) which obtained the Certificate of Lease on 2/6/1995. That the lease followed an allocation of the suit property to the Cooperative Society via a letter of allotment dated 22/7/1993. He produced the original Certificate of Lease, a green card and the Letter of Allotment as PExh 5(a), PExh 3(b) and PExh 5(b) respectively. He testified further that by way of a transfer dated 7/4/1998 which he produced and marked as PExh4, the Plaintiff obtained the lease for the suit property from the Sacco. He asserted that the relationship between the Sacco and the Plaintiff was that both had the same members, and the Sacco transferred the suit property only for purposes of housing teachers. He produced the original certificate of incorporation for the Plaintiff and marked it as PExh 6. Subsequent to the Sacco being allocated the suit property, beacons were erected and a beacon certificate dated 10/2/1996 issued. He produced the beacon certificate as PExh7.

6. His further evidence was that via a meeting held on 10/9/2016 the Plaintiff passed a resolution authorizing the filing of this suit. He produced the Minutes and Resolutions of the meeting as PExh 8(a) and 8(b) respectively. He maintained that on 16/4/2015, prior to filing of the instant suit, the Plaintiff issued against the Attorney General (AG) a notice to institute suit. That the AG responded to the notice on 13/5/2015. He produced and marked the notice and reply as PExh 9(a) and 9(b)

respectively. PW1 emphasized that the suit property was not prison land and that it is actually registered in the name of the Plaintiff. That the Prison land falls within Block 3 whereas the Plaintiff's falls within Block 6. He stated that the Prison had its own title though he did know the land reference number allocated to it. He insisted that the Prison land was in Block 3.

7. PW1 testified further that the Plaintiff was obtained legally the suit property it owned by following all requisite process towards its acquisition. He testified that the reason why the Plaintiff sued was the fact that it had not been occupying the suit property on account of being evicted and denied entry to it by the 1st Defendant. He asserted that the officers of the 1st Defendant uprooted the beacons to the suit property. He stated orally further that he had been to the suit property and knew where it was located. Also, that he knew the Kitale Medium Prison land and the two parcels were a kilometre apart. He urged this court to grant the prayers sought in the Plaint.

8. Upon cross-examination he stated that he signed documents on behalf of the Plaintiff after he was given authorization. Upon being referred to PExh1 he stated that by the time the meeting was held he was already the Chairman of the Plaintiff and the Minutes indicated as much. But he admitted to being elected the Chairman on the said material date despite there being no agenda to that effect in the Minutes. He stated that the Plaintiff was registered in the year 1994 and that the suit property was transferred to it in the year 1998 but the certificate of lease was obtained in the 2016. He elucidated that the lapse of 20 years was on account of the fact that the Plaintiff was planning develop the suit property. When referred to PExh4 he confirmed that there were two signatures against the part of the secretary. But he stated that the Plaintiff only had one secretary.

9. PW1 stated further in cross-examination that the PExh5(b), the letter of allotment did not indicate the Part Development Plan (PDP) number on it. But he insisted that a copy of the PDP was attached to the letter of allotment. He further stated that he did not have any evidence to demonstrate that the PDP was advertised for sixty days (60) before it was issued to the Plaintiff. He stated that he neither had a letter of survey of the suit property nor did he produce a survey plan which ought to have accompanied the PDP. PW1 testified that the letter of allotment was issued by the Commissioner of Lands but he did not have any letter of authorisation by the President granting authority to the Commissioner of Lands to issue the suit property to the Sacco. Further he testified that he did not produce any letter from the Sacco seeking that it be allocated the suit property.

10. Upon being referred to PExh7 he testified that the beacon certificate was issued on 2/3/1996 which was before the Sacco made an agreement to transfer the suit property to the Plaintiff. He stated further that the beacon certificate was actually for the subdivision of the property LR No. Kitale Municipality Block 6/93 into 41 portions and it was issued after the Plaintiff made an application for subdivision of the suit property. However, he admitted that there was no beacon certificate for the creation of the suit property and he did not produce any other beacon certificate. He stated that he was not present when the beacons for the suit property were being placed and he could not tell the type of beacons that were placed. But he stated much later that they were steel rods, though he did not produce any evidence to support this contention.

11. On being asked about PExh 9(a) and 9(b) he confirmed that the Sacco was the instructing body that authorised the issuance of the demand letter and not the Plaintiff, nevertheless the reply was done to the Plaintiff. Subsequently he confirmed that there was actually no demand letter issued from the Plaintiff to the Defendants. PW1 was referred to the defendants List of Documents. From one, he confirmed he was able to locate the suit property from the aerial view of Kitale Prison which was at the bottom left corner but confirmed not knowing the neighbouring people or owners. Afterward being shown the PDP he asserted that the suit property neighboured that of the late Mr. Serut, KCC and Jua kali,

and to the bottom there was a river. But he could not tell that the 1st Defendant's boundary was within the suit property nor was he aware that KCC and Jua Kali were on part of the 1st Defendant's land.

12. Upon being cross examined on when the Sacco took possession of the suit property he stated that it did so sometime in 2012 or 2013, planted maize and fenced the property. He stated that the Sacco was actually the one which was evicted from the suit property by the 1st Defendant and not the Plaintiff. However, the Sacco did not file any case and or sue the 1st Defendant over the eviction. He further admitted that from the year 2013 to 2016 to the filing of this suit was about 4 years.

13. On being shown DExh1, DExh2 and DExh3 he stated that as 1943, one hundred and fifty-nine acres (159) had been gazetted for GK Prison. He admitted that he did not have any evidence to show any de-gazettement of part of the 159 acres for excision from the 1st Defendants parcel of land. Further upon being shown, he confirmed DExh4 that as at 4/12/2009 the de-gazettement of 159 acres had not been done. Referred to DExh6 he stated that under Gazette Notice of 721 of 1961 and Legal Notice No. 359 of 1943 it was clear that LR No. 272 had an approximate acreage of 159.01. Further, that the Plaintiff had been allocated 10 acres although under development status it showed that it had laid claim to the land but were yet to take possession of the allocated portion. Further he confirmed that under the part of way forward about the said 10 acres the report recommended that the title ought to be revoked and land repossessed. But he did not to agree with the report. He admitted further that the Plaintiff's land was adjacent to Mr. Serut's land and that both Mr. Serut's and the Plaintiff's suit properties were part of the 1st Defendant's land.

14. In re-examination he stated that when the allotment letter was issued the suit property was indicated as being un-surveyed. He maintained that the parcel of land bordering the suit property was plot No. 71 and he had not been shown any document to ascertain that Plot No. 71 actually belonged to Mr. Serut. Further he maintained that the legal notice 721 of 1961 did not show the acreage of the 1st Defendant's property but only referred to prison buildings. He demystified the fact that DExh6 did not explicitly mention the suit property but only mentioned other parcels of land on Block 6 as being encroached. But it did not provide that the suit property was among them and that the suit property was thus not among the titles to be cancelled.

15. PW2 Naomi Rop, testified that she was a Land Registrar in Trans-Nzoia County since January, 2021. She confirmed that her duties included the issuances of titles deeds and certificates of official search, and acting as the custodian of the land registrar and other searches. She testified the PExh 2(a) was a Certificate of Lease for the suit property in the name of the Plaintiff. It was issued on 8/9/2016 and was sealed with the official seal. She further testified that PExh 2(b) was an official search of the suit property dated 29/1/2019. She stated that they had records for the suit property. She produced the white card and the green card for the suit property as PExh 11(a) and 11(b) respectively. She testified that acreage of the suit property was 2.40 Ha and that the Certificate of title was genuine, and that there had never been any complaints from any person private or public about the said suit property.

16. On cross-examination and being referred to PExh 11(a) and 11(b) she confirmed that the suit property was initially issued and or was registered in the name of the Trans-Nzoia Teachers Co-operative Savings and Credit Society Limited (Registered Trustees). Further that before the issuance of the Certificate of Lease to the Plaintiff a lease had been issued to the Sacco. She further confirmed that before a Certificate of Lease was issued to the Sacco, a lease was sent from the Lands Office headquarters at Ardhi House. It was drawn in the name of the Cabinet Secretary Ministry of Lands and Physical Planning and it was booked in Kitale on 2/6/1995.

17. On further cross-examination, she confirmed that the issuance of lease is normally accompanied by a sealed Registry Index Map (RIM). However, she admitted that she did not have the RIM for the suit

property but that it ought to be there. She asserted that the RIM existed but she did not produce it in court though it was in the office. She further testified that before an amendment of the RIM and issuance of a lease, the amendment comes first. She further confirmed that the lease document showed that the lease was to run from 11/8/1993 for a period of 99 years and the amendment of the RIM comes before a lease is made. Nevertheless, she admitted that according to PExh10(b) the RIM for the suit property, the amendment of the RIM was done after the issuance of the lease and according to her the same was un-procedural and improper. She asserted that she did not deal with allotments and or Part Development Plans (PDP).

18. On re-examination, she clarified that the first amendment of the RIM was done on 25/4/1994 and it was in respect of the title of the suit property. She confirmed that a RIM is amended after the issuance of the lease and that there was no un-procedural step in that process. She asserted that she did not have the original sealed RIM in court but that the same existed.

19. PW3 Protus Muhindi, testified that he was the County Surveyor Trans Nzoia having worked as such for three years. His duties included being in charge of all survey matters in the County and the custodian of all survey records for the County. He confirmed having the records for the suit property. He testified that he was also the custodian of maps including those of public land including the map for Block 6 and that the suit property existed on the map. He further testified that from the map the parcels adjacent to the suit property was parcel No. 93 which also borders Block 3 as shown on the map produced as PExh 10(b). He asserted that there was nothing suspect about the map and it was the official map for Block 6. He produced the RIM and marked it as PExh 10(b). He stated that Block 6 borders Block 3 on the northern side and Block 4 on the eastern side. He further testified that he was aware of the existence of Kitale Medium Prison but confirmed not seeing any records for the 1st Defendant nor whether the prison land was surveyed and that he did not have its records.

20. On cross examination he stated that he was a registered surveyor not a licenced surveyor and he had never surveyed the suit property. He asserted that Sacco acquired the suit property through government allocation and that they ought to have a letter of allotment accompanied by a PDP. He maintained that a letter of allotment must always indicate a PDP number. Upon being referred to PExh5(b) he confirmed that the letter of allotment did not indicate a PDP number and normally a letter of allotment is accompanied by a PDP itself. He stated further that the PDP attached to the letter of allotment issued to the Plaintiff did not have a number and it was not in order nor was it proper.

21. He admitted that the PDP attached to PExh5(b) bore names of owners of the land but it did not indicate the name of the Sacco but the ones adjacent to the suit property had names written on it. Upon further cross examined on the issue of PDP for the suit property he stated that the suit property was created as a result of the PDP and that a PDP normally is made before survey. He further testified that there was a possibility of someone securing a different PDP if none was indicated on the letter of allotment. Nevertheless, he indicated that he did not have the corresponding file on the survey of the suit property. He testified elaborately on the process of allocation of a parcel of land. He stated that for one to be allocated land by the National Land Commission (NLC) he has to apply to the District Allocation Committee which was chaired by the District Commissioner (DC). Its members were to be from the Lands Office of whom the Physical Planner was one. Upon receipt of the application, the Committee would then issue a letter of allotment after which the land is surveyed. After the survey, a survey plan is drawn. He confirmed having the survey plan for the suit property but not the survey plans that existed before the suit property was surveyed as Parcel No. 93. After the survey, a beacon certificate is issued. The Director of Survey gives the Commissioner of Lands a go ahead to issue a lease to be executed. When doing so the Director is supposed to give the Commissioner of Lands an Authentication Slip and then a sealed RIM. He further testified that he did not know if there was a

sealed RIM for the suit property nor did he have one thus he could not tell if the proper procedure was followed in the acquisition of the suit property.

22. On re-examination he stated PExh10(b), the RIM tallied with PExh5(b) the letter of allotment, which is normally prepared by the Director of Survey. He stated that once survey is done, the records are sent to the Director of Survey and that PExh5(b) was based on the records held with the survey. Further he stated that no party had questioned PExh5(b). That marked the close of the Plainitff's case.

The Defendant's Case

23. DW1 Leonard Ogutu testified on behalf of the 1st Defendant. His oral testimony was that he was the Inspector of Prisons, Land Survey having worked with the office as a surveyor for six years. He testified that he was aware of all the prison lands in Kenya and most especially the ones in Trans-Nzoia County. He testified that he knew the suit property. He stated that he was familiar with the process of allocation of public land to private individuals and proceeded to expound on the said process. He states that before government land is available for allocation to a private person, Cabinet has to sit, deliberate on the proposal, approve and approve degazettement of the land and it is degazetted and then the process of allocation started as provided by law. He further stated that the suit property was part of government land pursuant to a Legal Notice No. 721 of 1961, Gazette Notice 145 of 1943 and Legal Notice No. 753 of 1963. He maintained that the acreage of Kitale Medium Prison - the 1st Defendant - was 159 acres and that to date the prison's property had never been degazetted. He produced the Legal Notice 721 of 1961 as DExh1, Legal Notice No. 753 of 1963 as DExh2, letter dated 16/9/1996 as DExh3 and letter dated 4/12/2009 as DExh4 respectively.

24. He testified that when a party doesn't accept the offer of an allocation within 30 days, the land is allocated to another individual or taken back to the government. However, according to Pexh5(b) the Plaintiff exceeded with two days as the allotment was made on 22/7/1993 and the acceptance was made on 24/8/1993. He stated that he visited the prison land when the 159 acres were being surveyed and he confirmed that Kitale Block6/93 was part of the 159 acres of the prison land. He stated further that the 159 acres of the prison could lie within two or more Blocks (within Kitale) and it is possible that the parcel of land for the 159 acres could overlap between Block 6 and 3 of Kitale Prison.

25. His testimony was that there were no occupants on the 159 acres except the 1st Defendant. He stated that people had tried to claim the 1st Defendant's property. Nonetheless using the office of the Attorney-General (AG), the Ethics and Anti-Corruption Commission (EACC) and National Land Commission (NLC) through the presentation of a report to the National Security Advisory Committee (NSAC) in 2017 the same was not possible.

26. He stated that according to PExh5(b) the 1st Defendant's land neighbours the Hindu Cemetery, the Mohammedan Cemetery, Township Primary School and the road to the market and on the other side of the market. He further stated that the PDP indicates that the suit property was part of the 1st Defendant's land and that the Plaintiff's letter of allotment does not have a PDP number.

27. He testified that a committee was formed to find out the extent of grabbing of the 1st Defendant's land. He was a member of the Committee which then presented a report to the NSAC, which was marked as DMFI 5 and 6. In the report, the Committee established that Ebenezer Health Service, Jua Kali shades, Bahati Academy, Mr. Serut, Trans Nzoia Cooperative Society and others had encroached the 1st Defendant's land. He produced the extracts of the report as DExh 5 and DExh6. He further testified that the procedure in which the suit property was allocated to the Plaintiff was not proper. He produced the Legal Notices No. 721/1161 and 750/63 and a letter dated 4/12/2009 as DExh 1, 2 and 3 respectively.

28. On cross examination he asserted that he was an expert in survey matters. He qualified as such in the year 2005. Upon being referred to DExh1 and DExh2 he admitted that the legal notice only gazetted the buildings to be used for prison and that legal Notice No. 751 of 1963 described all the prison land in Kenya not only the prison in Kitale. He stated that in terms of acreage the legal notice described the prison land as all that parcel of land described in Legal Notice 721 of 1961. He stated that the 1st Defendant's land measuring 159 acres was yet to be surveyed thus did not have a title deed. He asserted however that in 2012 the prison land was surveyed by the office of the Director of Surveys and issued with freehold titles.

29. He was referred to DExh3 a letter which he admitted did not show the ownership of the 159 acres of land of the 1st Defendant nor did it indicate a LR number but only indicated FR/272. Referred to DExh6 he stated that appendix did not show the suit property but only indicated persons written under and in this case, it showed the Plaintiff.

30. On re-examination DW1 confirmed that number written against LR No. being FR/272 was the folio registration number and that the acreage of the 1st Defendant's land was 159 acres. He testified that the name of Plaintiff was among the list of people that had encroached the 1st Defendant's property.

31. DW2 Samuel Mugo Gatoto, a Senior Superintendent of Prisons testified that he was currently in charge of Nyandarua Prison. That between March, 2014 to September 2020 he was the officer in charge of Kitale Medium Prison. He adopted the witness statement he wrote on 29/01/2020 as his evidence in chief. In the statement he stated that he was the immediate former officer in charge of the G.K. Kitale Medium Prison. The prison was initially known as G.K. Kitale remand prison before it changed to its current name Kitale Medium Prison. He asserted that the suit property (LR. No. Kitale Municipality Block 6/93) fell within 159 acres belonging to the 1st Defendant. The land was gazetted as prison land as per Gazette Notice No. 145 of 1943 and that to the date of the testimony the 159 acres had never been degazetted.

32. He stated that the Plaintiff did not hold a valid title to the suit property as it was never available for allocation nor were they in possession of the suit property. He stated further that the suit property had never been surveyed thus no beacon certificate was ever issued thus the property was still government land to date.

33. He stated that the 1st Defendant's land measuring 159 acres was gazetted vide Gazette Notice No. 145 of 1943 and consequently it is reserved for public purpose. Therefore, the Plaintiff could not purport to having been allocated the suit property and the title issued to them was procured fraudulently. He further stated that the transactions purporting to create a title in the name of the Plaintiff were a nullity as due procedure was not followed in regard to the alteration of boundaries of the survey map or amendment of the gazette notice. He urged the court to cancel the Plaintiff's title and reversion of the same to the government. That marked the close of the Defendant's case.

34. Later both parties agreed that the Court visits the disputed land. The Court therefore reopened both parties' cases solely for purposes of the site visit. It conducted the visit on 21/3/2023. At the site, DW1 was recalled and reminded he was still on oath. Standing at one corner of the parcel of land said to be G.K. Prison land measuring 159 acres, he pointed out to the Court where one of the beacons was before it was uprooted when the bordering land property was fenced with a wall. (The Court observed that the land bordered the Hindu and Muslim cemeteries which were fenced with a stone perimeter wall and a fifteen-metre wide road reserve which ran to the river. The road separated the land from Kitale Dumping Site). DW1 continued in evidence that the Prison land lay between the cemeteries and the road reserve which went to the Lower Elgon Road near the stream. He pointed land was which

cultivated and had had maize germinating. He stated it was the Prison land and on it, at from where the Court and witnesses stood the disputed parcel of land stretched, cutting off the 159 acres. He stated that from where Court and witnesses and counsel stood, the Prison land stretched to the market road up the hill. (The Court sketched the visualization of the same from the description by the witness).

35. He testified further that at the time of testimony the land did not have beacons because they were uprooted/removed. He repeated that when land is allocated it ought to be given a PDP and when a survey of the same is done, a beacon certificate is issued. He stated that he saw a beacon certificate but did not know it was gazetted. He repeated that for government land to be allocated to a private person the Cabinet has to sit and issue a Memo to degazette the land. Cabinet must approve the degazettement. That where there was none then the allocation was illegal.

36. On cross-examination he stated that he was not aware that there were beacons on the land to demarcate the extent of the portion claimed by the Plaintiff. He stated that beacons do not give rise to a title but a title is issued after a survey of land is done. He insisted that previously government land was preserved by a Gazette. He stated that the Gazette he produced showed that the Prison land was 159 acres.

37. On re-examination he stated that before, the Prison land had beacons at the corners. That marked the close of the Defence case once more.

38. The Plaintiff's witness, PW1, too was recalled at the site. He testified while pointing out to the Court that the Plaintiff's land bordered the Hindu Cemetery and the Prison land, and stretched from the corner point where the Court, witnesses and learned counsel stood but off the road reserve towards the river but did not reach the river/ stream. He stated that there was another road, the Lower Elgon road which bordered it at the bottom end. He insisted that the land belonged to the Plaintiff. It measured 7 acres. That prisoners uprooted the beacons but he could not tell if the beacons that were there earlier separated the Plaintiff's land and the Hindu Cemetery. That previously there was a road separating the Plaintiff's land and that of the Cemetery and it formed a T-Junction with the fifteen-metre road reserve (described earlier by the DW1). He repeated that the Plaintiff followed due process in acquiring the land.

39. On cross-examination, stated that the land in question was not prison land and the Plaintiff was the original allottee. The Plaintiff was unaware that the land was Prison land and that it should have been degazetted first. He stated that there used to be beacons separating the disputed land from that of the neighbours and it was criminal to interfere with boundaries. He admitted, however, that the Plaintiff had never reported the matter of removal of beacons to the police and no one had ever been charged with interference with the boundary. He stated that no survey had been done to indicate there were beacons on the land or that they were removed. That previously the Plaintiff utilised the land for maize farming but he could not tell how much was harvested. In re-examination he stated that he could not recall how long the Plaintiff used the land before being barred.

40. Upon the Court clarifying from the witness, he stated that indeed the Map the Defendants had showed a feeder (access) road. He could not tell the purpose of an access road.

41. At that the Plaintiff also closed its case once again.

Submissions

42. Following the close of parties' respective cases, all the parties were directed to file and exchange their closing submissions. The Plaintiff filed their submissions on 15/11/2022 whereas the Defendants filed their submissions on 16/5/2023.

The Plaintiff's Submissions

43. Counsel for the Plaintiff outlined the following three issues for determination.

    i. Whether the Plaintiff is the legal registered owner of land parcel Kitale Municipality Block 6/93

    ii. Whether the suit land was ever gazetted as prison land and whether the suit land was ever surveyed as prison land and that the Defendants acquired its ownership and any other parcels around obtained in a similar fashion.

    iii. Whether the Defendants 's counterclaim should be dismissed.

44. On the first issue Counsel submitted that the evidence adduced including the Plaintiff's exhibits and verbatim testimonies indicate that the suit property was indeed allocated and eventually transferred to the Plaintiff. He submitted that based on the aforementioned the Plaintiff has demonstrated that the suit property is lawfully registered in the name of the Plaintiff and not the Defendants.

45. On whether the suit property was ever gazetted as prison land, Counsel submitted that since the prison land has never been surveyed there was no way of ascertaining how the 159 acres were marked and gazetted as prison land and further the Gazette Notice produced of 1961 only gazetted some buildings as a prison and not the purportedly 159 acres that allegedly belonged to the prison.

46. On the issue of the Defendant's Counter-Claim, Counsel urged that on account of the Defendant's abandoning their counter-claim, the same ought to be dismissed as a matter of course

The Defendant's Submissions

47. The Defendant's went on to summarize the pleadings and the evidence of the parties, as given above: this court will not reproduce the summary once again They then framed eight issues for determination, being:

    i. Whether the Plaintiff has locus standi to institute and argue the suit.

    ii. Whether the suit is time barred.

    iii. Whether Kitale Municipality Block 6/93 is part of and or was hived out from gazetted prison land.

    iv. Whether Kitale Municipality Block 6/93 was acquired unlawfully and fraudulently

    v. Whether the 1st Defendant is entitled to peaceful and quiet possession and use of the suit land.

    vi. Whether the Plaintiff's suit has merits.

    vii. Whether the Counter- claim has merit.

    viii. Whether the orders sought ought to be granted.

48. On the first issue Counsel submitted that the instant suit was fundamentally defective as there was no evidence of a duly sealed resolutions authorizing the Plaintiff to institute or even maintain the proceedings. Counsel relied on Order 4 Rule 1(4) of the Civil Procedure Rules which provides that for a body corporate as it is the case for the Plaintiff, the verifying affidavit ought to be sworn by an officer of the company duly authorised under seal of the company. Counsel submitted that on account of the lack of capacity on the part of the Plaintiff as provided for under Order 4 Rule 1(4), the instant suit was defective, incompetent and ought to be struck out.

49. On the second issue being that the suit is time barred, Counsel made reference to Section 3(1) of the Public Authorities Limitations Act and Section 4(2) of the Limitations of Actions Act. Counsel submitted that the Plaintiff alleged trespass to the suit property by the 1st Defendant but fail to indicate the date when the action accrued. Counsel argued that it was a fatal omission on the part of the Plaintiff not to include the date when the action accrued on account of its claim being a tortious one. Nevertheless, Counsel submitted that during cross examination PW1 admitted to having been forced out of the suit property in or about 2012 whereas the suit was instituted in year 2016. Counsel submitted that based on the provisions of statute, the Plaintiff's admission the suit herein was indeed filed outside the time limit provided by law. Further no reasons were adduced for the said delay nor were there orders of extension of time within which to file the suit. Counsel placed reliance on the case of Haron Onyacha Vs National Police Service Commission & Another (2017) eKLR and he urged that the suit be dismissed on account of being statute barred.

50. On whether the suit property was part of or was hived out from gazetted prison land, Counsel argued that no evidence was tendered by the Plaintiff in terms of a survey plan or a beacon certificate to demonstrate the suit property is distinct from the 159 acres of land reserved as prison land. He argued that the beacon certificate that was tendered as evidence was for the subdivision of the suit property into 41 portions. Counsel submitted that PW3 did not have the correspondence file from the Director of Survey which would have included a valid PDP, survey plan, beacon certificate and the land reference number as allocated by the Director of Survey. Further the Counsel submitted that the allotment letter produced by the Plaintiff did not have a PDP number nor did the PDP have a definite number. Consequently, Counsel reiterated that the lack of the said crucial documents and PDP number, the Plaintiff cannot be allowed to state that the suit property was not part of or was hived off from the 159 acres of land gazetted as prison land.

51. Counsel further submitted that conversely the Defendants tendered elaborate evidence in the form of legal notice 721 of 1961, Legal Notice 753 of 1963, letters dated 16.9.1996 and 4/12/2009 demonstrating that indeed the suit property was hived off the 159 acres reserved as prison land and that the prison land being 159 acres overlaps the two blocks, being Block 3 and Block 6. He submitted that even during the site visit conducted on 21/3/2023 it was demonstrated that the suit property was within the prison land and there was no boundary between the suit property and the prison land. he thus urged the court to make inference that the suit property is part and or was hived out from the 159 acres of land set aside for prisons use.

52. The Defendants Counsel submitted that the suit property was yet to be surveyed and if at all it was surveyed then the said survey was yet to be registered. He placed reliance of Section 32 of the *Survey Act* and submitted that land is only deemed as having been surveyed when the survey plan is authenticated by the Director of Survey and in the instant case no survey plan was tendered as evidence thus demonstrating that the suit property still forms part of the 159 acres of land reserved for public purposes. He argued that even if the land had actually been surveyed, allocated to the Sacco and subsequently transferred to the Plaintiff, the same was not done lawfully nor was it done procedurally.

53. On whether the suit property was acquired illegally, unlawfully and fraudulently, Counsel made reference to Section 2 of the Government *Land Act* (Repealed) and Section 3 of the Physical Planning Act together with cases of Kipsirgoi Investments Limited Vs Kenya Anti-Corruption Commission (2018) eKLR, Chemey Investment Limited Vs Attorney General & 2 Others (2018) eKLR, Kenya Anti-Corruption Commission Vs Lima Limited & 2 Others (2019) eKLR and Timothy Ingosi & 87 Others Vs Kenya Forestry Services & 2 Others (2015) eKLR.

54. Counsel submitted that based on the above cited cases and provisions of statute the Defendant have demonstrated that the suit property was never unalienated government land nor was it available for allocation to the Plaintiff. Further the legal instruments that reserved the suit property as prison land were never degazetted. The Defendant's counsel argued that even if the Plaintiff were to contend that the suit property was unalienated and thus available for allocation, the due process was still not complied with. He submitted that under Section 3(a) of the Government Lands Act only the president could grant or dispose off estates, interest or rights to unalienated government land and in this instance the Plaintiff did not tender any evidence on the presidential authority to alienate the suit property. The Defendants relied on the case of Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR where the Court of Appeal substantively analysed the issue of the procedure of acquiring title.

55. Counsel for the Defendants reiterated that the acquisition of the suit property was thus un-procedural, illegal as the land was not available for alienation other than for public use and un-procedural as the correct procedure was not followed.

56. On whether the 1st Defendant is entitled to peaceful and quiet possession and use of the suit property, Counsel submitted that the suit property is being occupied and utilized by the prisons. He submits that this is demonstrated by the fact that possession by the prison predates the colonial times and the prison has been in peaceful and uninterrupted occupation, possession and utilisation to date. This is in contrast to the Plaintiff who have failed to tender evidence that they have ever been in occupation of the suit property. The Defendants urged on account of the above-mentioned they are entitled to continued quiet possession and use of the suit property to the exclusion of the Plaintiff.

57. On the issue of whether the Plaintiff's suit is merited the Defendants placed reliance on Section 26 of the *Land Registration Act* and in the cases of Munyu Maina Vs Hiram Gathiha Maina (2013) eKLR, Republic Vs District Land Registrar, Mombasa & 5 Others Ex parte Super Nova Properties Limited (2016) eKLR, Funzi Island Development Limited & 2 Others Vs County Council of Kwale & 2 Others (2014) eKLR and Kipsirgoi Investments Limited Vs Kenya Anti-Corruption Commission supra. Counsel submitted that the Plaintiff ought to demonstrate how it acquired the suit property and it simply not sufficient to wave a lease or a certificate of lease and assert that it has good title. Counsel further submitted that the onus was on the Plaintiff to demonstrate through tangible evidence that the title to the suit property was properly acquired. He argued that the right to property as envisaged under Article 40 of *the Constitution* does not extend to property unlawfully acquired. He relied on the case of Tom Dola & 2 Others Vs Chairman, National Land Commission & 5 Others (2020) eKLR.

58. On the issue of whether the Defendant's counter-claim has merits Counsel for the Defendants submitted that in absence of tangible evidence that the suit property was properly allocated to the Plaintiff's as envisaged under Article 40(6) of *the Constitution*, then the Plaintiff's title is impeachable for having been acquired unlawfully. Additionally, the Defendants have proved the particulars of fraud on the part of the Plaintiff's which evidence remains uncontroverted, thus the Defendants claim has merit and ought to be allowed.

59. On the last issue of whether the orders ought to be granted, the Defendants submitted that the Plaintiff had failed to prove their case against the Defendants and that it had failed to demonstrate what legal interest it had before 2016 to plead acts of trespass as against the Defendants. Further Counsel for the Defendant submitted that the Plaintiff had failed to met the threshold for granting of an injunction nor have they demonstrated existence of any beacons on the suit property or the removal thereof to warrant the grant of the orders sought.

60. The Defendants concluded their submissions by reiterating that there was ample evidence that the suit property was part of the gazetted prison land reserved for public use only and that the prison department had been in possession since precolonial times. Further they submitted that the title issued to the Plaintiff was in breach of statutes and the Defendants had on a balance of probabilities proved their case.

Issues, Analysis And Determination

61. I have considered the pleadings, the evidence adduced by the parties in support of their respective cases and in my view the issues arising for determination are as follows;

    a. Whether the Plaintiff has locus standi to institute the instant suit.

    b. Whether the Plaintiff has proved that its title is lawful as to entitle it to sustain a claim for trespass

    c. Whether the suit is statute barred.

    d. Whether Kitale Municipality Block 6/93 is part of gazetted prison land.

    e. Whether Kitale Municipality Block 6/93 was acquired illegally, unlawfully and fraudulently.

    f. Whether the Defendant's counter-claim has merit.

    g. Who bears the costs of the suit?

Whether the Plaintiff has locus standi to institute the instant suit.

62. The Defendants are seeking that the suit to be struck out on the ground that the Plaintiff did not comply with the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010. This is on account of the fact that they were no duly sealed resolutions filed authorizing the Plaintiff to institute the present suit, and neither did the Plaintiff demonstrate appointed the firm of Katama Ngeywa & Company Advocates to file the present suit nor was the Plaintiff authorized Pantaleon Wanjala Khisa to swear the verifying affidavit. Order 4 rule 1(4) of the Civil Procedure Rules 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.'

63. I am alive to the fact that in its pleadings the Plaintiff describes itself as a limited liability company and therefore it is trite that the deponent of the verifying affidavit ought to annex the authority as provided for under Order 4 Rule 1(4) of the Civil Procedure Rules. In the case of Leo Investments Ltd Vs Trident Insurance Company Ltd (2014) eKLR Odunga, J agreed with the decision of Kimaru J in the case of Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR when faced with a similar scenario stated: -

> " ...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit." Emphasis mine

64. Correspondingly the Court of Appeal in the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR have also analysed the import of Order 4 Rule 1(4) by stating 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." Emphasis mine

65. In the present matter the Plaintiff at the time of filing its Plaint on 21/10/2016 also filed minutes of meeting held on 10/9/2016 and a sealed resolution dated 10/9/2016 attached to the bundle of documents dated 25/11/2021. In the said resolution, they appointed and authorized the firm of Katama Ngeywa & Company Advocates to file the present suit and also authorized Mr. Pantaleon Wanjala Khisa to execute all documents including any required pleadings. The said resolution was under the letter head of the Plaintiff company and was duly executed under seal in the presence of the Chairman of the Plaintiff. In the premises I am of the view that there cannot be any doubt that Mr. Pantaleon Wanjala Khisa was authorized to plead on behalf of the Plaintiff and that the verifying affidavit accompanying the plaint was properly signed by him. Additionally, even if the said resolution was lacking it would not be sufficient for the Defendants to merely state that the Plaintiff did not have authority but to avail sufficient evidence to show that Mr. Pantaleon Wanjala Khisa did not have the requisite authority. It would therefore not be in the interests of justice to dismiss a suit on the ground merely that there was no authority filed to institute the suit. That is a defect that does not, in my view, go to the jurisdiction of this court, and is an omission that is curable.

Whether the Plaintiff has proved that its title is lawful as to entitle it to sustain a claim for trespass

66. The Plaintiff sued the Defendant for an order of injunction against the latter due to a claim of trespass by the said Defendant. In order for a person to succeed in such a claim he/she/it has to have a valid title to the property in question. The Plaintiff claimed that its title to land parcel No. Kitale Municipality Block 6/93 was validly acquired. It called PW1, PW2 and PW3 to confirm the claim. The Defendant, on the other hand called DW1 and DW2 to refuted the claim through their evidence. I have carefully analysed the evidence of the parties. It is clear from the evidence of the Plaintiff, as given by PW1 and PW3 that the title of the Plaintiff was wrought with many procedural illegalities hence not lawful. First, from the documentary evidence provided, the copies of the letter of allotment (PExh 5(b) and the copy of the PDP attached to it were not certified by the office that issued them, as required by Sections 80 and 81 of the *Evidence Act*. I would reject the same as proof of the proper root of the title held by the Plaintiff. In any event the copy of the purported letter of allotment shows that it was, if at all, issued in favour of Trans Nzoia Teachers Association of P. O. Box 2274 Kitale. There is no evidence of how the said Association could be related to Trans Nzoia Teachers Co-operative Savings and Credit Society Limited.

67. If indeed there was a correlation, it should have been by way of a transfer of the asset in form of the parcel of the land between the two entities or it be shown how the former transformed into the latter. Absent of that then the latter ought to have produced a letter of allotment specifically showing that it was given an allotment which would ultimately give rise to the Lease [PExh 5(a)] executed on 2/06/1995 and subsequently transferred to the Plaintiff. Additionally, about the copy of the PDP shows that between the parcel of land it referred to and the Hindu Cemetery there lay a parcel of land unmarked or unnamed. This is contrary to the evidence which the Court received on the ground when it visited the site and PW1 and DW1 both testified that the disputed parcel of land was adjacent

to the Hindu Cemetery while PW1 added that the two were only separated by a feeder or access road. I therefore find that the Plaintiff has no valid title to base its claim of trespass and injunction. Much on this finding is explained below when dealing with the merits or demerits of the Defendants' Counterclaim.

Whether the suit is statute barred

68. The Defendants have averred that the suit is time barred as it contravenes the provisions of Section 3(1) of the Public Authorities Act and Section 4(2) of the Limitations of Actions Act. This is on account of the fact that PW1 admitted in cross examination that the Sacco was forced out of the suit property in or about 2012 or thereabout. Consequently, according to the Defendants, the instant suit being filed in 2016, was statute barred. A cursory perusal of the filed Amended Plaint undeniably shows that the Plaintiff alleges trespass of the suit property by the officers of the 1st Defendant which trespass they allege was done without their authority or consent. This precipitated the Plaintiff to seek for an order of mandatory injunction requiring the removal of the 1st Defendant, its servants, agents or any other person acting through the 1st Defendant from the suit property and a permanent injunction to prevent any continued trespass of the suit property by the Defendant or the interference with the Plaintiff's quiet possession.

69. Section 3(1) of the *Public Authorities Limitation Act* states as follows: -

> "No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

70. Additionally, Section 2(2) (a) of the *Public Authorities Limitation Act* defines proceedings against the government as follows;

> "Proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such." Emphasis mine

71. In consideration of the aforementioned provision, I am of the view that the 1st Defendant, is a government department within the meaning of Section (2)(2)(a) and thus falls within the purview of the *Public Authorities Limitation Act*. Consequently, it necessitates the application of the Public Authorities Limitations Act to ascertain the question of whether the Plaintiff's suit is constrained by statutory limitations.

72. Section 3(1) of the *Public Authorities Limitation Act* provides for a time frame of twelve months within which an action for tort ought to be filed. Despite the Plaintiff failing to adduce in its pleadings when the cause of action of trespass arose, it is not in dispute that PW1 admitted in cross examination that the officers of the 1st Defendant forcefully entered the suit property in or about the year 2012 and they have since then persisted on their acts of trespass. It is further not in dispute that the instant suit was filed in 2016, fours years after the alleged cause of action of trespass.

73. In Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR the Court of Appeal aptly held that;

> "...the overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, that it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims."

74. Similarly, in Haron Onyancha V National Police Service Commission & anotherf20171eKLR, where Mutungi J quoted the case of IGA V Makerere University [1972] EA 65 where Mustafa J.A and LAW, Ag. VP, held as follows; -

> " A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought.".". The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, the plaint must be rejected." Emphasis mine

75. Guided by the aforementioned authorities, it is trite law that a statute-barred plaint cannot disclose a reasonable cause of action. In my view the Plaintiff's suit is indeed statute-barred under both legislations or Acts of Parliament since the action of trespass occurred four years before the suit was instituted. Having found that the suit is time barred it is also obvious the court lacks jurisdiction to entertain the same. In my view it is common sense that the lapse of the limitation period means that the mandate of the court to receive and entertain proceedings in a particular cause of action is extinguished by effluxion of time. This was the court's rendition in the case of Bakery Confectionery Food Manufacturing and Allied Workers Union –vs Razo Limited [2021] eKLR where Onyango J held hat:

> " The claimant did not file the matter in court until 25th February 2016 which is 5 years after the last course of action arose. As such the suit is statute barred and the court does not have jurisdiction to hear and determine the claim."

76. To this end, I find that the Plaintiff's suit is indeed filed out of time as provided under the *Public Authorities Limitation Act* and its hereby struck out because statutory limitation goes to jurisdiction. Furthermore, the Plaintiff neither adduced any reasons for the said delay nor did the seek an extension of time to file the instant suit. Consequently, Plaintiff's suit is thus dismissed, with costs. I shall proceed to consider the Defendant's Counterclaim.

Whether Kitale Municipality Block 6/93 is part of gazetted prison land.

77. DW1 testified that the suit property was part of government land reserved for prison use and that the acreage of the prison farm was 159 acres. He maintained that the suit property was actually hived off from the 159 acres reserved for prison use. DW1 produced Legal Notice 721 of 1961, Legal Notice No. 753 of 1963, letter dated 16/9/1996 and letter dated 4/12/2009 as DExh1, DExh2, DExh3 and DExh4 respectively to evince the acreage of the prison farm and that the 159 acres of land was actually gazetted as prison land. PW1 equally testified that the Plaintiff was the registered proprietor of the suit property, the same having been allocated to the Sacco on 22/7/1993 and subsequently transferred to the Plaintiff. He produced the certificate of lease and the allotment letter as PExh 2(a) and PExh 5(b) respectively.

78. It is a principle of law, under Sections 107 and 108 of the *Evidence Act*, that whoever lays a claim before the court against another has the burden to prove it unless the law specifically lays the burden on the other party. From the evaluation of the evidence adduced and the testimonies of each parties, the

Defendants asserted though the production of legal notices and gazette notices that the suit property was part of the 159 acres of prison farm which had actually been gazetted as such the suit property was never available for allocation to the Plaintiff.

79. Despite the contentions of the Plaintiff that the Gazette Notice of 721 of 1961 gazettes some buildings as a prison and not the purportedly 159 acres, and the lack of production of the Gazette Notice No. 145 of 1943 which gazettes the 159 acres of prison land including the suit property, I take judicial notice of the Gazette 145 of 1943 that declares the prison property as being 159 acres which includes the suit property as mentioned in DExh3 is an official document of the Government of Kenya of which all and sundry ought to know. A gazette notice is a statutory instrument which is s it falls within the ambit matters this Court is enjoined under Section 60 of the *Evidence Act* to take judicial notice of. Section 60 of the *Evidence Act* provides for facts which the Court may judicially notice as follows:

> " Facts of which court shall take judicial notice
>
> (1) The courts shall take judicial notice of the following facts—
>
> (a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya...;"

80. Accordingly, I am satisfied that the Defendant discharged the burden of proof which it was required to do on a balance of probabilities, having adduced the legal notices and gazette notices that support its claim that the 159 acres of land of which it is claimed the suit property was hived off from was gazetted and reserved for Prison land, and it was public land. The evidence adduced by the Defendants in terms of the gazette notice remain uncontroverted. To this end, the burden of proof shifted to the Plaintiff to prove that the suit property was actually degazetted before being allocated to the previous owner, the Sacco, before subsequent transfer to the Plaintiff.

81. On the issue of degazettement, DW1 testified that he was a qualified surveyor. He also testified as to the process of public land being allocated to private individuals. His uncontroverted testimony was that where land belongs to government, before it is alienated to private persons, Cabinet must first sit, deliberate on the plan to degazette the land from public to private, approve of the degazettement, and the Notice degazetting the land is issued. At that point, the land will now be available for allocation. PW3, one Protus Muindi, testified elaborately on the process of allocation of land to individuals. This Court finds that this process kicks in when land has been made available for allocation upon the process alluded to by DW1 being followed, if it relates to land previously gazetted as public land. Thus, if is my finding that the Plaintiff failed to adduce any such evidence that the suit property was degazetted before it was allocated to the Sacco and eventually transferred to its name a fact that was admitted by PW1 during cross examination. To this end, I find that suit property is part of and or was hived out of the 159 acres of land that had been gazetted for prison use and the title which was issued to the previous owner who transferred to the Plaintiff had a questionable root legally.

Whether Kitale Municipality Block 6/93 was acquired illegally, unlawfully and fraudulently.

82. It was the Plaintiff's case that the suit property was acquired lawfully after it was allotted to the Sacco, transferred to its name and subsequently a Certificate of Lease issued to it on 8/9/2016. Section 107 of the *Evidence Act*, Cap 80, concisely states:

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

83. Also, further, Section 108 of the Act states thus:

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

84. Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

> " 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."

85. Consequently, the burden of proof squarely lay on the Plaintiff to prove that it was the proprietor of the suit property having acquired the same legally, lawfully and without any instances of fraud. The Plaintiff claimed to be the registered legal owner of Kitale Municipality Block 6/93 and asserted ownership of the suit property was founded on the allotment letter issued to the Sacco, Trans Nzoia Teachers Co-operative Savings Society Limited. The Defendants on the hand have questioned the allotment letter issued to the Plaintiff on the grounds that the suit property was not available for allocation on account of the land being reserved for prison use. To this end, it is incumbent on this court to interrogate the process of acquisition of the suit property vis a vis the legal prescription for the issuance of a parcel of land. In Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR the court expressed itself as follows on the issue of acquisition of a parcel of land;

> " It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process."

86. It is therefore necessary for the court to determine how the Plaintiff ended up having a Lease and Certificate of Lease in its name, and further determine if the Government did intend to issue the Plaintiff with a Lease over the suit land. It is trite that the process of acquisition of government land was set out in the Government Lands Act Cap 280 (Repealed), which Act gave powers to the president to allocate unalienated parcel of lands. Under the said Act it only provided two instances upon which government land could be allocated to private persons under Section 3 and 7 of the Government *Land Act*.

87. Section 3 of the Government *Land Act* (Repealed) provides;

> " The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
>
> (a)subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land."

88. Further Section 7 of the Government *Land Act* (Repealed) provided that;

> " The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act: Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128."

89. In the present case, the Plaintiff asserted that the suit property was allocated to it by the Commissioner of Lands and to buttress this point they produced the letter of allotment as Pexhb5(b). However, did the Commissioner of Land have power to alienate the suit property? In my view and in line with the aforementioned Sections 3 and 7 of the Government Lands Act (Repealed) only the president had the power to alienate government property and the Commissioner of Lands had no authority whatsoever. In James Joram Nyaga & Another V The Hon. Attorney General & Another [2007] eKLR the court referring to Section 3 and 7 of the GLA observed as follows:

> " The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya."

90. In the case of Ali Mohamed 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 the Court listed steps that ought to be followed in the disposition of government land. The Court expressed itself as follows on the issue of the procedure to be followed in acquisition of government land by private persons;

> " ...The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition...The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters

to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period...The fourth step would be for the gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants...The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed)... The sixth step would be for the issuance of an allotment letter to the allotee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. The allotment letter also must have attached to it a part development plan (PDP)
...

...The seventh step, which comes after the allotee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease." Emphasis mine

91. Guided by the steps provided in the aforementioned case, this Court has carefully and deeply reflected on the parties' evidence herein on the steps that the Plaintiff undertook towards the acquisition of the suit property in order to ascertain whether it was acquired lawfully and legally and without any instances of fraud. While PW1 stated how the Plaintiff acquired the suit land by way of transfer from the previous owner, and PW2 and PW3 attempted to demonstrate that there was "nothing suspect" (in the words of PW3) regarding the title held by the Plaintiff over parcel Kitale Municipality Block 3/93, it is not lost sight of the fact that the Plaintiff's witnesses admitted to some procedural failures in issuance of the letter of allotment. In particular, PW1 admitted that PExh5(b), the letter of allotment, did not indicate the Part Development Plan (PDP) number on it. Further, he did not have evidence that the PDP if any was advertised for 60 days as required by law and that the Plaintiff did not have a beacon certificate for the parcel of land. PW2 admitted in cross-examination that the amendment of the RIM was done after the issuance of the Lease though it should have been vice versa. PW3 admitted that there was no authorization by President to the Commissioner of Lands to allocated the land. Also, that the PDP attached to the letter of allotment issued to the Plaintiff did not have a number and it was not in order nor was it proper. He admitted also that there was a possibility of someone securing a different PDP if none was indicated on the letter of allotment.

92. To this end, I have carefully examined the copy of the letter of allotment produced as PExh5(b) which indicates that the property that was allegedly allocated to the Trans Nzoia Teachers Association was UNS. Residential Plot- Kitale Municipality measuring 2.4 hectares. However, the PDP that was attached to the Plaintiff's Letter of Allotment, although approved did not have a development number and in my view the absence of a properly documented PDP only renders the Plaintiff's Letter of Allotment as being incomplete. It is not possible for this court to ascertain how the suit property was even allocated to the Plaintiff in the first place without a definite PDP number since a letter of allotment is based on the PDP.

93. This position was asserted by Court in African Line Transport Co. Ltd Vs, The Hon. Attorney General, Mombasa HCCC No.276 of 2013, where the court held as follows on the issue of PDP: -

> " 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.

94. Additionally, the terms and conditions contained in the Letter of Allotment indicates that once offer was made to the allotee, acceptance had to be made within thirty (30) days from the date of issue and failure to which, the allotment would lapse automatically. It is clear that the offer was made on 22/7/1993. However, a cursory perusal of the letter of acceptance by the Sacco indicates that the same was accepted on 24/8/1993 which was two days after the expiry of the period that was stipulated in the terms and conditions contained in the letter of allotment. It is not clear as to when the same was delivered in the Lands Office but the remarks by the officer whose title is initialled as LA shows that acceptance of payment to the Ministry was made on 28/09/1993. That was a month after the expiry of the period stipulated. Again, the acceptance letter was made by an entity not allocated the parcel of land, even if the allocation were to be taken to be lawfully. In the law of contract, specifically under the doctrine of privity of contract, an agreement can only be reached between parties to the agreement. Thus, even if an acceptance can be said to have been made in this case, it was no acceptance at all. To date there has never been an acceptance of the offer by the Trans Nzoia Teachers Association. Thus, the purported letter of offer was never and has not been accepted to date. That being the case, the if there were processes that took place after the purported allocation as purported to be from the letter of acceptance onward to the issuance of the Lease and title in question, the Commissioner of Lands and the relevant offices and the said Trans Nzoia Co-operative Savings and Credit Society Limited they took place under a mistaken believe that the Commissioner of Lands was dealing with the proper allottee, which was not the case.

95. In any event, there is no evidence that the Commissioner of Lands had authority from the President to allocate the said government land. As admitted by PW3 in cross-examination, the Plaintiff did not have the authority to allocate the land. Therefore, he proceeded from a point of illegality in the first place. And even if he were to be found to have the authority, it is clear that the offer made to the Association lapsed and there was nothing to be accepted. Thus, anything done after the expiry of the period, absent of an extension, or a new letter of allotment was neither here nor there. Further in this case the suit land was already committed for public use and so unavailable for alienation even under Section 9 of the Government Lands Act.

96. Correspondingly it is the finding of this Court that the land that was allocated to the Trans-Nzoia Teachers Co-operative Savings and Credit Society Limited was part of the land reserved for Prison land. The land was not available for alienation to this initial allotee. It therefore follows further that the purported allocation of the suit property which was created from a gazetted prison land was unlawful. In my view, the title held by the Plaintiff having been created illegally following unlawful allocation of the reserved prison land could not confer upon it any valid interest in the suit property. As found earlier in this judgment, the root of the allotment was irredeemably flawed. In the absence of a valid proprietary interest in the suit property the said Sacco had nothing to transfer to the Plaintiff. The title that was conveyed to the Plaintiff by the said Sacco was in the circumstances invalid, null and void.

97. This finding is similar to the finding in the persuasive case of Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others [2013] eKLR Court held as follows;

> "My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in *the Constitution* and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose."

98. In my humble view it is thus clear that the Plaintiff in this case did not comply with any of the requisite steps outlined in the case of Ali Mohamed Dagane Supra that ought to be undertaken in the acquisition of government land by private persons as it is in the instant case. To my mind, this only means that the process of acquisition of the suit property by the Sacco and the eventual transfer to the Plaintiff was not only illegally as the land was never available for allocation but was also un-procedural since requisite procedures were not undertaken before the land was subsequently allocated to the Association. This is substantiated on account of the fact that the Plaintiff did not adduce any evidence to show that the following steps, which I summarize, were followed as required by law. One, that the 159 acres of prison land being degazetted to give rise to the suit property, two, an authority from the president directing the Commissioner of Lands to allocate the suit property to the Association; three, minutes of any municipal council identifying the suit property as being available for allocation; four, compliance with the terms and conditions in the letter of allotment nor was there a definite PDP number attached to the letter of allotment. Furthermore, there was no evidence adduced of a beacon certificate for the suit property as the one produced as PExh7 was for the subdivision of the suit property into four plots and not for suit property. Consequently, I find that the acquisition of the suit property by the Sacco and the eventual transfer to the Plaintiff was thus illegal, unlawful, un-procedural and was indeed fraudulent.

Whether the Defendant's counter-claim has merit.

99. As at this stage it is clear that the Defendants' claim is merited. The Defendants have sought to the cancellation of the Plaintiff's title and for a declaration that they are entitled to quiet and uninterrupted possession of the suit property. The Plaintiff on the other hand alleged that they were allocated the suit property by the then Commissioner of Land however, having found that the right procedure for allocation of the suit property to the Sacco was not followed, this court finds that the resultant title was irregularly issued. In the case of Kassim Ahmed Omar & Another Vs Anwar Ahmed Abed & Others, Malindi ELC No.18 of 2015, the Court held that:-

> " A certificate of title is an end produce of a process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court."

100. Further in the case of Funzi Development Ltd & Others Vs County Council of Kwale, Mombasa Civil Appeal No.252 of 2005, the Court held that: -

> "…. 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 sanctions an illegality or gives it seal of approval to an illegal or irregularly obtained title."

101. I find that the Plaintiff's title is one this Court cannot seal approval of.

102. Having found that the suit land was not properly alienated and that the Plaintiffs could not own land as they were not properly registered at the time of issuance of the alleged title, the Court finds that the Plaintiffs title was not properly acquired and cannot therefore not be protected by Article 40 of *the Constitution*. Article 40 (6) of *the Constitution* does not offer protection to property acquired irregularly or illegally. This Court having found that the Plaintiffs title was obtained irregularly declares it null and void and it is the best case of a title fit for cancellation hence the certificate of title issued to the Plaintiff.

103. Section 80(1) of the *Land Registration Act* grants the Court the discretion to direct that the register be rectified by cancellation of any certificate of lease. It Provides as follows: -

> " Subject to sub-section (2) the Court may order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made is omitted by fraud or mistake"

Who bears the costs of the suit?

104. Costs follow the event. The event herein is that the Plaintiff has lost his case and the Defendants have succeeded in their Counterclaim Thus, the Plaintiff is hereby condemned to pay costs of both the suit and Counterclaim.

105. For the foregoing reasons, on the one hand I find that the Plaintiff failed to prove its case on a balance of probabilities. On the other hand, Defendants succeed in their Counterclaim. I therefore enter judgment in favour of the Defendants against the Plaintiff in terms of the Counterclaim and issue the following orders:

a. The Plaintiff's suit is dismissed.

b. A declaration be and is hereby issued that that Kitale Municipality Block 6/93 or any other title in the Plaintiff's name arising from the prison land was unlawfully, irregularly and fraudulently hived out and or excised from a gazetted prison land.

c. A declaration be and is hereby issued that the Plaintiff's acquisition of Kitale Municipality 6/93 is unlawful and fraudulent and the Plaintiff's title documents are null and void ab intio.

d. An order be and is hereby issued cancelling title and all entries made in the register of Kitale Municipality Block 6/93, suit parcel of land herein and all titles obtained in similar fashion.

e. A declaration be and is hereby issued that the 1st Defendant and by extension Kitale Medium Prison is entitled to peaceful and quiet possession and use of all land forming Kitale Municipality Block 6/93.

f. An order of permanent injunction be and is hereby issued restraining the Plaintiff, its servant, agents and or any other person acting under it from ever laying claim to, interfering with or in any other manner dealing with Kitale Municipality Block 6/93.

106. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6TH DAY OF OCTOBER, 2023

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE