



**Pereira & 2 others (Suing as the trustees of the Goan Community, Mombasa) v
Catholic Diocese of Mombasa Registered Trustees & another (Environment and Land
Case Civil Suit 448 of 2002) [2022] KEELC 2 (KLR) (2 February 2022) (Judgment)**

Agapito Pereira & 2 others v Catholic Diocese of Mombasa Registered Trustees & another [2022] eKLR

Neutral citation: [2022] KEELC 2 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 448 OF 2002**

M SILA, J

FEBRUARY 2, 2022

BETWEEN

**AGAPITO PEREIRA 1ST PLAINTIFF
FATIMA LOBO 2ND PLAINTIFF
IGNATIUS PEREIRA 3RD PLAINTIFF
SUING AS THE TRUSTEES OF THE GOAN COMMUNITY, MOMBASA**

AND

**THE CATHOLIC DIOCESE OF MOMBASA REGISTERED
TRUSTEES 1ST DEFENDANT
ATTORNEY GENERAL 2ND DEFENDANT**

Categorizing as “public” a school that the Government does not own is a misnomer

A question arose in relation to the ownership of a school built on land that was given by a community pursuant to an agreement. The agreement allowed the Catholic Diocese of Mombasa to manage the school and it was said to have been breached. The community (the Goan Community) cited the alleged breach and sought vacant possession of the land and damages for repairs.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – right to education – types of schools – categorization of schools – assisted schools and public schools – factors to consider in determining whether a school was an assisted school – whether the designation of schools as public schools meant that the schools were owned by the Government – whether the handing over of the management of a school by its registered proprietor amounted to giving of a licence which could be revoked – Land Registration Act, Act No. 3 of 2012, section 24.



Brief facts

The case of the Goan Community was that it owned the land where the Sacred Heart School (school) was located. It averred that it handed over management of the schools therein to the Catholic Diocese of Mombasa, the 1st defendant, in the year 1991. In the year 2002, the Goan Community demanded the school back citing breach of the management agreement (agreement) of 1991. It thus sought vacant possession and damages for repairs.

For the defendants, although they did not dispute that the agreement of 1991 was drawn and executed between the plaintiff and the 1st defendant, they contended that the school was a public school even before the agreement. They claimed that the management of the school was thus with the Government and the Goan Community had no business demanding the school back or interfering with it.

Issues

- i. What were the factors to consider when determining whether a school was an assisted school?
- ii. Whether the designation of schools as public schools meant that the schools were owned by the Government.
- iii. Whether the handing over of the management of a school by its registered proprietor amounted to the giving of a licence which could be revoked.

Relevant provisions of the Law

Land Registration Act, Act No. 3 of 2012

Section 24 - Interest conferred by registration.

Subject to this Act—

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

Held

1. The proprietorship of the land where the school was situate, comprising of the nursery, primary and secondary schools, was with the Goan Community, Mombasa; under a freehold title. There was no encumbrance on that title by any person including the 1st defendant. That title was not disputed and was not challenged.
2. None of the witnesses were grounded in the school before the year 1991. Thus, none of the witnesses had first-hand information on the operations of the school prior to the year 1991. They all relied on the records handed over to them by their predecessors. The history of the school and its management would thus need to be determined based on the documentary evidence tendered.
3. The Education Act, 1968, was repealed by the Basic Education Act, Act No. 14 of 2013 which was the prevailing statute. It had only two categories of schools, public and private. Under section 2 and 43(1)(b) of the Basic Education Act, a private school comprised of schools established, owned or operated by private individuals, entrepreneurs and institutions. A public school under section 43(1)(a) covered schools established, owned or operated by the Government and included sponsored schools.
4. A public school could encompass a sponsored school, but it was not clear what the position was where the sponsored school was not owned by the Government. Prior to the Basic Education Act, 2013, there were categories of schools that would be aided or maintained by the Government but they were not Government owned. Probably that fact escaped the drafters when they drew the Basic Education Act, and the transitional provisions did not address the movement to the new categories of schools.
5. Of the three school registration certificates, only one was issued before 1991. The certificate issued on April 12, 1967 was for the school and the manager was the Board of Governors. In 1967, Kenya was operating under the 1952 Education Ordinance and the categories of schools were aided



- schools, Government schools, and public schools. The certificate did not state whether the school was Government, aided or public.
6. According to the minutes on March 7, 1991, the school was an aided school within the meaning of the 1952 Education Ordinance. Thereafter, after the enactment of the 1968 statute, it fell under the category of an assisted school. From a reading of those minutes, there was discussion on non-teaching staff and their salaries being paid by the Goan Community. The kindergarten was also being run wholly by the Goan Community and separately from the primary school. The school had a surplus of finances, and out of that surplus, Kshs. 40,000 went to the Goan Community. Therefore, the school was an aided school.
 7. The school was not a Government owned school. It was owned by the Goan Community. It appeared to be a misnomer to categorize as “public” a school that the Government did not own but that was the reality of the matter. The defendants argued that the school was a public school, but that was immaterial. What was material was that the Goan Community owned the school by virtue of being the registered proprietor of the land where the school rested. They could thus allow an entity to manage the property and the school, and they also had a right to cancel such licence.
 8. Where land for a school was held under a lease, the terms of the lease would dictate its use and proprietorship. A freehold title would not have conditions save probably conditions set out in town planning for the user of the land. A proprietor would be vested with all the proprietary rights which were given in the law. The Goan Community as the registered proprietor of the land was the entity that was vested with proprietary rights over the land. That was recognized by section 24 of the Land Registration Act, Act No. 3 of 2012.
 9. It was the registered proprietor who was vested with the rights and privileges belonging to or appurtenant to the land. That included the right to permit or licence a person to use that land and the right to terminate such permission or licence. That was precisely what happened through the agreement of January 1, 1991. The Goan Community, who hitherto were managing the schools, handed over their management to the 1st defendant.
 10. Both defendants did not refute that they had denied access to the Goan Community to operate the kindergarten. Neither was it denied that the schools had been handed over to the Ministry of Education. The Goan Community was the owner of the schools and what it handed over to the 1st defendant was akin to a licence, which had terms and which could be revoked. No term in that agreement permitted the 1st defendant to cede control and management of the school to the Ministry of Education. Thus, there was a breach of the terms and therefore, the Goan Community had the right to revoke the agreement.
 11. The revocation was done through the letter dated September 27, 2002 when the Goan Community demanded the Catholic Diocese of Mombasa to hand over possession of the school together with all the assets by the end of November 2002. The 1st defendant needed to comply with clause 8 of the agreement and hand over both the property and the sponsorship of the school to the Goan Community. It never did and thus it breached the agreement. The Goan Community had every right to seek vacant possession of the disputed properties and of the schools and the right to have the defendants permanently restrained from the properties.
 12. The court would readily have ordered for vacant possession to be given in the shortest time. However, there was a school running and there were students there. Consideration had to be given to them for it was not the intention of the court to abruptly disrupt their education.
 13. Liability was not contested, and even if it was, the court would have held the 1st defendant liable for repairs. The management of the school had been handed over to them and it was therefore their responsibility to exercise due care to maintain the property. Given the relationship of the parties, there was certainly a duty of care following the common law neighbour principle in the law of negligence. It could not be that a licensee could waste property and not make good the damage to the licensor.



There had to be liability for the damage, whether it was explicit from the contract, or implied from it, or under the general law of negligence.

Judgment entered for the plaintiffs against the defendants.

Orders

- i. *The court ordered that vacant possession be granted within and no later than 12 months from the date of the judgment. In the meantime, the parties were to engage, in good faith, on how the school and the land was going to be handed over to the Goan Community so that there was a smooth transition to the new regime.*
- ii. *The court ordered that within the 12-month period given to hand over the premises, the Catholic Diocese undertakes the repairs outlined in the valuation report produced by PW-2. If they did not do so, then they would be liable to the extent of the amount quoted in the valuation report, that was Kshs. 16,052,000, or to such extent as could be left undone at the handing over.*
- iii. *1st defendant to bear the plaintiff's costs of the suit.*

Citations

Cases

Kenya

1. *Arya Pratinidhi Sabha Eastern Africa v Attorney General (Sued on behalf of the Republic of Kenya and on behalf of the Minister for Education) Petition 225 of 2008; [2011] KEHC 3872 (KLR) - (Explained)*
2. *Ekirapa, Albert & 9 others Suing on behalf of themselves and the Parents Association (School Committee) of Aga Khan Primary School, Nairobi v Aga Khan Foundation & another Environment & Land Case 455 of 2008; [2019] KEELC 509 (KLR) - (Mentioned)*
3. *Famy Care Limited v Public Procurement Administrative Review Board & 4 others Petition 43 of 2012; [2013] KEHC 3934 (KLR) - (Mentioned)*
4. *Kariuki, Gitonga Wambugu & 2 others v Eliud Timothy Mwamunga Environment & Land Case 239 of 2015; [2018] KEELC 2381 (KLR) - (Mentioned)*
5. *Shree Visa Oshwal Community & another v Attorney General & 3 others Civil Appeal 126 of 2014; [2019] KECA 942 (KLR) - (Explained)*
6. *Shree Visa Oshwal Community Nairobi Registered Trustees v Attorney General & 3 others Petition 262 of 2013; [2014] KEHC 7749 (KLR) - (Mentioned)*

United Kingdom

Cumberland Consolidated Holdings Limited v Ireland [1946] KB 264 - (Explained)

Statutes

Kenya

1. Basic Education Act (cap 211) sections 2, 27, 43(1); 59- (Interpreted)
2. Constitution of Kenya article 40- (Interpreted)
3. Education Act (Repealed) (cap 211) sections 6, 10, 11- (Interpreted)
4. Evidence Act (cap 80) section 7- (Interpreted)
5. Land Registration Act (cap 300) section 24 - (Interpreted)
6. Societies Act (cap 108) In general - (Cited)
7. Teachers Service Commission Act (cap 212) section 4(3) - (Interpreted)

Advocates

Mr Adboch, for the plaintiffs

Mr Wafula for the 1st defendant

Ms Kiti for the 2nd defendant



JUDGMENT

(Suit by The Goan Community, Mombasa seeking orders of vacant possession of a school and damages for repairs to the buildings; The Community urging that it owns the school and through a 1991 agreement, it handed over management to the Catholic Diocese of Mombasa; The Goan Community suing claiming that the Catholic Diocese has breached the agreement by *inter alia* handing over the school to the Government and also causing it to be in disrepair; defendants contending that the school is a Public School and the Goan Community has no interest in it; what a public school entails; ownership of the land being under The Goan Community; fact that the school is assisted by Government making it a public school but not Government owned; The Goan Community still retaining proprietary rights over the land and have right to vacant possession of it; held that there was breach of agreement of 1991 and Catholic Diocese liable for the cost of repairs).

A. Introduction and Pleadings

1. This suit was instituted by way of a plaint which was filed on December 17, 2002. The plaint was amended a couple of times resting with the further amended plaint filed on May 31, 2019. The plaintiffs are the trustees of the Goan Community, Mombasa, a society registered under the *Societies Act*. They bring the suit on behalf of The Goan Community Mombasa. The 1st defendant is the Catholic Diocese of Mombasa, sued through its Registered Trustees. The 3rd defendant is the Attorney General sued for and on behalf of the Department of Education, Ministry of Education.
2. It is the case of the plaintiffs that The Goan Community is beneficially entitled to the land parcel Mombasa/Block XXII/31, situated along Archbishop Makarios Road in Mombasa, together with the buildings constructed thereon which comprises a school. This is the school known as Sacred Heart School (hereinafter, 'the school'). The plaintiffs aver that by an agreement dated 1 January 1991 between The Goan Community and the Catholic Diocese of Mombasa, The Goan Community handed over to the Catholic Diocese of Mombasa the management of the school property, the management and sponsorship of the Primary School, and the sponsorship of the Secondary School, subject to terms, conditions and covenants incorporated in the said agreement. It is pleaded that it was a term of the said agreement that :-
 - i. The Goan Community, Mombasa shall retain permanent and exclusive use of the kindergarten classrooms and all other outbuildings not forming part of the primary or secondary schools;
 - ii. The 1st defendant will be entitled to use kindergarten classrooms during the morning sessions of the school for a period of three years from January 1, 1991;
 - iii. The Goan Community, Mombasa shall be given the use of the school hall and the quadrangle between the primary and secondary school for its own use.
3. It is further pleaded that it was an implied term of the agreement that upon possession, the Catholic Diocese of Mombasa would keep the suit property in good and habitable condition during the subsistence of the agreement. The Goan Community claims that the Catholic Diocese of Mombasa breached the aforementioned terms, as they failed to fully deliver up to The Goan Community the kindergarten classrooms and continue to run and operate a kindergarten therein. It is pleaded that this is to the detriment of The Goan Community as it is unable to profitably run its own kindergarten business. The Goan Community further contends that the Catholic Diocese of Mombasa has



breached the agreement, or is alternatively in breach of its duty, by failing to take care of the school and not carrying out normal maintenance and to take out insurance against fire, earthquake and third-party liabilities. These include failure to repair, re-paint, or decorate the property regularly and allowing the property to deteriorate. It is averred that as a result, the property has been rendered un-inhabitable. The Goan Community pleads that it has suffered loss and damage, in that the value of the property has been diminished substantially, due to damage and deterioration, including leaking roofs, broken doors and windows, malfunctioning toilets with no water supply, worn out floors and unattended paintwork. The plaintiffs aver that they will now be required to expend enormous amounts of money in repairs, so as to bring back the property to its original habitable state. They plead that they will be required to spend approximately Kshs 16,052,000/= in repairs.

4. It is pleaded that by a letter dated September 27, 2002, duly served upon the Catholic Diocese of Mombasa, The Goan Community terminated the aforesaid agreement at the end of November 2002, and consequently, the Catholic Diocese of Mombasa was to hand over vacant possession of the school together with all the assets. It is pleaded that the Catholic Diocese of Mombasa failed to vacate the school and hand over the assets, and instead handed over the management of the school to the Government, without their consent and knowledge. It is contended that the surrendering of the school to the Government also constituted a breach of the agreement. The plaintiffs aver that the school was intended to be, and is, a community project and is not a public or Government maintained school.
5. In the suit, the plaintiffs seek the following orders :-
 - a. Discharge, repudiation and or termination of the agreement in as far as it relates to the management, sponsorship and running of the schools.
 - b. Return of vacant possession of the suit property being Mombasa/Block XXII/31 together with all the improvements and assets therein to the plaintiffs.
 - c. Kshs 16,052,000/= being costs of repairs as assessed on March 23, 2019 over the suit property.
 - d. A permanent injunction restraining the defendants whether by themselves or servants and or agents from howsoever interfering with and or disrupting the effective and efficient management of the said schools situated on the suit property.
 - e. Costs.
 - f. Interest on (c) and (e).
 - g. Any other or further relief that this honourable court may deem fit to grant.
6. The Catholic Diocese of Mombasa, as 1st defendant, filed defence to the original plaint on January 27, 2003, which it maintained, despite the amendments to the plaint. It admitted that it had an agreement with the plaintiffs. It pleaded however, that its role was that of a sponsor and that all management issues concerning the school were bestowed upon the Government of Kenya and that the school is designated as such. It pleaded that management and running of the school is the responsibility of the Government, hence it cannot be held liable for what it is not responsible for. It pleaded that the suit is against public policy and its effect will be to cause hardship and affect innocent students.



7. For the Attorney General, the 2nd defendant, a defence was filed on May 6, 2013. It is a defence that simply denies everything pleaded in the plaint and it is added that the Government was not a party to the agreement.

B. Evidence of the Parties

8. PW-1 was the 3rd plaintiff, Ignatius Pereira, and one of the trustees of The Goan Community. He testified that on January 1, 1991, The Goan Community signed an agreement with the Catholic Diocese of Mombasa. He referred to it for its terms and conditions. He testified that the Catholic Diocese failed to deliver the kindergarten to The Goan Community despite the agreement to do so. He added that they have failed to carry out repairs. They engaged Tysons Limited to undertake a valuation of the repairs and they were advised that it will need about Kshs 16 million. He had the valuation report with him. He stated that on September 27, 2002, they wrote a letter terminating the agreement and required the Catholic Diocese to hand over possession. He testified that the Catholic Diocese handed over the school to the Government without their knowledge and consent. He produced a copy of the title deed to demonstrate ownership of the land where the school is situated. He stated that they want back the school in order to manage it themselves. They thus wish to have vacant possession and be paid damages for the estimated repair costs. He was surprised that the school has a licence to operate, as in his view, it is run down.
9. Cross-examined by counsel for the Catholic Diocese of Mombasa, he testified that the school is a public school, his definition of public school being that it is open to any child to join the school. The teachers are employed by the Teachers Service Commission (TSC). He testified that when The Goan Community was running the school, the Government did not build anything. He did not know who was employing the teachers before 1991. He became trustee in the year 2001/2002. He affirmed that the Head Teacher is an employee of TSC and is the one responsible for the day to day running of the school. They had no problem with TSC teachers being employed in the school for the duration that the school was under the Catholic Diocese. He testified that the Catholic Diocese was supposed to manage the property and be sponsors of the school. This would entail painting and making repairs. He did not have the status of the structures before the school was handed over to the Catholic Diocese and he conceded that without it, one would not be able to tell what has deteriorated. He was not happy with the academic performance of the school and placed blame on the teachers.
10. Cross-examined by counsel for the State, he agreed that the Government was not party to the agreement. They have no problem with the employment of teachers in the school by the TSC and have no issue with the Government. He explained in re-examination that they sued the Government because the Catholic Diocese of Mombasa stated that it had handed over the school to the Government. He reiterated that they want the school back as there was breach of the agreement.
11. PW-2 was Richard Munyua Kiambi a registered and licensed valuer. He testified that he was instructed by The Goan Community to carry out a valuation of the school and further undertake an assessment of repairs to the buildings thereon. He did the inspection and prepared a report which he produced as an exhibit. In his assessment the buildings will require repairs of approximately Kshs 16,052,000/=.
12. With the above evidence, the plaintiffs closed their case.
13. DW-1 was Father Benjamin Ndune, a Catholic priest and the Education Secretary Catholic Diocese of Mombasa. He had a witness statement which he adopted as his evidence. In it, he acknowledged that The Goan Community is the registered owner of the property on which the Sacred Heart Schools, Mombasa, are built. The schools consist of a nursery school, a primary school and a secondary school. Historically, the school was intended for children of The Goan Community. However, owing to the



dwindling of their population, the school was opened to other children. He stated that even before the Catholic Diocese of Mombasa came to sponsor the school, the school was a public school since it was being managed and run by the Government. He relied on a letter dated February 4, 1991 written by The Goan Community to The Permanent Secretary, Ministry of Education. He claimed that from the said letter, it would appear that it is the Government which built the school and that TSC was posting teachers to it. He admitted the agreement of January 1991 between the Catholic Diocese of Mombasa and The Goan Community, where the former handed over the management and sponsorship of both the primary and secondary school to the latter. In his view, taking over the management and sponsorship of the school was to make sure that the Catholic tradition of the school was maintained. He stated that statutes relating to education provide for the creation of a Board of Management and a Parent Teachers Association to be in charge of the management of public schools. He added that the 1st defendant had three representatives in the Board of Management appointed by the County Education Board. He stated that its representatives were mainly required to ensure that the Board of Management's decisions respect and adhere to the Catholic traditions. He stated that the 1st defendant does not draw any financial benefit from the schools. He stated that the staffing needs, and the raising of funds for maintenance, is the preserve of the Board of Management and the Parent Association of the Schools who are to advise the County Education Board on the school needs, and not the faith based sponsor (the Catholic Diocese). He thus disputed liability for the repairs. He added that since their role is limited to being a faith based sponsor, the prayer for vacant possession does not arise. In his oral evidence in court, he maintained that they had a sponsorship mandate in matters of chaplaincy and they were only to help in spiritual matters. He testified that the Church is not in a position to give back management of the school to The Goan Community as they cannot give what they do not have given that the management of the school is with the Ministry of Education.

14. Cross-examined by counsel for the State, he testified that the Board of Management comprises of about 13 people. The Goan Community does not have a member in the Board. He stated that decisions on how to run the school are made in the Board but subject to approval by the Ministry of Education including decisions on repairs. He testified that they help the school in spiritual matters, donate books, and train teachers, but they are not mandated by law to maintain the infrastructure.
15. Cross-examined by counsel for the plaintiffs, he testified that he was not there in 1991 when the agreement was made and his evidence is from the records that were handed over to him. He testified that when they signed the agreement, the understanding was that this was a public school. He testified that with the understanding of the spirit of the then Education Act, and the Goans being Catholics, approached the Catholic church. His understanding of the term "management" in the agreement was that it was restricted to chaplaincy only. He nevertheless conceded that The Goan Community transferred the cash and accounts. He added that the signatories would be the head teacher and some members of the Board. His position was that these accounts were not transferred to the Catholic Diocese of Mombasa. He had no straight answer to give on whether movable assets were transferred. He stated that the status of the school as a public school would override any agreement. He acknowledged that they did not notify The Goan community that the Government has taken over the school. It was his view that the Ministry owned the school.
16. Re-examined, he added that when they entered the school, it was the Ministry of Education which was managing it and this has not changed.
17. With the above evidence, the 1st defendant closed its case.
18. The 2nd defendant called Okwatsa Newton Evans as her witness. He works for the Ministry of Education as the Sub-County Director of Education, Mombasa. He testified that the school is a public primary and secondary school. He testified that the secondary school was first registered as



a public school in 1967 and according to the certificate of registration, the managers are the Board of Governors (BoG). He further testified that the latest registration of the secondary school is dated 2005 and the certificate still indicates that the manager is the BoG. The primary school section shows that registration took place on 4 December 2014 and the managers are the Board of Management (BOM). The sponsor for the secondary school is indicated in the certificate as the Catholic Diocese of Mombasa while the sponsor for the primary school is the County Education Board (CEB). He testified that the Catholic diocese is part of the CEB as BoM. He testified that the BoM has 17 members which include 3 members from the Catholic Diocese who mainly address issues related to ethos, discipline and spirituality. He testified that the school, being a public school, gets its financial resources from Government capitation. They have a vote for repairs, maintenance and improvement (RMI) from Government funds. The BoM supervises the management of funds, and part of this supervision includes procurement and public works, and assisting with bills of quantities. He explained that the BoM requests the government for funding depending on the need including repairs and any other infrastructure development. The teachers in the school are employed by the TSC, and in case of a shortage of teachers, the BoM would employ and pay other teachers, the so-called, BoM teachers.

19. Cross-examined by counsel for the 1st defendant, he testified that the school has been a public school from 1967. He however did not know the circumstances under which the Government came into the picture in 1967. Since this year the teachers have been employed by the Government. The BoM (formerly BoG) acts on behalf of the Government. He asserted that management of the school has been with the Government since 1967.
20. Cross-examined by counsel for the plaintiffs, he testified that the Sacred Heart School is composed of a nursery, primary and secondary school. He said that as per the certificate of registration, the ECDE (nursery) and the primary have a joint certificate. He explained that management of pre-primary is with the County Government. He testified that he is not aware of the agreement between The Goan Community and the Catholic Diocese over the management of the school. He stated that the TSC does not pay teachers for private schools.
21. After the two witnesses, the defence closed its case. I directed counsel to file their written submissions which they did.

C. Submissions of Counsel

22. In his submissions, Mr Adhoch, learned counsel for the plaintiffs, submitted that there is no dispute that there exists an agreement between The Goan Community and the Catholic Diocese of Mombasa. Counsel submitted that according to the agreement, the responsibility bestowed upon the Catholic Diocese of Mombasa was to manage the school property, manage and sponsor the primary school, and sponsor the secondary school, which schools were owned by The Goan Community. Counsel submitted that according to the prevailing Education Act (now repealed) “manager” was defined as any person or body of persons responsible for the management and conduct of a school and included a Board. He submitted that the Education Act (Repealed) did not define a “sponsor” but the *Basic Education Act* does so at section 2, and it defines “sponsor” to mean a person or institution who makes a significant contribution and impact on the academic, financial, infrastructure and spiritual development of basic education. Counsel submitted that the agreement bestowed full responsibility of the school property upon the 1st defendant. He submitted that the 1st defendant had an obligation to ensure that the property, being the schools, were maintained and kept in good and habitable condition by regularly repairing, re-painting and decorating them. He submitted that in accordance with Clause 8 of the agreement, in the event that the Catholic Diocese of Mombasa opted to relinquish management of the school property and sponsorship, the same was to revert to The Goan Community together with the moveable assets. He submitted that there was a breach of the agreement by the 1st defendant.



Counsel also addressed the question whether the schools were public schools. He referred to the repealed Education Act which defined “public school” as a school maintained or assisted out of public funds. He submitted that the school was built, managed and run by The Goan Community before the same was handed over to the Catholic Diocese of Mombasa. Counsel submitted that there was no evidence to show that the Government has been funding the school. He submitted that there is no evidence that the teachers are paid using public funds. He submitted that no pay slips of the teachers were produced. He submitted that the fact that the teachers are accredited by the TSC and deployed to teach in various schools does not and should not be construed to mean that the school is a public school. Counsel submitted that according to the certificate of registration dated April 12, 1967, the Sacred Heart High School is classified as a secondary school and the Certificate does not state whether the school was a private or public school at the time of registration. He further submitted that the other Certificate of registration dated February 16, 2005 only makes reference to the secondary School. Counsel submitted that both certificates do not mention the primary school or the kindergarten schools. Counsel submitted that as per the certificate dated February 16, 2005, the secondary school is classified as a public school having been registered as such on February 16, 2005, which meant that the registration came after the agreement of 1991. He submitted that prior to the registration, The Goan Community was not involved in the process nor were they consulted. Counsel submitted that as per Clause 8 of the agreement, the 1st defendant did not have the requisite authority to hand over the management of the school to anyone else other than The Goan Community.

23. Counsel submitted that under section 24 of the *Land Registration Act*, it is only the person registered as the proprietor who can transfer the interest on the land to a third party. Counsel also submitted that article 40 of the *Constitution* protects the right to ownership of property and forbids the arbitrary deprivation of property. Counsel submitted that the insistence that the schools are public schools is an attempt to compulsorily acquire the plaintiff’s property. Counsel relied on the case of *Famy Care Limited vs Public Procurement Administrative Review Board and Others Nairobi Petition No. 43 of 2012* where the court cited the case of *Shree Visa Oshwal Community Nairobi Registered Trustees vs. Attorney General & 3 others* [2014] eKLR. He submitted that the court stated that where there is a clear statutory provision which dictates how a certain legal or statutory procedure should be undertaken, that procedure cannot be overlooked by invoking public interest. He submitted that it is unconstitutional for the defendant to purport to apply any provision of the Education Act (Repealed) and the Basic Education Act to interfere with the plaintiff’s proprietary rights. He submitted that there is no provision in the said Acts that validates and justifies the Government’s unlawful acquisition of the subject property. Counsel placed reliance on the case of *Arya Pratinidhi Sabha Eastern Africa vs Attorney General being sued on behalf of the Republic of Kenya for and on behalf of the Hon Minister for Education* [2011] eKLR. Counsel submitted that the evidence adduced by the defendants shows that only the Secondary School was registered as a public school in 2005, albeit unlawfully, and that there is no indication that the Primary School and Kindergarten are public schools, and thus the two Schools were in the hands of the 1st defendant following the agreement of 1991. He maintained that following that agreement, the responsibility of managing the school was always on the 1st defendant. He submitted that the 1st defendant failed in its obligations and allowed the property to deteriorate by failing to carry out repairs and renovations. On whether The Goan Community is entitled to the prayers sought, counsel relied on the case of *Cumberland Consolidated Holdings Limited vs Ireland* [1946] KB 264 at 270, a case cited by the court in *Gitonga Wambugu Kariuki & 2 others vs Eliud Timothy Mwamunga* [2018] eKLR. He submitted that according to the title deed, The Goan Community is the legal and lawful owner of the suit property together with all developments thereon, and should be granted vacant possession. He also sought the sum of Kshs. 16,052,000/= for the repairs.



24. For the Catholic Diocese of Mombasa, Mr Wafula, learned counsel, submitted that the plaintiffs failed to tender evidence to support the basis of their claim. He submitted that pursuant to section 7 of the Evidence Act, the burden of proof was on the plaintiffs and he referred me to a couple of authorities on the issue of burden of proof. He submitted that it is not correct to claim that the 1st defendant breached the agreement. He submitted that the subject schools were public schools before the purported agreement of 1991. He referred to the Certificate of Registration of June 12, 1967. He submitted that The Goan Community had an arrangement with the Government that enabled the Government to run and manage the school from way back in the 1960s which is yet to be terminated. He submitted that the allegation that the 1st defendant transferred management of the school to the Government is without basis. He submitted that according to the Education Act, Cap 211 which commenced on February 6, 1968, (Repealed), “public school” meant a school maintained or assisted out of public funds. He submitted that pursuant to section 6 of the repealed statute, the management of public schools was to be under the Board of Governors or as the Minister may otherwise direct. He submitted that section 8 of the same Act provided for churches to be sponsors of schools and the purpose was to maintain religious traditions. He submitted that under section 10 and 11 of the repealed Act, it was the duty of the Minister to appoint the BoG whose primary function was to manage the school in accordance with the said statute, the Teachers Service Commission Act, Cap 212, and any other regulation. He submitted that the BoG was managing the school on behalf of the Minister of Education and the person responsible for the management of public schools is the Minister for Education.
25. Mr Wafula submitted that before the execution of the agreement, all elements that made a school a public school were present. He submitted that the schools were funded by the Government; that most buildings were erected out of public funds; and that teachers were posted to the school by the TSC. He submitted that management of the school as at 1990 was not with The Goan Community as alleged and The Goan Community could not purport to transfer to the 1st defendant what it did not have in the first place. He submitted that none of the witnesses supported the prayer for vacant possession and that PW-1 maintained that the school should continue being run as a public school with TSC posting teachers. Counsel submitted that the figure of Kshs 16,052,000/= has been computed to the last cent and therefore, it is special damages and not general damages, thus the need to be specifically pleaded and strictly proved. Counsel referred me to various authorities on this point. He submitted that the plaintiffs failed to provide particulars of the claim in the plaint. Without prejudice, he submitted that they have also not been proved. He submitted that there was no mention of the state of the schools prior to the purported transfer. He asked that the suit be dismissed with costs.
26. For the State, Ms Kiti, learned State Counsel, submitted that at the time of making the agreement, the school was already being run and maintained by the Government since independence. She referred me to the definitions of “public school” and “assisted school” in the Education Act (Repealed) and the decision in the case of Albert Ekirapa & 9 others on behalf of themselves and the Parents Association (School Committee of Aga Khan Primary School, Nairobi vs Aga Khan Foundation & Another [2019] eKLR. She submitted that the agreement of 1 January 1991 was to hand over the sponsorship of the school, so as to maintain the Catholic tradition as the community desired. She thought that the plaintiffs in their evidence agreed and recognized the school as a public school with teachers being deployed by the TSC and they had no problem. She submitted that both primary and secondary schools are registered public schools, and have certificates of registration, and that they are being run and maintained by the Government of Kenya under the Ministry of Education through its appointed Board of Management. She submitted that the Ministry has taken financial charge, and this is demonstrated by payment of materials, repair and maintenance, improvements, vote heads, and auditing of accounts.



27. Counsel submitted that section 43 of the Basic Education Act, provides that public schools are schools established, owned or operated by the Government. She referred to section 55 of the said Act which establishes a BoM for every public school, section 56 on the composition of the BoM, and section 59 of the Act on the functions of the BoM. Counsel submitted that the Ministry has endeavored to maintain and repair the school as best as it could with the resources and budget allocated to it in accordance with the Basic Education Act and the safety guidelines, and as such, The Goan Community ought to refrain from sideshows and interfering with the smooth running of the school. On the claim for repairs, counsel submitted that the amount of Kshs. 16,052,000/= is not justified nor merited. She submitted that there were no reports from the Ministry of Public Health or Public Works to justify the stated amount. Lastly, counsel submitted that the public interest and education of the students override private benefits and politics. She submitted that the school has been fully established as a public school, reserved for public use, and therefore, The Goan Community has no right whatsoever over it. She asked that the suit be dismissed with costs.

D. Analysis and Final Orders

28. Before I go deeply into the matter, I will put in a nutshell the case of the parties. The case of The Goan Community is that it owns the land where the Sacred Heart School is located. It avers that it handed over management of the schools therein to the Catholic Diocese of Mombasa in the year 1991. In the year 2002, it demanded back the school citing breach of the management agreement of 1991. It thus seeks vacant possession and damages for repairs. For the defendants, although they do not dispute that the agreement of 1991 was drawn and executed between the plaintiff and the 1st defendant, they contend that the school was a public school even before this agreement. They say that the management of the school is thus with the Government and The Goan Community has no business demanding back the school or interfering with it.

29. Quite a number of issues arise out of the above respective cases of the parties.

i. Ownership of the Land

30. The proprietorship of the land where there is located the Sacred Heart School Mombasa, comprising of the nursery, primary and secondary schools, is with The Goan Community, Mombasa. This is a freehold title registered as Mombasa/Block XXII/31. There is no encumbrance on this title by any person including the Catholic Diocese of Mombasa or the Government. This title is not disputed and is not challenged.

ii. What is the status of Sacred Heart School(s)?

31. None of the witnesses were grounded in the school before the year 1991. PW-1 became a trustee of the plaintiff in the year 2002. DW-1 was in the Seminary in the year 1991. DW-2 became employed as a teacher in 1991 and I assume that he was not employed in the schools in issue. If he was, I would have expected him to say so. Thus none of the witnesses have first hand information on the operations of the school prior to the year 1991. They all relied on the records handed over to them by their predecessors. The history of the school and its management will thus need to be determined based on the documentary evidence tendered.

32. The defendants produced as exhibits three school registration certificates, the agreement of January 1, 1991, a letter dated February 4, 1991, and minutes of a meeting held on March 7, 1991. The plaintiffs produced the same agreement of 1 January 1991, and a letter dated September 27, 2002. Starting with the registration certificates, only one of the three is prior to 1991. This is a Certificate of Registration for "Sacred Heart High School." The date of registration is April 12, 1967. DW-2 did not know how the



Government came into the picture in 1967. He relied on the certificates of registration to demonstrate that this is a public school. So was this a public school and if so what are the implications ?

33. We must pause here because it is critical to understand the legal regime on schools for the relevant years. And since we have evidence of a registration that dates back to the year 1967, we need to appreciate the legal prevailing regime then. Unfortunately, counsel did not address me on this critical point and I have had to undertake a painstaking research on the same. What I have unearthed is that prior to the Education Act, of 1968 (cap 211) (repealed), we had the Education Ordinance of 1952. That Ordinance had three important categories of schools. The first category was a “Government school” which was defined as a “school maintained out of public funds and managed by the Department” meaning the Department of Education of the Kenya Colony (the Government at the time). The second category was a “public school” which was defined to be a “school maintained or aided by way of recurrent grant out of public funds or the funds of any public or local authority.” The third category of schools was an “aided school” which meant “any public school other than a Government school.” There were thus schools managed directly by the Government and this was what was called a Government school. An “aided school” was not owned by the Government, but since it received some funding from Government, it still fell in the category of “public school.” A school could thus be a “public school” without necessarily being owned by the Government. At that point in time, the policy of the Government appears to have been to assist a majority of schools, even those that were not established by the Government, and we indeed had a large number of schools that were established by missionaries and other institutions which were not owned by the Government. If they received some aid, in form of a grant out of public funds or funds of a public or local authority, they would still be considered “public schools” but this would not be the equivalent of a “Government School.”
34. In 1968, a few years after the attainment of independence, the Education Act, cap 211, was passed. It categorized schools a little differently from the 1952 Ordinance. This time, there was no category of schools known as “Government Schools.” What the Education Act, 1968 had was a “public school”, a “maintained school”, an “assisted school”, and an “unaided school.” A “public school” was a school maintained and assisted out of public funds. A “maintained school” meant a school in respect of which the Ministry or local authority accepted general financial responsibility for maintenance. An “assisted school” meant a school, other than a maintained school, which received financial assistance from the Ministry or assistance from the Teachers Service Commission. An “unaided school” was a school which was not receiving grants out of public funds. You could thus have an assisted school or maintained school which was not Government owned but it would be regarded as a “public school” for reason that it received some sort of grant from the Government or received teachers from the Teachers Service Commission. Such school was actually privately owned, but the Government, using public funds, in one way or another, gave some aid to the school and the school was open to the public. It would still be regarded to be a “public school” yet the Government would have no proprietary interest in it. There was no category of school called “private school.” What we had was an “unaided school” which was a school that did not receive any grant out of public funds. But even then, the Teachers Service Commission Act, cap 212, which was enacted in 1967, under section 4(3) made provision for the TSC to assign a teacher employed by the Commission for services to an “unaided school.” The interest of the Government was to see to it that schools thrived, that they were well equipped, and had personnel. The issue of ownership of schools was clearly not very important to the Government. In other words, public funds could be used to assist schools established by other bodies. The schools would be classified as “public” for that reason, but it wouldn’t mean that they are owned by the Government. What the Act did not state, and was silent on, is how an “aided” or “maintained” school could move out of Government assistance. It was probably not contemplated that a body that received Government aid would at some point apply to have it withdrawn.



35. The *Education Act, 1968*, was repealed by the *Basic Education Act*, Act No 14 of 2013 which is the prevailing statute. It has only two categories of schools, public and private. Under section 2 and 43(1) (b) a “private school” comprises of schools established, owned or operated by private individuals, entrepreneurs and institutions. A “public school” under section 43(1) (a) covers “schools established, owned or operated by the Government and includes sponsored schools.” The statute also defines a “sponsor” in section 2 as “a person or institution who makes a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education.” Under section 27 the Role of the sponsor shall be –
- (a) to participate and make recommendations of review of syllabus, curriculum, books and other teaching aids;
 - (b) representation in the School Management Committees and Board of Management;
 - (c) to provide supervisory and advisory services in matters regarding spiritual development in schools including the appointment of chaplains at their own expense;
 - (d) maintenance of spiritual development while safeguarding the denomination or religious adherence of others;
 - (e) to offer financial and infrastructural support.
36. From the above, it will be seen that a public school could very well encompass a sponsored school, but it is not clear what the position is where the sponsored school is not owned by the Government. As we have seen, prior to the Basic Education Act of 2013, we had categories of schools that would be aided or maintained by the Government but they were not Government owned. Probably this fact escaped the drafters when they drew the *Basic Education Act*, and the transitional provisions do not address the movement to the new categories of schools.
37. So with the background above, what has been, and what is the current status of the Sacred Heart Schools, Mombasa ? I have already mentioned that none of the witnesses were directly involved with the schools before 1991 and I have pointed out the documentary evidence presented. Of the three registration certificates, only one was issued before 1991. It is the certificate issued on April 12, 1967. It is for Secred (sic) Heart High School and the manager is the Board of Governors. It should be recalled that in 1967, we were operating under the 1952 Education Ordinance and the categories of schools we had were aided schools, Government schools, and public schools. This certificate does not state whether the school was Government, aided or public. However, the minutes of March 7, 1991, make me come to the conclusion that this was an “aided school” within the meaning of the 1952 Ordinance. Thereafter, after the enactment of the 1968 statute, it fell under the category of an “assisted school.” When you read those minutes, you will see that there was discussion on non-teaching staff and their salaries were paid by The Goan Community. The Kindergarten was also being run wholly by The Goan Community and separately from the Primary School. The school had a surplus of finances, and out of this surplus, Kshs. 40,000/= went to The Goan Community. I am not therefore in doubt that this was an “aided school” and later an “assisted school.” It would still fall under the definition of “public school” but it was not a Government school and neither was it Government owned. It was a “public school” because it was assisted by the Government as I have taken trouble to explain above. The owner of the school, was The Goan Community. The *Education Act, 1968*, in fact had a special term for the institutions that started schools such as what we have here. They were referred to as “voluntary bodies” which were institutions other than the Government, or local authority, or



any department or undertaking of the Government or local authority. This is contained in section 2 of the Education (Board of Governors) Order, under the said Act of 1968 (the BoG Order). The BoG Order had two schedules; one schedule for schools established by voluntary bodies, and the other for schools that were not established by voluntary bodies which were invariably Government schools. Sacred Heart Secondary School actually appears in Schedule 2 of the BoG order. Most of these schools were established by churches, the Catholic church being one of the major players. The Government had no problem assisting such schools and could provide funding for infrastructure and even provide teachers employed by the TSC, which made them “public schools” but they never were Government schools and the Government never owned them. They were owned by the voluntary bodies. In our case, Sacred Heart School was owned by the Goan Community, but since it received assistance from the Government, it was a public school.

38. The submissions of counsel for the defendants fail to appreciate the point, that though the school was a public school, it was not a Government owned school. It was still owned by the Goan Community. It appears to be a misnomer to categorize as “public” a school that the Government does not own but that is the reality of the matter.
39. The issue arose in a different way in the case of *The Arya Pratinidhi Sabha Eastern Africa vs The Honourable Attorney General, Nairobi High Court, Petition No 225 of 2008* (The Parklands Arya Girls High School case). In this suit, the petitioner was the registered proprietor of the land parcel LR No 209/19 on which it had established Parklands Arya Girls High School which school had been started prior to the 1968 Education Act. The Ministry of Education purported to invoke its powers under the said Act to take over control and management of the school without the consent of the petitioner hence the suit to stop this action. The respondent’s argument was that this was a public school and cited that it was listed in Schedule 2 of the BoG schedule. It was also urged that since its inception, it had constantly received grants from the Government and that the teachers were all employed by the Government. It thus submitted that it was justified to take over the school. Musinga J (as he then was), was not persuaded by the arguments. He allowed the petition and had this to say :-
37. It is unconstitutional for the respondent to purport to apply any provision of the Education Act to interfere with the petitioner’s proprietary rights over the suit property as well as their right of worship. It matters not whether the parents of the students in the school have contributed to the acquisition of some of the facilities and/or equipment in the school. The parents’ contribution is good and commendable but that per se cannot alter the proprietary interest of the petitioner.
38. The Education Act came into operation on 4th April, 1968. As at that date the petitioner had continuously managed and controlled the running of the school through Arya Samaj Education Board. The running of the school could not therefore be taken over by the Ministry of Education without express consent of the petitioner. Any purported take over and acquisition of an interest in or right over the petitioner’s property by the respondent is a gross violation of the petitioner’s fundamental rights and freedoms as guaranteed by the *Constitution*. No provision in the Education Act can be invoked to override the petitioner’s Constitutional right to ownership of property.
40. A more or less similar position was sustained by the Court of Appeal in the case of *Shree Visa Oswal Community & Another vs The Attorney General & 3 Others*, Court of Appeal at Nairobi, Civil Appeal No 126 of 2014. In this case, the appellant held a leasehold grant to LR No 209/5996 situated in



Parklands area, Nairobi. The Ministry of Education purported to take over the school on the basis that it is classified as a public school. It alleged that it has been converted into a private/commercial school without justification. The Ministry of Lands thus purported to revoke the grant in public interest and directed the appellant to surrender the school to the Ministry of Education. The Court of Appeal castigated this action. It *inter alia* held that it was immaterial whether the school was run as a private or public entity in so far as its lease was concerned.

41. This is exactly what we have here. The defendants argue that the school is a public school, but it is immaterial. What is material is that The Goan Community owns the school by virtue of being the registered proprietor of the land where the school rests. They can thus allow an entity to manage the property and the school, and they also have a right to cancel such licence.
42. Ms Kiti in her submissions referred me to the case of *Albert Ekirapa & 9 others vs The Aga Khan Foundation & another* but the decision in that case does not help her cause. This was a case filed by the Parent Association of Aga Khan Primary School. They sought orders inter alia that the property where the school was located is public land and an injunction to restrain the defendants from converting the school from a public school to a private school. The land where the school was located was held under a leasehold title in the name of the 1st defendant. The court dismissed the case of the plaintiffs despite holding that the school was a public school under the Education Act and further held that the property was held by the 1st defendant to use for educational purposes with deference to the special conditions set out in the lease.
43. It would mean therefore, that where land for a school is held under a lease, the terms of the lease will dictate its use and proprietorship. A freehold title would not have conditions save probably conditions set out in town planning for the user of the land. A proprietor would be vested with all the proprietary rights which are given in the *Constitution* and in the law. The Goan Community as the registered proprietor of the land is the entity that is vested with proprietary rights over the land. This is recognized by section 24 of the *Land Registration Act*, Act No 3 of 2012, which provides as follows :-

24. Interest conferred by registration.

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
44. It will be seen from the above that it is the registered proprietor who is vested with the rights and privileges belonging to or appurtenant to the land. That includes the right to permit or licence a person to use that land and right to terminate such permission or licence. This is precisely what happened through the agreement of January 1, 1991. The Goan Community, who hitherto were managing the schools, handed over their management to the Catholic Diocese of Mombasa. The said agreement reads as follows:-

“Whereas the Goan Community are registered owners of the Sacred Heart School, property situated on Plot Number 31 Section XXII Mombasa, Archbishop Makarios Road and are desirous of handing over the management of the school property, the management and



sponsorship of the Primary school and the sponsorship of the Secondary school to the Diocese.

And whereas the diocese has agreed to take over the management of the said School property, the management and sponsorship of the Primary school and the sponsorship of the Secondary school.

Now this agreement witnesseth as follows :-

1. The Goan Community shall prepare the Primary school accounts and have the same audited before the handing over date.
2. The Primary School Bank Account including Deposit Accounts and cash at hand shall be handed over to the Diocese on the handing over date.
3. The Goan Community shall pay all the outstanding debts of the Primary school incurred by them before the handing over date.
4. The moveable assets of the school as contained in the annexed schedule shall be handed over to the Diocese on the material date.
5. The responsibility of the Goan Community shall cease as from the date of handing over and the Diocese shall assume full responsibility as from that date.
6. The Goan Community shall retain permanent and exclusive use of the Kindergarten classrooms and other out buildings that do not at present form part of either the Primary or Secondary Schools. The Goan Community shall allow the Diocese to use the Kindergarten classrooms during the morning school session for a period of three years from 1st January, 1991.
7. The Goan Community shall be given the use of the School hall and the quadrangle situated between the Primary and Secondary Schools for the duration of the agreement.
8. In the event of the Diocese opting to relinquish the management of the School property and sponsorships, the same shall revert to the Goan Community together with the moveable assets.”

iii. **Was there breach of agreement?**

45. The Goan Community complains that the Catholic Diocese declined to allow it to use the Kindergarten in breach of the agreement. It also contends that the Catholic Diocese breached the agreement by handing over the management of the Schools to the Ministry of Education. The third quarrel is that the Diocese failed to maintain the schools. Both defendants do not refute that they have denied access to The Goan Community to operate the Kindergarten. Neither is it denied that the schools have been handed over to the Ministry of Education. I have taken time to elaborate that it is the Goan Community which is the owner of the Schools. What it handed over to the Catholic Diocese is akin to a licence, which had terms and which could be revoked. No term in that agreement permitted the Catholic Diocese of Mombasa to cede control and management of the school to the Ministry of Education. There was thus a breach of the terms. The Goan Community thus had the right to revoke the agreement. The revocation was done through the letter dated 27th September 2002 when The Goan Community demanded the Catholic Diocese of Mombasa to hand over possession of the school together with all the assets by the end of November 2002. The Catholic Diocese of Mombasa needed to now comply with Clause 8 of the above agreement and hand over both the property and the sponsorship of the school to The Goan Community. It never did. It clearly breached the agreement.



iv. **Remedies and final orders.**

46. The Goan Community therefore has every right to seek vacant possession of the disputed properties and of the schools and the right to have the defendants permanently restrained from the said properties.
47. I would readily have ordered for vacant possession to be given in the shortest time but I appreciate that there is a school running and there are students there. Consideration has to be given to them for it is not the intention of this court to abruptly disrupt their education. I will order that vacant possession be granted within and no later than 12 months from today. In the meantime, the parties to engage, in good faith, on how the school and the land is going to be handed over to The Goan Community so that there is a smooth transition to the new regime.
48. The only other substantive prayer that I need to address is the prayer for damages in the sum of Kshs 16, 052,000/= . This constitutes estimated repair costs. The basis of this claim is that it was an implied term of the agreement or that there was a breach of duty of care. On this issue, Mr Wafula, learned counsel for the 1st defendant did not actually contest liability. What he pleaded was that the amount of Kshs 16,052,000/= was not specifically pleaded and proved. I do not see his point because the plaint does explicitly and specifically plead the sum of Kshs 16,052,000/= . On whether the amount is proved, there is the report of the Quantity Surveyor which itemizes the repair costs. As I have said, liability is not contested, and even if it was, I would have held the Catholic Diocese of Mombasa liable for repairs. The management of the school had been handed over to them and it was therefore their responsibility to exercise due care to maintain the property. Given the relationship of the parties, there was certainly a duty of care following the common law “neighbour principle” in the law of negligence. It cannot be that a licensee can waste property and not make good the damage to the licensor. There must be liability for the damage, whether it be explicit from the contract, or implied from it, or under the general law of negligence. It was argued that the plaintiffs have not proved that the premises was in good repair when it was handed over. It must be assumed that it was, for nowhere is there any evidence that it was handed over in disrepair. It is certainly in serious dilapidation at the moment and there is no insinuation that the damage was there when the premises was handed over to the management of the Catholic Diocese of Mombasa. I do not see how the 1st defendant can escape liability for the repairs. I order that within the 12 month period given to hand over the premises, the Catholic Diocese does undertake the repairs outlined in the Valuation Report produced by PW-2. If they do not do so, then they will be liable to the extent of the amount quoted in the valuation report, that is Kshs 16,052,000/= ,or to such extent as may be left undone at the handing over.
49. The final issue is costs. It was the 1st defendant who was handed over the premises to manage. It is the 1st defendant who ceded control to the 2nd defendant. The 1st defendant will bear the plaintiff’s costs of this suit. I make no order for or against the 2nd defendant in respect of costs.
50. Judgment accordingly.

DATED AND DELIVERED THIS 2ND DAY OF FEBRUARY, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

