REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1460 OF 2002

CONSOLIDATD WITH ELC NO 2088 OF 2007

AND

ELC NO 922 OF 2007

KENYATTA UNIVERSITY.....PLAINTIFF

- VERSUS -

KIMANI MBUGUA & 78 OTHERS.....DEFENDANTS

CONSOLIDATED WITH ELC NO. 1038 OF 2012 (OS)

GABRIEL NDEREBA & 1698 OTHERS.....PLAINTIFFS

- VERSUS -

KENYATTA UNIVERSITY.....DEFENDANT

JUDGEMENT

1. By a plaint dated 16th August 2002 and amended on 21st October 2004 the plaintiff filed a suit against six (6) defendants, Kimani Mbugua, Francis Ng'ang'a , Ngaruiya Chege, Mercy Nyambura Kariuki, Stella Mueni and Eunice Mugure Kanika and all trespassers seeking judgment for:-

a. A mandatory injunction restraining the defendants from continuing with occupation of the plaintiff's land,

b. Recovery of possession of the said property by the plaintiff.

c. General damages for trespass.

d. Interest on (c) at court's rates from the date of filing suit until payment in full.

e. Costs of the suit.

f. Any other relief the court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance. the defendants entered appearance through the firm of Maina Muchiri Advocate on the 3rd October 2002. They also filed a statement a defence dated 16th October 2002 denying the allegations of trespass. They stated that they are tenants in common having been granted part of the land about thirty (30) acres to sub divide among themselves. They pray that the plaintiff's suit be dismissed with costs.

3. In HCCC 922 of 2007, the plaintiff Stephen Mwangi Githinji has sued the defendant, Kenyatta University by a Plaint dated 20th July 2007. He seeks a judgment against the defendant for:-

a. A declaration that the plaintiff is the legal owner and/or proprietor of plots known as unsurveyed Plot No 470 Kamae Resettlement Scheme Phase two, Nairobi and unsurveyed Plot No 483 Kamae Resettlement Scheme Phase Two Nairobi.

b. An order of permanent injunction restraining the defendant, its agents, servants, workmen or any other person acting through the defendant from trespassing, digging trenches occupying and/or in any other way interfering with the plaintiff's quiet possession of Plot Nos 470 and 483 Kamae Resettlement Scheme Phase Two Nairobi.

c. Costs of the suit and interest thereon.

d. Any other relief that this honourable court shall deem just and fit to grant.

4. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of M/S Lawrence Mungai & Co. Advocates on the 28th August 2007.

5. In HCCC 2088 of 2007, the plaintiffs John Njuguna, Paul Ndung'u and Francis Ngugi (suing on their behalf and on behalf of 71 others) have sued the defendant (Kenyatta University) seeking:-

a. A declaration that the plaintiffs are the legal owners and/or proprietors of plots known as unsurveyed plots Kamae Resettlement Scheme Phase Two, Nairobi.

b. An order or permanent injunction restraining the defendant, its agents, servants, workmen or any other person acting through the defendant from trespassing, digging trenches, occupying and/or in any other way interfering with the right of the plaintiff's over plot known as unsurveyed plots Kamae Resettlement Scheme Phase Two Nairobi.

c. Costs of this suit and interest thereon.

d. Any other relief that this honourable court shall deem just and fit to grant.

6. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance on 18th September 2007 through the firm of M/S Lawrence Mungai & Co. Advocates.

7. On the 9th October 2007, the two suits being HCCC 922 of 2007 and HCCC 2088 of 2007 were consolidated.

8. The defendant filed a statement of defence dated 19th September 2008 praying that the Plaintiffs' suit be dismissed with costs. The plaintiff filed a reply to each defence dated 30th September 2008 respectively.

9. On the 11th March 2008, HCCC 1460 of 2002 was consolidated with HCCC 922 of 2007 and HCCC 2088 of 2007, Kenyatta University vs Stephen Mwangi Githinji & 78 Others. It was also agreed by consent that all pleadings filed by Kenyatta University herein referred to as the Plaintiff be deemed as being a plaint and all proceedings filed by the defendants 1-79 be allowed as defence.

10. Following the orders of 21st may 2009 the Plaintiff filed a further amended plaint dated 29th May 2009 seeking orders that:-

a. A mandatory permanent injunction restraining the defendants from continuing with occupation of the plaintiff's land.

b. Recovery of possession of the suit property namely LR NO 11026/2 by the Plaintiff.

c. An order for eviction of the defendants and other trespassers from LR NO 11026/2.

d. A declaration be issued to declare that the occupation and user of a portion of LR NO 11026/2 by the defendants and other trespassers is illegal.

e. General damages for trespass.

f. Interest on (e) at court rates from the date of filing suit until payment in full.

g. Costs of the suit.

11. The defendants on the other hand filed an Amended defence dated 19th June 2009. They deny that they have trespassed, intruded and/or rendered un useful a portion of the plaintiff's land measuring 150 acres or thereabouts as alleged. Further that they are in occupation of the land by operation of the doctrine of adverse possession having been in possession of the suit premises since the early 1960's. They pray that the plaintiff's suit be dismissed with costs.

12. After all this had been done one Gabriel Ndereba and 1698 others filed an originating summons dated 20th December 2012 against the defendant Kenyatta University, Under Order XXXIV Rules 3D and 3F of the Civil Procedure Rules sections 7, 17, 37 and 38 of the Limitation of Actions Act and Section 3A of the Civil Procedure Act.

13. They seek that the Originating Summons be heard for the determination of the following questions:-

> **1. That the honourable court be pleased to grant an order to the effect that the plaintiffs are entitled to be registered as the proprietors of the portion of LR No 11026/2 occupied by them situated within Nairobi in place of the currently registered owner namely Kenyatta University pursuant to the provisions of Section 38 of the Limitation of Actions Act (Caps 22 Laws of Kenya) through the doctrine of adverse possession on the ground that the plaintiffs have lived on the suit property for a period exceeding 12 years preceding presentation of the summons.**
>
> **2. That the Registrar of Lands do make the necessary alteration to the register and register the portion of LR No 11026/2 occupied by the plaintiffs and situated in Nairobi in the name of the plaintiffs.**
>
> **3. Any other or further relief that this court may deem just and fit to grant.**
>
> **4. That costs of this suit be provided for.**

The summons is supported by the affidavit of Gabriel Ndereba, one of the plaintiffs/applicants herein, sworn on the 20th December 2012.

14. On the 2nd June 2015, the Defendant's Notice of Motion dated 22nd May 2015 was allowed by consent. This in essence meant that ELC 1038/2012 (Originating Summons) was consolidated with the suit herein.

The Plaintiff's Case

15. The Plaintiff is the registered owner of parcel of land known as LR NO 11026/2 (hereinafter referred to as **"the suit land"**) of which the defendants have illegally encroached on. The plaintiff averred that it had previously donated 30.82 acres of its land upon which all the genuine squatters who had encroached on the land measuring 150 acres. The squatters had prevented the plaintiffs from meeting its statutory obligations and prosecuting its mandate of providing and expanding facilities for higher education.

16. In 1965, the British government handed over the Templar Barracks which the suit land stands on to the Government of Kenya. It was converted to Kenyatta College in the year 1970 and to Kenyatta University in 1985. On 1st October 1977 the plaintiff obtained title to the suit land for a term of 99 years vide Grant No IR 33404, for LR No 11026/2. The grant specified three conditions limiting the use to educational, administrative and residential purposes.

17. In 1984, the plaintiff requested the Provincial Administration to evict squatters. However, in a meeting between the Plaintiff, Provincial Administration and the Ministry of Lands and Settlement it was agreed that the squatters be settled on a 30.82 acre portion. This was pending resettlement in an alternative land by the Provincial Administration. The Plaintiff reconsidered the issue approving the excision of the 30.82 acres for the squatters resettlement on 27th September 1989 and the relevant government agencies carried out subdivisions of the portion known as the Kamae Resettlement Scheme.

18. In 2001, the plaintiff found out that unauthorized persons had encroached on the suit property adjacent to the 30.82 acres of Kamae Resettlement Scheme by putting up permanent structures. It informed the Provincial Administration and in 2002, it learnt that unsurveyed plots in the suit land were being offered for sale causing the plaintiff to cause a *caveat emptor* to be published in the Kenya Times on 1st October 2002. It then instituted this suit.

19. The plaintiff caused a further *caveat emptor* notice to be published in the Daily Newspapers cautioning the public against any dealings with individuals purporting to allocate or sell portions of the suit land. Following recommendations of the Parliaments Public Investment Committee the plaintiff dug huge trenches measuring 1500 mm wide and 1500 mm deep as the previous fence would be removed and filled up by squatters.

Defendants' Case

20. The Defendants filed an amended defence dated 22nd June 2009 claiming ownership of the suit land. They state that they have been in occupation of the suit land. That majority of them settled on the suit land as early as 1964 and that the then President in the year 2000 directed the then Provincial Commissioner Nairobi to ensure the subdivision of the land was done and title deeds issued to those living on the land.

21. The Defendants further state that since 1964 they lived peacefully on the land until the year 2002 when the plaintiff laid claim on the same. It is their case that the then President Daniel Moi in a public rally directed that a further seventy (70) acres in addition to the already allocated 30.82 acres be surrendered for their settlement.

The Evidence of the Plaintiff

22. The Plaintiff called two witnesses PW1, Dr. Nelson Karagu, the Registrar Finance and Development and also a lecturer at Kenyatta University testified on 2nd October 2015. He also told the court that he has been the Registrar in Charge of Administration. He was familiar with the facts of this case. He adopted his witness statement dated 22nd May 2015 as part of his evidence. He confirmed that the plaintiff is the registered proprietor of LR NO 11026/2. He referred to Grant No IR 33404 in page 1 of the Plaintiff's bundle of documents. The grant was issued on 1st October 1977 for a term of 99 years. The suit land measures 447.3 hectares. He also stated that about 30.82 acres was allocated to squatters. That in 1984 the squatters were 670 in number as per the list in page 11 of the plaintiff's bundle of documents. He told the court that several meetings were held between the University Administration and the Provincial Administration. After these meetings, it

was agreed that 30.82 acres be excised from LR NO 11026/2 to accommodate the 670 squatters. The Ministry of Lands then prepared a survey plan.

23. He also stated that in 2009 a committee was set up to identify the bonafide original squatters for settlement and illegal squatters and deal with them. The original squatters were to get letters of allotment and their validity was to be confirmed. The plaintiff fenced off its land to prevent further encroachment but the fence and the concrete posts were removed. It then decided to dig trenches. It filed HCCC 1460 of 2002 but the court orders were violated. The squatters have continued to erect permanent structures despite the court orders.

24. By a Notice dated 24th February 2006 a Caveat Emptor was published in the Daily Nation. There is also one dated 28th March 2014 and another published on the Star Newspaper. He also stated that the Letters of Allotment held by the defendants do not state LR NO 11026/2 as this is private land and not open for allocation. The squatters are not entitled to land by adverse possession as there have been court cases in court since the year 2002. He urges that the prayers on the plaint be allowed.

25. PW2 Professor Paul Kuria Wainaina, the Deputy Vice Chancellor at Kenyatta University and also in charge of Administration testified on 3rd February 2016. He told the court that he joined Kenyatta University in 2005 and became a Deputy Vice Chancellor in 2009. He adopted his witness statement dated 22nd May 2015 and a replying affidavit sworn on 8th March 2013 as part of his evidence in this case. He stated that he is aware of the suit property and the issues surrounding it. He confirmed that the plaintiff is the registered proprietor of the suit property. The suit property was to be used for educational, residential and administrative purposes for the students and staff of Kenyatta University.

26. He referred to a letter from the Office of the President dated 27th September 1989 to the then Vice Chancellor Professor P. M. Githinji asking that the plaintiff cedes 30.82 acres to the squatters. The squatters were to be identified by the Provincial Administration and the squatters themselves. Only the squatters registered in 1984 would be recognized. Only 670 squatters would be settled on the 30.82 acres ceded by Kenyatta University. That by that time the place was called Marengeta hence the name “squatters of Marengeta”.

27. It is his evidence that from the correspondences between 1994 to 2002 he learnt that vide a survey plan No 200/70, LR NO 11026/2 was to be subdivided and the new portion would be LR NO 11026/4 measuring 12.48 ha or 30.82 acres. He further stated that squatters have now settled were over 100 acres of the plaintiff’s land. He urges that the prayers in the plaint be granted.

Evidence of the Defendants

28. The defence called four witnesses. DW1 Frances Kamau Wanjau testified on 14th July 2017. He adopted his witness statement dated 28th May 2015 as part of his evidence in this case. He told the court that he resides on LR NO 11026/2 in a place called Kamae. He said he settled in Kamae in 1964. That the land was given to them by President Kenyatta in the year 1966 or 1967 in the presence of the Provincial Administration. That later they approached President Moi who agreed to let them settle on the land and directed that they be issued with letters of allotment. He said later they were shown a portion and he put up a house. He also confirmed that a surveyor came to the land and set the boundaries.

29. He stated that the letters of allotment are in defendants’ bundle filed on 30th September 2015. He also stated that he was shocked when the plaintiff sued them. He also stated that the residents of Kamae now number about 10,000. He prays that the plaintiff’s suit be dismissed with costs and they be allowed to continue living there as they have nowhere else to go.

30. DW2 also testified on 14th July 2017. He is Gabriel Ndereba Karume. He adopted his witness statement dated 28th May 2015 as part of his evidence in this case. He said he was born in Kamae then, called Marengeta in 1964. He built his house in 1988. He stated that in the year 2000, the then President Moi directed that they be added another 70 acres. The then Provincial Commissioner Nairobi, Cyrus Maina showed them the boundary which is the current Northern Bypass. That a survey was done and letters of allotment were processed. He said the first time the plaintiff tried to evict them was on the year 2002. Before that it never took any action. He referred to a newspaper cutting of the Kenya Times in which the directive is reported. They were to be given additional land. He prays that the plaintiff’s suit be dismissed with costs.

31. DW3 John Kamau Munjogu testified on 25th March 2019. He adopted his witness statement dated 28th May 2015. He stated that he was born in 1945 and has been residing on Kamae for 47 years. He confirmed what DW1 and DW2 told the court.

32. DW4, Francis Ng’ang’a , also testified on 25th March 2019. He adopted his witness statement dated 28th May 2015 as part of his evidence in this case. He stated that he was born in Kamae and has constructed a house there. He also confirmed what DW1 and DW2 told the court. He prays that the plaintiff’s suit be dismissed with costs.

33. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff’s Submissions

34. They are dated 6th June 2019. The plaintiff is a public university created as such under statute namely the Kenyatta University Act, 1985 (now repealed by the Universities Act, 2012). It server students from all over the country numbering approximately 70,000. The defendants are a group of five (5) individuals pursuing narrow private interest purportedly on their own behalf and on behalf of purported other individuals whose identity are unascertainable. They raise ten issues for determination. They are:-

1. **Whether the Defendants’ suits are competent?**

2. Whether a letter of allotment confers ownership?

3. Whether a letter of allotment can be used to defeat a claim of a registered owner?

4. Whether a claim for adverse possession can be argued simultaneously with a claim for ownership.

5. Whether a claim for adverse possession lies in respect of a land belonging to public university?

6. Whether the prerequisites for a claim for adverse possession have been met?

7. Whether the orders of permanent injunction can issue against a public university?

8. Whether the defendants are deserving of the final reliefs sought having breached the conservatory orders?

9. Whether the plaintiff is entitled to the orders sought and whether the defendants are entitled to the orders sought?

10. Whether the public interest must take priority over narrow and selfish interest?

35. Civil Suit No 1038 of 2012 and 2088 of 2007 are incompetent to the extent that they purport to be representative suits without complying with order 1 rule 8 and 13 of the Civil Procedure Rules and other provisions of the law. The said suits are also incompetent to the extent that the individual claim of each of the defendants has not been individually pleaded and proven. The plaintiffs in the two suits have not complied with the strict and mandatory requirements of the said order 1 rule 13. These suits are therefore incompetent.

36. In ELC 1038 of 2012 (Originating Summons) the suit is instituted by Gabriel Ndereva "and 1698 others". The 1698 others are not identified in the body of the Originating Summons and none of them has sworn an affidavit in support of the motion. The authority to act and or plead is not signed by any of the plaintiffs but by the advocate for the plaintiff. There is a list of attached titled "Kamae Resettlement Scheme Phase Two list of beneficiaries" does not state that it was prepared for purposes of instituting a suit. There is no indication that the listed people were giving any authority. There was no authority for Gabriel Ndereba to purport to sue on behalf of 1698 and the suit by those others is incompetent. None of the two suits is a representative suit. It has put forward the cases of **Rose Florence Wanjiru vs Standard Chartered Bank of Kenya Ltd & 2 Others [2014] eKLR; Jack Mukhongo Munialo vs Nzoia Sugar Company Ltd [2017] eKLR; Ali Mhala Swaleh & 4 Others vs Mohammed M Sheikh Ali & 12 Others [2017] eKLR**. There is no ascertainment of the respective identity of each plaintiffs, the time in which each of them allegedly encroached on the suit property, the length of time they have allegedly been in occupation and the respective portions of the land claimed by each of the defendant.

37. The claim of each of the defendants on whose behalf the defendants suit are purported to be instituted has not specifically and individually pleaded and proven. It has put forward the case of **Mombasa Teachers Cooperative Savings & Credit Ltd vs Robert Muhambi Katana & 15 Others [2018] eKLR.** No documentary evidence was tendered regarding the respective dates on which each of the defendant allegedly took possession of the respective portions of the university land claimed by each of the said defendants. None of the individual portions claimed by each of the defendants was distinctly identified.

38. It is trite law that a letter of allotment does not confer title to property. It has put forward the cases of **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Another [2012] eKLR; Evans Kathusi Mcharo vs Permanent Secretary, Ministry of Roads Public Works and Housing & Another [2013] eKLR; Veronica Wangari Kabogo vs Julius Githome & 3 Others [2017] eKLR**. For the defendants to claim ownership of the suit property they must demonstrate that they hold valid letters of allotment and have subsequently been issued with requisite title documents. The defendants have not met any of the above conditions. They claim to hold certain purported letters of allotment dated 29th July 2002 but were invalid for failure to identify the county council on behalf of which they were issued and failure to identify the respective plots on the grounds.

39. The said letters of allotment are said to have been issued pursuant to a directive by the then President Moi while speaking at a public rally at Korogocho, Kasarani Constituency on 22nd November 2000. The defendants have relied on a newspaper article published by the Kenya Times on 23rd November 2000. The said article however refers to a land near Kenyatta University not University land. It has put forward the case of **Nelson Kazungu Chai & 9 others vs Pwani University College [2017] eKLR.** The claim of a registered owner overrides a claim of a holder of a letter of allotment. It has put forward the case of **Marion Muthamia Kiaru (suing on behalf of the Estate of Muthamia Kiara (Deceased) vs Ben Mutungi Muthiora [2016] eKLR.**

40. A letter of allotment cannot override a duly registered title. The University was registered as a Lessee from the Government of Kenya of the University land on 1st October 1977 and a grant issued to that effect. The said purported letters of allotment were issued on 29th July 2002 in respect of plots purportedly on the university land whilst the aforesaid grant subsisted. It has put forward the case of **Mike Maina Kamau vs Attorney General [2017] eKLR** which restated the position emulated by the Court of Appeal in **Dr. Joseph Arap Ng'ok vs Justice Moijo Ole Keiwua & 5 Others.**

41. The Plaintiff in ELC 922 of 2007 claims to have purchased two plots; unsurveyed Plot No 470 and 483 Kamae Resettlement Scheme Phase two from Paul Kamau Gachuhi and Patrick Njuguna Njoroge respectively. The said plaintiff cannot claim any better title than what the vendors had. The said vendors had no title to any purported plot of any portion of the university land they could not pass a good title to the plaintiff. It has put forward the case of **Annah Muthoni Njaimwe vs Philip Kirichu Ngugi & 3 Others [2019] eKLR.**

42. The plaintiff in ELC 922 of 2007 was put in notice vide the caveat Emptor caused by the university to be published in leading daily newspapers on 1st October 2002. It has put forward the case of **Lilian Wairimu Ngatho & Another vs Moki Savings Corporative Society Ltd & Another [2014] eKLR; ELC 2088 of 2007 and 922 of 2007** must fail and the same ought to be dismissed with costs to the

university. It has put forward the case of **Shaneebal Ltd vs County Government of Machakos [2018] eKLR** which cited the case of **Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others Nairobi (Milimani) HCCC No 1243 of 2001**.

43. A claim for adverse possession cannot be argued simultaneously with a claim for ownership. The two claims are mutually exclusive. It has put forward the case of **Gabriel Mbui vs Mukindia Maranga [1993] eKLR**. In their amended defence in ELC 1460 of 2002, the defendants claimed ownership of the disputed portion of the university land by virtue of the purported letters of allotment as well as by dint of alleged adverse possession. Allowing a claimant to claim both adverse possession and ownership in respect to the suit property would be tantamount to allowing the claimant to approbate and reprobate. It has put forward the case of **Behan & Okoro Advocates vs National Bank of Kenya [2007] eKLR.**

44. A claim for adverse possession does not lie in respect of public or government land. It has relied on Section 41(1)(i) of the Limitation of Actions Act, Cap 22 Laws of Kenya and the cases of **Masek Ole Tinkoi & 3 Others vs Kenya Grain Growers Ltd & 2 Others [2018] eKLR; Faraj Maharus vs J. B. Martin Glass Industries & 3 Others [2005] eKLR.** The question as to whether a public university is a state organ (hence government) was settled by the court in the case of **Martha Kerubo Moracha vs University of Nairobi [2016] eKLR**. The plots claimed by the plaintiffs are on a portion of the university land. They cannot maintain a suit for adverse possession against the university.

45. The defendants have not established a case for adverse possession of the suit property against the university. It has put forward the case of **Munyaka Kuna Co. Ltd vs Bernado Vicezo De Masi (The Administrator of the Estate of Dominico De Masi (Deceased) [2018] eKLR**. The defendants have not identified the portion of the university land in respect of which they claim adverse possession. It would be virtually impossible for the court to determine factual possession of the land in question. No evidence was tendered by the four defendants who testified to demonstrate factual possession. No building plans were submitted to the relevant governmental agencies prior to the construction of the purported premises on the disputed university land. No evidence of utility bills such as electricity and water was tendered to corroborate the alleged factual possession of the said property.

46. They have not demonstrated that they occupied the disputed land without force. PW1 in his testimony confirmed that the defendants removed fences and concrete posts erected by the university. They also filled up trenches dug by the university to prevent them from encroaching on university land. DW1 confirmed this occupation has not been proved to be continuous. They have not demonstrated that the university had knowledge of the encroachment on the disputed property for a period of 12 years preceding the filing of ELC 1460 of 2002. It has put forward the case of **Titus Kigaro Munyi vs Peter Mburu Kimani [2015] eKLR**. The claim of adverse possession must be supported by an affidavit to which a certified extract of title of the land in question has been annexed as per order 37 rule 7 of the Civil Procedure Rules. It has relied on the cases of **Moses Chepkonga Cherono vs Margaret Njoki Kinyanjui [2017] eKLR. Kiprono Arap Soi vs Peter Murmumet Tompoi & Another [2016] eKLR.**

47. No permanent injunction can be issued against the government as per section 16(1) of the Government Proceedings Act. The orders sought by the defendants are in the nature of a permanent injunction.This claim must fail. Despite this court issuing conservatory orders the defendants have continued to construct. DW1 confirmed that currently there are storey buildings on the property with 4-5 floors. Having blatantly breached the said orders the defendants are therefore undeserving of the final reliefs in any event.

48. Public interest must take priority over narrow and selfish interests. The university intends to use the suit property to develop student hostels to accommodate 10,000 students in light of the increased student population which has over stretched existing facilities. It also intends to construct a children's hospital Doctor's Plaza and staff quarters of the personnel working at the Kenyatta University Teaching Training and Referral Hospital. The defendants are threatening the advancement of education of more than 70,000 students drawn from all over the country at any given time.

49. The court ought to give due regard to the larger public interest to be served by the suit property over the narrow selfish interests of a few individuals. It has put forward the case of **Baseline Architects Ltd & 2 Others vs NHIF Board of Management [2008] eKLR**. It prays that the prayers on the Amended Plaint dated 29th May 2009 in ELC 1460 of 2002 be granted and that ELC 2088 of 2007, 922 of 2007 and 1038 of 2012 be dismissed with costs to the plaintiff herein.

The Defendants' Submissions

50. They are dated 15th December 2020. The central issue for determination is whether the defendants are entitled to the portion of 100 acres occupied by them.

51. The suit by the defendants are competent and have adhered to the prescription of the law. Consent and/or authority to act and/or plead was filed in ELC 2088 of 2007 and 1038 of 2012. The said documents were filed on 13th September 2007 and 21st December 2012 respectively. The authority to act in respect of ELC 1038 of 2012 (OS) has clearly listed the 1689 others whose names are clearly captured in the said authority to act, duly signed by all the parties.

Compliance with order 1 rule 8 of the Civil Procedure Rules was attained pursuant to the consent order recorded in HCCC No 1460 of 2002 as consolidated with the other suits. The said consent orders were recorded on 29th July 2008 and have never been varied, reviewed and/or appealed against.

52. The defendants have demonstrated by way of facts and evidence that their occupation of 100 acres within LR NO 11026/2 was sanctioned by the former president Daniel Toroitich Arap Moi in the year 2000 as evidenced in the newspaper cutting. During that period the former president was the plaintiff's Chancellor. He acted within the law in donating the land occupied by the squatters to the subject parties. The directive by the then chancellor has never been the subject of challenge in any forum. By provision of Section 120 of the Evidence Act Cap 80 (Laws of Kenya) the plaintiff is estopped from reneging on the directive by the former President. They have put forward the cases of **John Mburu vs Consolidated Bank of Kenya [2018] Eklr; 748 AIR Services Ltd vs Theuri Munyi [2017] Eklr**.

The orders sought by the plaintiff would have the effect of rendering the defendant destitute and destruction of their properties.

53. The defendants have also based their claim on the doctrine of adverse possession and proved all the ingredients necessary for sustaining the claim. The defendants were categorical on the location of the plots occupied by them. They told the court that the Provincial Commissioner visited the land and told them that the boundary between them and the university was the great North Road. There is no doubt that the land in question belongs to Kenyatta University. The defendants annexed vide the supporting affidavit to the originating summons dated 20th December 2012 as certified copy of the title document to demonstrate this fact. They have given sufficient proof of ownership of the subject parcel of land.

54. The certified copy of title in line with order 37 rule 7 of the Civil Procedure Rules is for purposes of ascertaining the registered owner of the land. In this case the plaintiff admits it is the registered owner of the suit property. The requirements for the certified extract is consequently superfluous. They have put forward the case of **Johnson Kinyua vs Simon Gitura Rumuri [2011] KLR** which was cited in the case of **Sera Muthoni Kimani vs John Wanyoike Gerald [2014] eKLR**; if the ownership of the land is not disputed and has even been confirmed by the registered owner then the requirements of a certified extract of the title is not mandatory.

55. The plaintiff's land does not fall within the description of government land within the meaning of Section 41(a) (i) of the Limitations of Actions Act. The plaintiff only started raising queries on the defendant's occupation in the year 2002 by which time the defendants had occupied the subject land for more than 12 years. The defendants have not claimed anywhere in the pleadings as having purchased the suit premises from the plaintiff. They have put forward the case of **Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR.**

56. It is stated that only 5 and not all the defendants testified. It is instructive to note that there are over 1500 defendants and it would be impractical to expect all the defendants to testify. The court in dispensing justice is called upon to observe the provisions of Section 1A of the Civil Procedure Act to facilitate the just expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

It is now settled law that no particular number of witnesses shall be required to prove a fact. They have relied on Section 143 of the Evidence Act.

57. The provisions of the Government Proceedings Act, Cap 40 (Laws of Kenya) are inapplicable to the plaintiff. The plaintiff is governed by the Universities Act No 42 OF 2012. Nothing in the said statute provides that the provisions of the Government Proceedings Act shall apply to public universities. They have put forward the case of **Simon Mbugua vs County Government of Trans Nzoia & 2 Others [2015] eKLR.**

58. The plaintiff's claim against the defendants as pleaded in the further amended plaint dated 29th May 2009 owing to the issues pleaded therein. Some of the prayers sought specifically prayers (c) and (d) are untenable as they seek orders against entities who are not parties to the present suit. A prayer against "the defendants and other trespassers cannot be issued as against unnamed parties. They have put forward the cases of **Precast Portal Structures Ltd vs Riccardo Lizzier & 3 Others [2016] eKLR; Virginia Kaniaru Gakuya vs Geoffrey Mureithi [1996] eKLR.** Court orders are not issued at large. They pray that the plaintiff's suit against the defendants be dismissed with costs.

59. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

i. Whether the defendants suit ELC 2088 of 2007 and ELC 1038 of 2012 (OS) are competent?

ii. Whether a letter of allotment confers ownership.

iii. And, if so, whether it can be used to defeat a claim of a registered owner.

iv. Whether the defendants are entitled to the suit land.

v. Whether the prerequisites for a claim of adverse possession have been met.

vi. Whether the defendants are entitled to the reliefs sought.

vii. Is the plaintiff entitled to the reliefs sought?

viii. Who should bear costs of the suit?

60. In ELC 2088 of 2007, the plaintiffs John Njuguna, Paul Ndungu and Francis Ngugi are said to be suing on their behalf and that of 71 Others. This makes it a representative suit. Similarly in ELC 1038 of 2012 (OS) the plaintiff Gabriel Ndereba is said to be suing on his own behalf and that of 1698 others. This also makes the suit a representative suit. **Order 1 rule 8** of the Civil Procedure Rules provides that:-

One person may sue or defend on behalf of all in same interest.

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as of all in same representing all or as representing all except one or more of them.

2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

3. Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

Order 1 rule 13 of the Civil Procedure Rules provides:-

1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

61. I have gone through the Originating Summons, "the 1698 others" are not identified on the body of the Originating Summons and none of them has sworn an affidavit in support of the motion. The document titled "Authority to Act or plead" is not signed by any of the plaintiffs but by the advocate. It would therefore mean that this document does not meet the mandatory requirement of order 1 rule 13 of the Civil Procedure Rules. I agree with the plaintiff's submissions that a proper authority would have to be signed by each of the 1698 plaintiffs and duly filed in the suit. The list attached to the originating summons does not state whether it was prepared for purposes of instituting a suit. The same applies to ELC 2088 of 2007. The consent and/or authority to plead and/or act, on behalf of 71 other plaintiffs is defective as it does not sufficiently show the respective identities of the said plaintiffs.

62. This therefore means that these suits were not instituted as representative suits. In the case of **Kahindi Katana Mwango & Another vs Cannon Assurance (K) Ltd [2013] Eklr**, the court stated as follows:-

"Indeed, order 4 rule 4 of the Civil Procedure Rules requires that where the plaintiff sues in a representative capacity, the plaint shall state the capacity in which he sues. The plaintiff's originating summons does not state whether the Jeuri Community Based Organization, through the two plaintiffs suing on behalf of 41 others is a representative suit or not. That in my view, renders the suit incurably defective. As at the time of filing the suit he plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of "JEURI COMMUNITY BASED ORGANIZATION" or on behalf of 41 others in accordance with the provisions of Order 1 rule 13 of the Civil Procedure Rules 2010. The applicant cannot just annex a list of inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein."

The same position was taken by the court in the case of **Abdulla Abshir & 35 Others vs Yasmin Farah Mohammed [2015] eKLR**. I find that the two suits are incompetent for failure to comply with the mandatory provisions of order 1 rule 8, 13 of the Civil Procedure Rules.

63. The defendants on the other hand urge this court not to look at the form but the substance of authority as Article 159 of the Constitution calls upon the court to administer justice without undue regard to procedural technicalities. I disagree. It has been stated time and again that where there are express provisions, the same must be complied with strictly. No justifiable reason has been given as to why the plaintiffs in the two suits did not comply with order 1 rule 8, 13 of the Civil Procedure Rules. As stated earlier these suits are incompetent for failure to comply with the above provisions.

64. I also agree with the plaintiff's submissions that the claim of each of the plaintiffs in these two suits has not been specifically and individually pleaded and proved. They have not demonstrated the time in which each one of them allegedly encroached on the suit property, the length of time they claim to have been in possession and the respective portions allegedly adversely possessed by each one of them. In the case of **Mombasa Teachers Cooperative Savings & Credit Society Ltd vs Robert Muthambi Katana & 15 Others [2018] eKLR**, the Court of Appeal held that:-

"…….We cannot help but note that the evidence tendered in support of the respondents case was by five respondents. These respondents only gave evidence with relation to the dates they each entered into possession of the suit property. There was no evidence to show that there was such consent of the former registered owner. The photographs of the structures created on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we unlike the learned Judge find that no further evidence was given with respect to whether other respondents took possession. Without such evidence there was nothing to support the respondent's contention that they had been in adverse possession of the suit property prior to the appellants title.

……., even if we were to accept that the five respondents had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portions of the suit property which they each occupied which was essential to their claim. Moreso, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property……"

65. The defendants have claimed ownership of the various plots on the bases of 110 letters of allotment dated 29th June 2002. I have gone through the said letters of allotment and note that none of them identifies the name of the county council on whose behalf of which it is issued, none of them make reference to LR NO 11026/2, none of them identifies the plan number in question, none has a plan attached and all these letters of allotment were issued subject to formal acceptance and payment of fees within 30 days from the date of issuance.

66. When cross examined by the plaintiffs counsel, DW1, Francis Kamau wanjau told the court that he did not have his letter of allotment

neither did he have a title deed for the portion he was claiming. DW2, also admitted on cross examination that his letter of allotment was for an unsurveyed Plot 309 Kamae Resettlement Scheme Phase 2. He stated that he did not have a receipt to confirm payment of Kshs.1,560. DW3 stated he bought one plot and another was allocated to him. He told the court that he represented those who bought the plots. He also admitted that the list attached to the originating summons does not state that the intention was to file a suit. He also admitted he had no authority from P.C.E.A to sue on its behalf.

67. I find that the said letters of allotment are invalid for failure to identify the respective plots on the ground and the county council on behalf of which they were issued. Even if they were valid it is now well settled that a letter of allotment does not confer title to property. In the case of **Stephen Mburu & 4 Others vs Comat Merchants Ltd [2012] eKLR.** It was held that:-

> **"…..From a legal stand point, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property".**

Similarly in the case of **Evans Kafusi Mcharo vs Permanent Secretary Ministry of Roads Public Works and Housing & Another [2013] eKLR** it was held that:-

> **"In making a distinction between petitioners who held letters of allotment and those who were registered proprietors of the land in question, this court in the case of John Mukora Wachihi & Others vs Minister for Lands & Others High Court Petition NO 82 of 2010 observed that the distinction is based on the fact that the right to property protected under the law and the constitution is afforded to registered owners of land; that a letter of allotment is not proof of title as it is only a step in the process of allocation of land. The court relied in that regard on the position enunciated by the Court of Appeal in the case of Wreck Motors Enterprises vs The Commissioner of Lands and 3 Others Nairobi Civil Appeal No 71 of 1997, where the Court of Appeal stated as follows:-**
>
> **"Title to land property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held".**

68. Also in the case of **Dr. Joseph M. K Ngok vs Mojo Ole Keiwua & 5 Others [1997] eKLR** the court stated as follows:-

> **"Titles to the lease property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document in accordance with the law".**

I find that the defendants have failed to prove that they have the title documents.

69. It is not in dispute that the plaintiff is the registered owner of LR No 11026/2, the suit property. The said land was allocated to the plaintiff vide a grant No IR33404 on 1st October 1977. The defendants state that they were issued with letters of allotment pursuant to a directive by the then President Daniel Toroitich Arap Moi while speaking at a public rally at Korogocho, Kasarani Constituency on 22nd November 2000. There is a newspaper article published by the Kenya Times on 23rd November 2000. The said article has been presented by the defendants as an exhibit. I have gone through the said article. It appears to me that the President was referring to land near Kenyatta University and not the university land.

70. In any case the land held by the plaintiff had already been allocated to it and it had a tittle. The same had already been alienated and could not be subject to subsequent allotment to individuals. The said letter of allotments held by the defendants issued on 29th July 2002 are therefore illegal. In the case of **Nelson Kazungu Chai & 9 Others vs Pwani University College [2017] eKLR,** the Court of Appeal held as follows:-

> **"Additionally, from the above correspondence, it is clear that once allotted to the institute, the suit land ceased being unalienated land as defined under section 2 of the repealed Government Lands Act. Consequently, the Commissioner of Lands could not cause allocation to issue in respect of the same because under section 3 of the Act, the only land that could be so allocated was unalienated land. Therefore under statutory law, the Commissioner of Lands ceased to have the mandate to allocate the land the moment the same was allocated to the institute. Even if the Commissioner were to purport to allocate the land the same would be null and void. As stated by the predecessor of this court in the case of Said Bin Seif vs Shariff Mohammed Shatry, (1940) 19 (1) KLR 9; an action taken by the Commissioner of Lands without legal authority is a nullity and such an action, however technically correct, is null and void and is of no effect whether under legitimate expection, estoppel or otherwise".**

71. It therefore means that the letters of allotment purportedly issued to the defendants could not be used to defeat the claim of a registered owner, in this case the plaintiff.

I rely on the cited case of **Muthithi Investments Ltd vs Andrew J. Kyendo & 22 Others [2014] eKLR** where J Mutungi stated as follows:-

> **"The defendants placed reliance on the alleged letter of allotment as giving them authority to enter and occupy the suit land. As I have stated above the letter of allotment purported allot Plot LR No 11344/R whose location on the ground was not shown. The land on which the defendants entered and commenced to put up developments was the land that was leased out to the plaintiff pursuant to the court order being LR. NO 23917 Nairobi. To the extent that the plaintiff is the registered owner of this land the entry, possession and occupation of the same by the defendants was unlawful. In my view even if the defendants had a letter of allotment of the same property, the letter of allotment, until there was acceptance and compliance**

with the terms of the allotment, remained just an intention on the part of the City Council which the council could rescind. Further on the basis of competing interests the interest of the holder of a validly registered title would be superior to that of the holder of a letter of allotment over the same property even if the letter of allotment may have been issued earlier than the title.

The plaintiff referred the court to a ruling in the case of Lilian Waithera Gachuhi vs David Shikuku Mzee (2005) eKLR where the Judge in a ruling delivered on 13th July 2005 stated thus:-

> **"I have no doubt that legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of the land…."**

I equally would stated that where it is established a valid title has been issued and the proprietor registered as the proprietor of the land a letter of allotment cannot dislodge that title. *In a recent ruling of this court delivered on 2nd May 2014 in the case of Njuwangu Holdings Ltd vs Langata KPA Nairobi & 5 Others (ELC No. 139 of 2013) the court considered the status of a letter of allotment vis a vis a registered title. In the suit I rendered myself as follows:-*

> **"As matters now stand the plaintiff who has a registered title over the suit property has a superior title to that of the 1st defendant who only holds a letter of allotment. I am in agreement with the decision of the Court of Appeal in the case of Satya Investments Ltd –vs- J. K. Mbugua Civil Appeal No 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystalize.**

Thus it is my finding and holding that the defendants are in illegal and unlawful occupation of the plaintiff's Land Parcel L. R. No 23917 Nairobi and are therefore trespassers and they ought to vacate and deliver vacant possession of the suit premises to the plaintiff….."

The plaintiff in ELC 922 of 2007 claims to have purchased two plots namely unsurveyed plot Numbers 470 and 483 Kamae Resettlement Scheme Phase Two from Paul Kamau Gachahi and Patrick Njuguna Njoroge respectively. The two vendors had no title to any portion the land held by the plaintiff hence they could not pass good title to the plaintiff.

In the case of **Annah Muthoni Njaimwe vs Philip Kirichu Ngugi & 3 Others [2019] Eklr** the court cited the case of **Line Transport Co. Ltd vs The Honourable Attorney General, Msa HCCC No 276 of 2003** where it was stated as follows.

> **"….and if the grant to Mr. Omari was null and void ab nitio, it conferred no interest in Mr. Omari. By extension of the principle of nemo dat quad non habet, if Mr. Omari acquired no interest in the property then he had no interest to transfer to the plaintiff. And that is the plaintiff's lot. There was gross irregularity which went to the very root of the title to the suit property, and the plaintiff acquired no interest to it."**

72. The plaintiff in ELC 922 of 2007 cannot also claim to be an innocent purchaser for value without notice as the plaintiff herein had placed the requisite *caveat emptor* advertisement in the leading Daily Newspapers. I rely on the case of **Lilian Wairimu Ngatho & Another vs Moki Savings Cooporative Society Ltd [2014] eKLR** where the court stated thus:

> **"It is my finding that the Caveat Emptor advertisements placed in the The Daily Nation newspapers were sufficient notice to the Applicants that the title from which they derived their respective titles had a defect or is subject to litigation. In addition, the plaintiff therefore discharged its duty to notify the applicants of the on-going litigation with respect to the suit properties".**

It therefore means ELC 2088 of 2007 and 922 of 2007 must fail as they are solely based on the letters of allotment. The Plaintiffs in these two suits and (the defendants herein) were unable to prove that the letters of allotment had been issued regularly.

73. It appears to this court that the defendants herein were not sure of their claim. They claimed the suit property by virtue of letters of allotment at the same time under adverse possession. In the case of **Gabriel Mbui vs Mukindia Maranya [1993] eKLR,** J Kuloba while citing **Chanan Sing J. M. Jandu vs Kirpal & Another [1975] EA 225 at 233**, held as follows:-

> **" To claim title by virtue of purchase and then to turn around and claim it by adverse possession is to set up mutually self-destructive contradictions and a confusion of thought".**

The same would apply to the defendants herein. They claim ownership of the plaintiff's land by virtue of the letters of allotment as well as by adverse possession. DW2 claimed ownership of unsurveyed Plot NO 309 through a letter of allotment while in ELC 1038 of 2012, he claimed adverse possession.

74. In ELC 1038 of 2012 Gabriel Ndereba stated that he is suing on his behalf and that of 1698 others. It is not in dispute that the plaintiff is the registered owner of the suit property. The defendants have contended that plaintiff's then Chancellor, the then President Daniel Toroitich

Arap Moi in the year 2000 at a public rally directed that the defendants be allocated the suit land and that the plaintiff is estopped from reneging on the said directive. In the case of **Nelson Kazungu Chai & 9 Others vs Pwani University College [2017] eKLR,** the Court of Appeal held that:-

> **"In order to successfully invoke the doctrine, it must be shown that the act or decision complained of affected such bother person either: (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do (per Lord Diplock in Council of Civil Service Unions (Supra).**
>
> **20. As indicated earlier, the introductory part of the appellants' request for land was based on a promise made by a Provincial Commissioner (PC) at a public speech. That promise was however not made by the Commissioner of Lands. On the contrary, the response the Commissioner gave indicated that the land in question was already part of the Kilifi Institute of Agriculture. On those premises, how could the appellants succeed in saying that the government had aroused in them a legitimate expectation of getting the land? An expectation can only be legitimate if it is coached in law and if the Supreme Court of India in Jetendra Kumar & Others vs State of Haryava & Another; Supreme Court of India Civil Appeal No 5803 of 2007, where it was stated that:-**
>
> > **'A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope.it is based on a right. [see also. Chanchal Goyal (Dr.) v State of Rajasthan (2003) 3 SCC 485 and Union of India v Hindustan Development Corpn. (1993) 3 scc 499]. It is grounded in the rule of law as requiring regularity, predictability and certainty with the Government's dealings with the public'.**
>
> **In this case, not only was the perceived promise not made by the Commissioner for Lands, but the same concerned land that was no longer within his mandate to grant. In any event, even if legitimate expectation had arisen, the appellants would still be disentitled to relief, for they had not enjoined the Commissioner of Lands as a defendant, yet his office is the one being alleged to have owed them a duty of fulfilling that legitimate expectation. The contention that the appellants had a legitimate expectation fails to find ground and the learned judge cannot be faulted for having so found".**

The suit land having been allocated to the plaintiff ceased to be unalientated land as defined under Section 2 of the Government Land Act (Repealed).

75. The ingredients of the doctrine of adverse possession were discussed by the Court of Appeal in the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2005] eKLR** where it was stated that:-

> **"Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in asserting of his title for a certain period, in Kenya 12 years".**

Similarly in the Case of **Celina Muthoni Kithinji vs Safiya Binti Swaleh & 8 Others [2018] Eklr**, the Court stated:-

> **"12. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was nec vi, nec clam, nec precario" that it peaceful open and continuous. The possession should not have been through force nor in secrecy and without the authority of or permission of the owner.**
>
> **13. This being a claim for adverse possession the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to theknowledge of the owner and that they have asserted a hostile title to the owner of the property".**

I agree with the plaintiff's submissions that the defendants have not identified the portion of the suit property of which they claim adverse possession. I also agree that they have not demonstrated that they have been in possession for a period of 12 years preceding the filing of ELC 1460 of 2002.

76. The only evidence of occupation of some individuals in the plaintiffs land is a letter written by the Chairman of Kamae Village (Mr. Wainaina K) to the Vice Chancellor of the University on 13th June 1995. In the said letter, he confirms that as at 1995, there were 670 residents comprising of Kamae Community. This confirms the plaintiff's position that as at 1984 there were 670 squatters. This means that apart from the 670 the rest of the defendants were not occupying the plaintiff's land as at 1995. I find that the defendants have failed to prove factual possession by way of building plans submitted to the relevant governmental agencies prior to the construction of the permanent structures on the suit land. They also did not adduce any evidence of utility bills such as electricity and water bills to show that they were in possession.

77. It is the plaintiff's case that the defendants entered the land forcefully. PW1 told the court that the defendants removed fences and concrete posts erected by the plaintiffs. They also filled up trenches which had been dug by the plaintiff to prevent them (defendants) from encroaching on the plaintiff's land. PW1 also stated that there was hostility meted out on the agents of the plaintiff whenever they attempted to visit the disputed property. That the establishment of the Administration Police Camp at Kamae Resettlement Scheme was due to this hostility. The defendants' occupation of the suit property has therefore not been peaceful.

78. The defendants have failed to demonstrate that the plaintiff had knowledge of the defendants' encroachment on the suit land outside the 30.82 acres allocated to the 670 squatters. It is on record that the plaintiff only became aware in 2001 and filed this suit in 2002. It then

issued newspaper advertisement warning against the illegal encroachment. In the case of **Titus Kigano Munyi vs Peter Mburu Kimani [2015] eKLR** the Court of Appel held that computation of time in a claim for adverse possession stems from when there is actual or constructive knowledge by the registered proprietor. In the instant case the plaintiff became aware of the illegal encroachment in 2002 and filed ELC 1460 of 2002. DW3, admitted on cross examination that his son constructed on the suit property after the year 2000.

79. It therefore goes without saying that the defendants occupation has not been continuous. The plaintiff dug up trenches after the fence was destroyed but the said trenches were filled up by the defendants. This necessitated the filing of ELC 1460 of 2002.

80. Order 37 rule 7 of the Civil Procedure Rules provides that:-

> **"(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.**
>
> **(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**
>
> **(3) The court shall direct on whom and in what manner the summons shall be served."**

I have gone through the Originating summons herein (ELC 1038 of 2012) (O.S) I find that the certified extract of title is not annexed. This is contrary to provisions of Order 37 rule 7 of the Civil Procedure Rules above. In the case of **Moses Chepkonga Cherono vs Margaret Njoki Kinyanjui [2017] eKLR,** it was stated thus:

> **"I have read the affidavit in support of the Originating Summons. There is no certified extract of the title to the land in question annexed. I have seen a copy of a letter of allotment annexed. A letter of allotment is however not evidence of title. Order XXXVI rule 3 D (2) of the Civil Procedure Rules which was in force as at the date of filing of the originating summons herein was couched in mandatory terms. Consequently, failure to annex a certified extract of the title to the land is fatal to the plaintiff's claim".**

I find that failure to annex certified extract of title is fatal to the defendants' claim.

81. I agree with the defendants' submission that the plaintiff's suit property is not government land as it had already been alienated. It therefore does not fall under the provisions of section 41 (a) (i) of the Limitation of Actions Act Cap. 22 (Laws of Kenya). I also note that the assertion by the plaintiff that a permanent injunction cannot issue against the plaintiff is not true. The plaintiff is established under the Universities Act, 2012. There is nothing in the statute which provides that the provisions of the Government Proceedings Act shall apply to public universities. I rely on the case of **Simon Mbugua vs County Government of Trans Nzoia & 2 Others [2015] eKLR**.

82. It is important to note that there were conservatory orders issued by this court in 2003 barring the defendants and the plaintiffs from undertaking development on the suit land. DW1- DW4 however admitted in this court that construction has been going on at the instance of the defendants and others who continue to encroach on the plaintiff's land. The result is that the character of the suit property has drastically changed with both residential and commercial buildings erected thereon. The said order was issued by consent and the defendants had knowledge of the said order.

83. It is on record that the plaintiff intends to utilize the suit property in tune with special condition No 3 in the Title. The defendants' interests threaten the advancement of education of more than 70,000 students drawn from all over the country. Indeed, due regard ought to be given to the larger public interest to be served by the suit property over the interests of a few individuals.

84. It is on record, that the plaintiff has already donated 30.82 acres for the settlement of the 670 squatters as per the list of 1984. This is the only portion the plaintiff is ready to donate to accommodate the original squatters.

85. The upshot of the matter is that ELC 2088 of 2007, ELC 922 of 2007 and ELC 1035 of 2012 (OS) fail. They are dismissed with costs to the plaintiff.

86. Consequently, I find that the plaintiff has proved its case as against the defendants. I enter judgment in its favour on the following terms:-

> **a. That a mandatory permanent injunction is hereby issued restraining the defendants from continuing with occupation of the plaintiff's land.**
>
> **b. That an order is hereby granted for recovery of possession of the suit property namely LR NO 11026/2 by the plaintiff.**
>
> **c. That an order of eviction is hereby issued against the defendants and other trespassers from LR NO 11026/2.**
>
> **d. That a declaration is hereby issued that the occupation and user of a portion of LR NO 11026/2 by the defendants and other trespassers is illegal.**
>
> **e. Cost of the suit and interest.**

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23RD DAY OF SEPTEMBER 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thuo for the Plaintiff

Ms Mokenya for Mr. Kabue for the Defendants

Steve - Court Assistant