



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 198 OF 2012**

**NICHOLAS MUNYI KAIGUA.....PLAINTIFF**

**VERSUS**

**THE PRESBYTERIAN FOUNDATION AS THE TRUSTEE**

**OF PRESBYTERIAN CHURCH OF**

**EAST AFRICA-PWANI PRESBYTERY.....1<sup>ST</sup> DEFENDANT**

**JUMA JEFA MBOE.....2<sup>ND</sup> DEFENDANT**

**SIDI CHENGO NGATO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*(Plaintiff suing 1<sup>st</sup> defendant for trespassing and developing on land to which he holds title; 1<sup>st</sup> defendant asserting that it purchased the land from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have good title; evidence showing that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants sold the land to the 1<sup>st</sup> defendant while the land was still under adjudication; disputes emerging during adjudication and the land in issue adjudicated to other persons who sold their interest to the plaintiff; 1<sup>st</sup> defendant processing a separate title in name of 2<sup>nd</sup> and 3<sup>rd</sup> defendants based on a setting apart under the Trust Land Act; 2<sup>nd</sup> and 3<sup>rd</sup> defendants not recognizing this title and disowning it; from the evidence and analysis, title issued under the adjudication process being the proper title; judgment entered for the plaintiff; 1<sup>st</sup> defendant ordered to vacate premises and pay general damages for trespass).*

**A. INTRODUCTION AND PLEADINGS**

1. This suit was commenced by way of a plaint filed on 19 September 2012. The plaintiff avers to be the registered proprietor of the land parcels Kilifi/Kawala 'A'/Kadzozzo/304 and Kilifi/Kawala 'A'/Kadzozzo/305, having purchased them from Peter Mwasi and Shingwaya Holdings Limited respectively. It is pleaded that Peter Mwasi and Shingwaya Holdings Limited acquired title to the said plots following an adjudication process that took place in respect of the Kilifi/Kawala 'A'/Kadzozzo Adjudication Section in the years 2009/2010. It is pleaded that the 2<sup>nd</sup> defendant (identified as Juma Jefa Mboe in the pleadings but actual name being Jumwa Jefwa) is the registered proprietor of the land parcel Kilifi/Kawala 'A'/Kadzozzo/306 following the same adjudication process. It is averred that the 1<sup>st</sup> defendant contends to have obtained a purchaser's interest over the comprised in Certificate of Title No. CR. 49739 for Land Reference No. 208405 South East Mariakani. It is pleaded that this title covers the plaintiff's and 2<sup>nd</sup> defendant's plots, and that the 1<sup>st</sup> defendant has proceeded to fence off the plaintiff's two plots Nos. 304 and 305, and the 2<sup>nd</sup> defendant's plot No. 306. The plaintiff contends that the 1<sup>st</sup> defendant's Certificate of Title is null and void as the same was obtained fraudulently *inter alia* that; the Gazette Notice No. 9896 dated 10 September 2009 that set apart the land was not in harmony with the certificate of title as the former indicated the user to be religious and education while the latter was agricultural and residence; that in a letter dated 4 April 2010, the Director of Land Adjudication and Settlement only excepted L.R. No 23914, L.R. No. 21623 from the Kawala 'A' 'B' and Kadzozzo Madzimani Adjudication Sections (and not the title LR No. 208405), thus making the title CR No. 49739 for LR No. 208405 unlawful.

2. It is pleaded that the plaintiff is the bonafide purchaser of the suit property for value without notice of any irregularities and has acquired valid title to Kilifi/Kawala 'A'/Kadzozzo/304 and 305. It is also pleaded that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant had no valid title over the suit property and could not pass any valid title to the 1<sup>st</sup> defendant. In the suit, the plaintiff prays for judgment against the defendants for:-

*i. A declaration that the plaintiff is the absolute proprietor of the two plots of land known as Kilifi/Kawala 'A'/Kadzozzo/304 and 305.*

ii. An injunction to restrain the defendant (sic) from dealing with or occupying any part of all that land known as Kilifi/Kawala 'A'/Kadzonzo/304 and 305.

iii. A declaration that Certificate of Title No. CR 49739 is null and void.

iv. An order directing the Registrar of Title to expunge the registration of Certificate of Title No. CR 49739 from the records.

v. A mandatory injunction requiring the defendant to remove the fence surrounding Plot No. Kilifi/Kawala 'A'/Kadzonzo/304 and 305 and also any structure belonging to the defendant standing on Plot No. Kilifi/Kawala 'A'/Kadzonzo/304 and 305 and in default the plaintiff to be at liberty to remove and demolish the said fence and building/structures standing on Kilifi/Kawala 'A'/Kadzonzo/304 and 305 at the defendant's costs.

vi. General damages

vii. Costs of the suit.

viii. Any other relief that the Honourable court may deem just to grant.

3. The 1<sup>st</sup> defendant filed its defence on 10 December 2012. In it, it pleaded that it lawfully purchased some unsurveyed portions of land from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, which parcels of land were later demarcated and registered as LR No. 208405. It pleaded that it took possession and substantially developed the land by inter alia developing the Presbyterian High School with no objection from any person. There was pleaded to be a suit, Mombasa HCCC No. 139 of 2011 where it had sued the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The suit is one seeking orders to compel the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to transfer to the 1<sup>st</sup> defendant the title to LR No. 208405. It pleaded that the plaintiff could not have purchased any lawful rights from Shingwaya Holdings Limited and Peter Mwasi, as they had no capacity to sell land owned and occupied by the 1<sup>st</sup> defendant. It pleaded that the plaintiff ought to direct his claim to the two vendors. It pleaded that its land was demarcated and set apart before the issuance of the titles Kilifi/Kawala 'A'/Kadzonzo/304 and Kilifi/Kawala 'A'/Kadzonzo/305 and that these titles are therefore void.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their Statement of Defence on 18 July 2013. They more or less admitted that the plaintiff is entitled to the prayers in the plaint. Inter alia, they admitted that the title LR No. 208405 was fraudulent, null and void. They also admitted that the plaintiff is a bona fide purchaser for value of the plots Kilifi/Kawala 'A'/Kadzonzo/304 and 305. They however denied being party to any fraudulent activities. They pleaded that the plaintiff should claim damages for trespass on the suit property from the 1<sup>st</sup> defendant. They asked that the suit against them be dismissed.

## B. EVIDENCE OF THE PARTIES

5. Nicholas Munyi Kaigwa, the plaintiff, testified that he is the registered owner of Kilifi/Kawala 'A'/Kadzonzo/304 and 305 (hereinafter simply referred to as Plots No. 304 and 305). He had with him the original title deeds which he produced as exhibits. He testified that he purchased the Plot No. 304 from Peter Mwasi and the Plot No. 305 from Shingwaya Limited on 4 June 2010. He produced the sale agreements as exhibits. When buying the plots he was aware that they were subject to an ongoing adjudication process. He produced the Gazette Notice No. 9896, of 18 September 2009, showing that the area was under adjudication. He produced two letters dated 14 June 2010 from the Ministry of Lands, Kilifi, Department of Land Adjudication and Settlement, both affirming that the two plots, previously in the names of the vendors, will be recorded in his name. He testified that he was in search of land around Mariakani area to undertake business in manganese and some agents showed him the two plots, which are on the first row along the Mombasa-Nairobi road, just before Mariakani Town. He was first shown the plot No. 304, but it had an odd shape and the only way he could make reasonable use of it was if he also purchased the neighbouring Plot No. 305. That is how he ended up buying the two plots. Towards the end of the year 2010, he saw some developments on the land including construction of a church. He filed suit and obtained orders of injunction but despite the order the church and a school continued being constructed. He testified that in the year 2009, the Ministry of Lands had written to the 1<sup>st</sup> defendant to stop activities on the land. He testified that the 1<sup>st</sup> defendant's title is not genuine as the claimed setting apart for its title was done when adjudication was going on.

6. Cross examined by Mr. Kamau, learned counsel for the 1<sup>st</sup> defendant, he testified that he got title into his name for the Plot No. 304 on 30 October 2010 and for the Plot No. 305 on 15 May 2013. He explained that he first purchased the Plot No. 304 measuring 5.5 acres from Peter Mwasi. The lands were under adjudication and every member in the community had an allocation number. When he purchased the land, there was nobody in occupation, and only an ancestral house of Peter Mwasi was on the land. In re-examination he referred to letters written by the District Land Adjudication and Settlement Officer of 20 July 2009 and 28 July 2009 asking the 1<sup>st</sup> defendant to stop activities on the two plots. He did not know how the title LR No. 208405 was acquired in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

7. PW- 2 was Peter Mwasi Masulu. His evidence was that they had ancestral land in the area which was adjudicated to him. There was a dispute before the Adjudication Committee filed by Jumwa Jefwa, the 2<sup>nd</sup> defendant, over the ownership of his plot No. 304. The Committee held in his favour with the objection being dismissed. He eventually sold the land to the plaintiff. He testified that part of it has been developed by the 1<sup>st</sup> defendant. When they started developing, he complained to the Ministry of Lands who wrote letters to the 1<sup>st</sup> defendant but they continued building. He affirmed having sold the land to the plaintiff and stated that it is now the plaintiff who is the owner of it.

8. With the above evidence, the plaintiff closed his case.

9. DW1 was Samwel Jefwa Mboe. His evidence was that the 2<sup>nd</sup> defendant was his late mother and the 3<sup>rd</sup> defendant his late grandmother.

He testified that elders from the Presbyterian Church (PCEA) visited the family with the intention to buy land. He was familiar with them as he himself is a member of PCEA, in Kokotoni. He stated that he is therefore well aware of the dispute from both the side of PCEA and from his family's side. They took the elders round the land, which they thought to be 3 acres, but when it was surveyed, it was measured at 5 acres. They wrote an agreement dated 14 December 2004 vide which they sold to PCEA 5.3 acres of land. The church was purchasing the land for purposes of having a cemetery but after seeing it, they thought of developing a school, and to serve this purposes, they needed more land. The neighbouring land was of Peter Mwasi, but it had a dispute. Nevertheless, PCEA got a surveyor who surveyed the land, and they said that they will negotiate with the owner when he emerges. This was in 2006. He and Samuel Thairu, an elder of the church, went to the Town Council offices at Mariakani, to inquire how they can get title since the land in the area did not have titles. They were told that PCEA can pay for the 19 acres they wanted to buy so that the same can be set apart by the Lands office in Kilifi. They could pay Kshs. 5,000/= for 5 -10 acres of land, and a sketch of 24 acres was provided whereupon PCEA paid Kshs. 15,000/=. He testified that what they sold to PCEA was 5 acres but PCEA included neighbouring land to come up with 24 acres hoping that the owners will agree to sell to them the land. The demarcation of the area subsequently took place with the Plot No. 304 falling to Mr. Peter Mwasi and Plot No. 305 to Shingwaya Holdings. His family got the Plot No. 306 with title being issued to his mother Jumwa Jefwa. He affirmed that his family has no other land apart from this.

10. Cross-examined by Mr. Gikandi, learned counsel for the plaintiff, he testified that the church surveyed four neighbouring plots totaling 24 acres, being the plots Nos. 304, 305, 306 and 107. He explained that what the church did was to survey land that it intended to buy. He stated that he has never seen the titles CR No. 57944 and 57945 (emanating from the title to LR No. 208405). He testified that the church had prepared an affidavit dated 14 February 2014, which affidavit stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the registered proprietors of the land parcel LR No. 208405 measuring 24.17 acres and have sold it to the church. They refused to sign the affidavit. He said that he has handed over to the church title to the Plot No. 306.

11. Cross-examined by Mr Kamau, counsel for the 1<sup>st</sup> defendant church, he stated that it was his parents who sold the land to the church. He participated in the sale agreement as a witness. The sale was for 5.3 acres which his parents were paid. This agreement was entered into in the year 2004. There was a second agreement written in 2006 for 19 acres. His parents were also paid for this. He elaborated that the 19 acres were disputed, and the church was aware of this, but they said that they will survey it and later deal with the disputes. Re- examined, he testified that at the time they sold the parcels of land, they had not yet been adjudicated. Upon adjudication, part of the land comprising the 24 acres went to Peter Mwasi and Shingwaya Holdings. The Plot No. 107 went to one Anwaralli. They were thus left with only the Plot No. 306. He explained that the school is built on Plot No. 304 formally of Peter Mwasi. He stated that the title of PCEA was not prepared with good intention. He explained that as a member of PCEA he contributes to their projects and has no intention to defraud the church since this is where he worships.

12. The 1<sup>st</sup> defendant called Samwel Gichuki Thairu as her witness. He is an elder with the 1<sup>st</sup> defendant church. He had a witness statement which he adopted as his evidence. In it, he inter alia stated that on 22 September 2004, the 1<sup>st</sup> defendant church purchased from the 3<sup>rd</sup> defendant land measuring 5.3 acres for the sum of Kshs. 424,000/=. On 26 July 2005, they entered into another agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the purchase of a further 19 acres at Kshs 60,000/= per acre. They paid the sellers. They took possession and built a girls' secondary school. They engaged a surveyor who however fraudulently registered the 24 acre piece of land in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and illegally proceeded to carry out subdivisions so that the land is now known with the identities Kilifi/Kawala 'A'/ Kadzonzo/304 and 305. They subsequently filed a suit Mombasa HCCC No. 139 of 2011 seeking specific performance against the vendors. In his oral evidence in court, he added that it was one of their member, Samwel Jefwa, who offered to sell the land to them. He met the registered proprietors, Jumwa Jefwa and Sidi Chengo. The two sale agreements were then entered into with total acreage of 24.3 acres. He stated that nobody complained and that they have possession and have put up a school.

13. Cross-examined by Mr. Kibara learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he stated that the church does not have title in its name to the disputed land. At the time they wrote the two agreements the land did not have any title. He explained that all properties under PCEA are purchased by the PCEA Foundation and this land was reserved to PCEA Makupa Parish. The agreements were however signed by the elders and he said that they had been empowered to do so. After the purchase, they pursued issue of title which came out in the name of the vendors, Jumwa Jefwa and Sidi Chengo. The title was processed after a "setting apart" and not through the adjudication process. The "setting apart" was in a Gazette Notice.

14. Cross-examined by Mr. Gikandi for the plaintiff, he could not explain how PCEA got approval to build the school without having title in its name. He claimed that title was issued to Jumwa Jefwa and Sidi Chengo and they then subdivided it to produce the Plots No. 304 and 305. He thought that the two plots should total 24 acres, but on being pressed to calculate the acreages from the titles themselves, he conceded that they are about 11 acres. He was aware of the adjudication process over the land. He was not aware of the letters written to the church to stop developing the land. He was aware of the suit that the church had filed, Mombasa HCCC No. 139 of 2011 and stated that they had judgment in their favour. He was not aware that the judgment had been set aside. He was not sure when they started building on the land but it was about 2009/2010. He blamed one Hezron Kamau for the mess and thought that Samwel Jefwa had been compromised.

15. With the above evidence, the 1<sup>st</sup> defendant closed her case.

16. I invited counsel to file submissions, which they did, and have taken the same into account.

### C. ANALYSIS AND DECISION

17. In a nutshell, the plaintiff asserts to be the owner of the Plots No. 304 and 305 herein. He purchased the plots from two persons, not parties to the case, namely Peter Mwasi and Shingwaya Holdings Limited. He explained that he purchased the properties while they were under adjudication and the adjudication register ended up reflecting his name. He was subsequently issued with title. His quarrel is that the 1<sup>st</sup> defendant has taken possession of the properties and developed a school on them thus frustrating his proprietary rights. The defence of the 1<sup>st</sup> defendant is that it purchased this land and other neighbouring parcels of land, in total 24 acres, from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. A title was issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the 24 acres. This title was not issued through an adjudication process, but through what was

referred to as a “setting apart.” It is the position of the 1<sup>st</sup> defendant that this 24 acre title covers part of what the plaintiff now holds out to be his land. However, that title is not in the name of the 1<sup>st</sup> defendant, but was issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants dispute this 24 acre title and in fact in their pleadings they appear not to want anything to do with it.

18. Before we go too far, it has dawned on me that the case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants must be marked as abated. The fact of their demise came to light when Samwel Jefwa testified. He stated that they died sometimes in the year 2017 and 2018. Though I do not have concrete evidence of death, through a Certificate of Death, I have no reason to doubt this evidence which nobody contested. It follows that the case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has abated. My hands are tied and I cannot make any orders in favour or against them for no substitution was effected. The case of the plaintiff against the 1<sup>st</sup> defendant however remains unaffected. In fact, I think the 1<sup>st</sup> defendant is the core defendant, for it is the 1<sup>st</sup> defendant who has taken over the land which is comprised in the titles of the plaintiff and proceeded to develop a school on them. What I need to determine is whether the plaintiff’s titles are genuine, for if they are, then I will have to uphold them and issue orders aimed at protecting the proprietary rights of the plaintiff.

19. The plaintiff has elaborated on the genesis of his titles as I have set out above. It is apparent that the area where the land is located was declared an adjudication area, for I have seen the letter dated 4 February 2010 from the Director of Land Adjudication and Settlement, clearing for purposes of adjudication, the area identified as Kawala ‘A’ and ‘B’ and Kadzodzo Madzimbani as an adjudication section, except for the land parcels LR Nos. 23914, 21623, 27243, and 7242. The 1<sup>st</sup> defendant asserts the right to possess the land on the basis of a title for 24 acres issued in respect of LR No. 208405, which it also claims was set apart. You will observe that the Director of Land Adjudication did not exempt any land described a LR No. 208405. It follows that titles to the land falling in this area, except for the four parcels of land exempted, could only be properly issued following the adjudication process. I thus doubt the authenticity of the title to LR No. 208405 or to any of its subdivisions. Nevertheless, I choose to interrogate this so called “setting apart” to see if indeed it followed the law.

20. The 1<sup>st</sup> defendant bases the alleged “setting apart” on a Gazette Notice published on 18 September 2009, where the Commissioner of Lands purportedly set apart an area of 9.6 Ha for religious/educational purposes. It is this same 9.6 Ha that the 1<sup>st</sup> defendant claims became LR No. 208405 and which it asserts it purchased from the ancestral owners. The “setting apart” was said to be under Part IV of the Trust Land Act, Cap 288, Laws of Kenya. It will be recalled that under the pre-2010 Constitution, Trust Land was vested in County Councils to hold for the benefit of persons ordinarily resident in that area. This was covered in Chapter IX of the now repealed 1963 Constitution. The manner in which Trust Land was governed was laid out in the Trust Land Act (now repealed) specifically Part IV thereof. Part IV elaborated two types of setting apart; one by the Government and the other by the County Council. The former governed an instance where the Government needed part of the trust land for its purposes while the later governed instances where it was the County Council that required the land. The setting apart by the Government was addressed in Section 7 which was drawn as follows :-

#### *7. Setting apart at instance of Government*

*(1) Where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.*

*(2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time—*

*(a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct;*

*and*

*(b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.*

*(3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.*

*(4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 11 of this Act the council shall make and publish in the Gazette a notice setting the land apart.*

21. You will note that the above section refers to Subsection (2) of Section 118 of the repealed constitution; that is, the purposes for the setting apart. Subsection (2) of Section 118 of the repealed Constitution provided as follows :-

*(2) The purposes for which Trust land may be set apart under this section are –*

*(a) the purposes of the Government of Kenya;*

*(b) the purposes of a body corporate established for public purposes by an Act of Parliament;*

*(c) the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya;*

*(d) the purpose of the prospecting for or the extraction of minerals or mineral oils.*

22. It will be observed that the Government could only set apart Trust land for public purposes. I have not seen any allowable setting apart by the Government for a private enterprise. Both the repealed Constitution and the Trust Land Act, made provision for compensation for those who had a right under customary law to occupy the land, where such land was acquired and set apart.

23. The other permissible setting apart was by the County Council itself under Section 13 of the Trust Land Act. This is where the County Council itself, not the national Government, needed land for its purposes. The purposes were laid out in Section 13 of the Trust Land Act, as follows :-

*(a) By any public body or authority for public purposes;*

*(b) For the purpose of the extraction of minerals or mineral oils;*

*(c) By any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area is set apart is to be put or by reason of the revenue to be derived from rent therefrom.*

24. The procedure to be followed for the above setting apart was in Section 13 (2) of the Trust Land Act, which provided as follows :-

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

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

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

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

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

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

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

25. I will go back to the Gazette Notice that purported to set apart the 24 acres. It could certainly not be a setting apart by the national Government because the setting apart was not for the benefit of any public body. It could also not be a setting apart by the County Council, because, firstly, the Gazette notice was not by the Council as required by Section 13 (3) of the Trust Land Act which I have set out above and we are not informed of any process passing through the Divisional Board as required by Section 13 (2) above. In either case, there needed to be compensation to the persons entitled to the land by custom, and in this instance, there was no such process of compensation. I therefore do not see the legality of this purported setting apart published in the Gazette Notice of 18 September 2009. Neither was this land recognized when the area was declared an adjudication area. It follows that this Gazette Notice could not override the declaration of adjudication of the area. Title to the land could therefore only properly issue through the adjudication process and not through the purported "setting apart" process that the 1<sup>st</sup> defendant clings on. The title issued after the purported "setting apart" cannot override the titles issued following the adjudication process.

26. Indeed, there was an elaborate adjudication process that was undertaken for the suit properties. There were in fact disputes and objections that were heard and determined, and which settled the rights of the occupants of the area. The result of these determinations was that Peter Mwasi was assigned the Plot No. 304 and Shingwaya Holdings (of the family of the late Keah) the Plot No. 305. Jumwa Jefwa (sometimes described as Juma Jefa) and Sidi Chengo were assigned the Plot No. 306.

27. Now, the other defence of the 1<sup>st</sup> defendant is that it rightfully purchased the 24 acres from Jumwa Jefwa and Sidi Chengo. It will be observed that these sales were before the land was adjudicated in the year 2010. What the 1<sup>st</sup> defendant purchased was therefore subject to the process of adjudication. If the adjudication process found that the land was not of the vendors, then any person who purchased from them could not get good title. Their title was contingent upon the vendors succeeding in the process of adjudication. In our case, the vendors were not successful during adjudication. I have seen evidence that they indeed had disputes with their neighbours which were determined by the

Adjudication Committee against them. If they lost, which they did, then any person who purported to purchase land from them, cannot claim to now have good title to the land. It follows that the 1<sup>st</sup> defendant cannot be protected by hiding behind the sale agreements entered into with Jumwa Jefwa and Sidi Chengo. The vendors at the time they sold, had no crystalized rights over the land and the 1<sup>st</sup> defendant could not obtain any.

28. In his submissions, Mr. Kamau, learned counsel for the 1<sup>st</sup> defendant, referred me to the case of *Yaxley vs Gotts & Another (2000) Ch. 162* and submitted that it was held in the said case that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust. The full decision was not given to me, but only an excerpt of it quoted in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) eKLR*. The decision in this case was over a sale of land but for which consent of the Land Control Board was not obtained. The Court of Appeal held that a constructive trust was created in favour of the purchasers despite failure to obtain the Land Control Board consent. This decision is distinguishable from the facts before us. What we have is a situation where persons sold land that they mistakenly thought to belong to them whereas it actually was not, as determined subsequently. In essence the sellers only sold a speculative interest not any concrete interest. It ended up that what the sellers purported to sell was actually not theirs. At the end of the day, they had no interest to sell and no interest that they could transfer to the 1<sup>st</sup> defendant save for what was crystalized to them which is now Plot No. 306.

29. It is instructive to note that the 1<sup>st</sup> defendant has no title in its name. It claims rights over the 24 acre title held in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The defence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was that they do not recognize this 24 acre title and they want nothing to do with it. They were aware at the time that they filed defence that they had no rights over this title. As far as I can see, the remedy of the 1<sup>st</sup> defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants lies elsewhere but not in claiming the land that the plaintiff has good title to.

30. I see nothing wrong with the titles of the plaintiff. I cannot fault him for suing the 1<sup>st</sup> defendant for the 1<sup>st</sup> defendant proceeded to develop on his land. The 1<sup>st</sup> defendant did so without even having any title in its name. Why was the 1<sup>st</sup> defendant proceeding to construct in a hurry on land that it even did not have title to ? It was careless if not reckless to do so. How do you proceed to undertake the massive investment of a school development on land that you have no title to ? One would have expected better from an established church institution such as the 1<sup>st</sup> defendant. They have nobody but themselves to blame.

31. From my above discourse, I uphold the title of the plaintiff. The plaintiff is properly the rightful owner of all that land comprised in the titles Kilifi//Kawala 'A' /Kadzongo/304 and 305. I declare that the 1<sup>st</sup> defendant has no right to be on that land. Having no proprietary rights over this land, the 1<sup>st</sup> defendant is hereby declared a trespasser. The 1<sup>st</sup> defendant must remove herself and all persons that she has put into occupation from the two parcels of land belonging to the plaintiff within the next 3 months. She must also remove her structures from the land within the said 3 months. In default the plaintiff is at liberty to demolish and remove such structures, if he so wishes, and pass over the costs to the 1<sup>st</sup> defendant.

32. The plaintiff has also claimed general damages. These are in the discretion of the court. Considering the size of the land, the user that the plaintiff has been denied, the time that this case has taken, and all relevant factors, I award the sum of Kshs. 2,500,000/= to the plaintiff against the 1<sup>st</sup> defendant in general damages for trespass, interest will accrue from time of Judgment.

33. The plaintiff will also have the costs of this suit as against the 1<sup>st</sup> defendant. I make no orders on costs for or against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants since their case had abated.

34. Judgment accordingly.

**DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**