



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 160 OF 2016

THE BOARD OF TRUSTEES

KENYA GOOD NEWS OUTREACH CHURCHES.....PLAINTIFF

VERSUS

MASINDE MULIRO PRIMARY SCHOOL.....DEFENDANT

JUDGMENT

(On cancellation of allocation of land and injunction)

INTRODUCTION

1. The Plaintiff brought this suit through a Complaint dated **31/10/2016**. It was filed on **3/11/2016**. It was later amended on an unspecified date but was filed on the **9/8/2019**. By it, the Plaintiff sought the following orders:

- (a) **A declaration that the Plaintiff is the legal owner of Plot No. KTL/10/94/128.**
- (b) **The Defendant be evicted from the aforesaid plot.**
- (c) **A permanent injunction be issued against the Defendant for any further and future interference thereon.**
- (d) **The Plaintiff be paid damages for loss of use.**
- (e) **Costs of the suit and**
- (f) **Any other relief the Court deems fit to grant.**

THE AMENDED PLAINT

2. In its claim, the plaintiff describes itself as a Religious Institution registered under the **Societies Act Cap 486 Laws of Kenya**. In the Amended Complaint, the Plaintiff averred that in the year **1993** or thereabouts it applied to the then **Kitale Municipality** to be allocated a Plot (this Court understood that to mean a "parcel of land"). The Institution averred further that it was allocated Plot No. **KTL/10/94/128** (*hereinafter referred to as the "suit land"*). It claimed further that upon allocation and approval of the Development Plan by the relevant authorities, it embarked on the construction of a Church among other structures; that it took possession of the suit land immediately after the allotment was issued and has been in continuous occupation to date. The Plaintiff avers further that the suit land has distinct and defined boundaries. The Plaintiffs' claim is that in **mid-October 2016**, the Defendant, without its consent or authority unlawfully and illegally entered on the suit land and started putting up structures despite protests by the Plaintiff; that the Defendants' forceful entry upon the suit land is illegal, unlawful and unjustified and amounts to trespass upon private property; that the Defendant has craftily obtained land documents belonging to the plaintiff and has intentions of acquiring the entire Plaintiffs' land; that the continued interference of the suit property by the Defendant has deprived the Plaintiff of the use and enjoyment of the suit land thereby causing the Plaintiff to suffer loss and damage; that there is no pending suit between the parties herein save that there existed **Kitale CMCC No. 431 of 2005** between the Plaintiff and Kitale Municipal Council. The Plaintiff further avers that in the year **2005**, the Defendants were under the umbrella of the now defunct Kitale Municipal Council and that the then Council being the trustee of Land under the Municipality and the allottees of the land in question acknowledged the rights of the Plaintiff by a consent entered in court.

THE DEFENCE AND COUNTERCLAIM

3. The Defendant filed a Statement of Defence and Counterclaim on the **17/1/2017**. Its Defence is that the letter of allotment dated **23/10/1995** in respect to Plot No. **KTL/10/94/128** was issued irregularly and unlawfully and has since been cancelled as the said plot encroaches an area planned and occupied by the Defendant; the Defendant denies that the Plaintiff had an approved Development Plan and never took immediate possession of the suit land; that the parcel of land does not have distinct and defined boundaries and that the said suit land has encroached on Plot No **KTL/10/92/4** which belongs to the Defendant; that the Defendant has not encroached on the suit land because it has constructed on the Plot it is entitled to thus the Defendant has not trespassed on the suit land; that the portion occupied by the Defendant is within the parcel of land known as **KTL/10/92/4** which belongs the Defendant.

4. Thereafter, the Defendant counterclaimed against the Plaintiff. In its counterclaim, it avers that the suit land encroaches on its parcel of land known as **KTL/10/92/4**; that the Letter of allotment for the suit land was cancelled by the Commissioner for lands on the **25/8/2010** and therefore the Plaintiff has no claim over it. It prays that judgment be entered for it against the Plaintiff for:

(a) **A declaration that the allotment for Plot No. KTL/10/94/128 in favour of the Plaintiff was duly cancelled and that the said Plot is no longer in existence**

(b) **A declaration that the Plaintiff is the legal owner of Plot No. KTL/10/92/4 and that the Plot No. KTL/10/94/128 has encroached on Plot No. KTL/10/92/4**

(c) **A permanent injunction be issued against the Plaintiff from claiming or trespassing upon Plot No. KTL/10/92/4 belonging to the Defendant School.**

(d) **That the Plaintiff be evicted from Plot No. KTL/10/92/4**

(e) **Costs of the suit.**

REPLY TO DEFENCE AND DEFENCE TO COUNTERCLAIM

5. The Plaintiff filed its Reply to the Defence and Defence to the Counter-claim. It is dated **25/8/2018** and filed on the same date. It reiterates the contents of the Plaintiff in the Reply to Defence and Defence to the Counter-claim. The Plaintiff states that in the event that the allotment was cancelled, which action it denies, the same was done without due process and was tailored to defeat the Plaintiffs' interest on the suit land hence null and void.

THE PLAINTIFFS' EVIDENCE

6. **PW1, Pastor Pius Simiyu Wamakacha**, testified on **3/3/2020**. He adopted as his evidence in chief his witness statement dated **31/10/2016**. He states that he is a preacher at the Good News Outreach Church. In his evidence he referred to the Certificate of the Church, marked as **PMFI 1**. His evidence is that the School is developing on the parcel of land owned by the Church, that is to say, Plot No. **KTL/10/94/128**. He testified that the Church applied for the Plot from the Municipal Council in **1994**; that it was allocated the Plot in **1995**; that the Church received a reply from the (Kitale Municipal) Council on **12/2/1994**, approving their request. He produced in evidence as "**P. Exhibit 2**" a letter dated **12/2/1994**; that the Church was given an allotment letter. He stated that before that the Church approached the Department of Physical Planning (of the Ministry of Lands and Settlement) which wrote to it a letter dated **20/12/1994**. He produced in evidence the letter marked as "**P. Exhibit 3**". He testified further that the Church was issued with an allotment letter dated **23/10/1995**. He produced it in evidence and marked it as "**PMFI 4(a)**". He also produced in evidence a Physical Development Plan showing the position of the suit land. The Plan was marked as "**PMFI 4 (b)**". His further evidence was that the Church built on the said suit land in **1995** and that the church conducted its business well. He further testified that some time in **2005** the Church sued the (Kitale Municipal) Council. That the suit was brought due to a boundary dispute between the Church and the School which is its neighbor; that in the case the Church did not want interference because the School was under the Council; that the suit was **Kitale SPMCC No. 431/2005**; that the school participated in the case and the court decided that the land belonged to the church and the School (*emphasis mine*). He produced as "**P. Exhibit 5**" a court order emanating from the case. He testified that the Church did not obtain the allotment letter irregularly because its allotment letter preceded that of the Defendant; that the Defendant's Plot (parcel of land) is different from theirs and the Plaintiffs have not encroached on the Defendants' land; and that its allocation of land was not cancelled. He prayed that the School removes their developments from the Church land (suit land) and that it be restrained from interference in the future.

7. Upon cross examination by **Mr. Wabwire**, State Counsel for the School, **PW1** confirmed that the case has been instituted by the Board of Trustees of Good News Outreach Church; that he is allowed to give evidence by virtue of a resolution made by the Church; that the Church applied for the suit land in **1994** and was allocated in **1995**. However, he did not produce the application letter for allocation. He also confirmed that he did not have both the application and acceptance letters which were necessary before the allotment letter could be issued; he admitted in cross-examination that the payment for the allotment was to be done within **30** days of issuance thereof and in default the offer would lapse (*see* the letter of allotment, **P. Exhibit 4 (a)**); he testified further in cross-examination that he wrote the letter of acceptance but did not have it in court; that the allotment letter was issued by the Office of the Commissioner of Lands. He was then shown copies of documents then marked as **DMF1 4**. He confirmed that it was a letter written to the Church by the Commissioner of Lands on the **25/8/2010**. He acknowledged that the letter was informing the Church that their (for the church) allotment had been cancelled. However, he disputed that letter was genuine; He stated that upon receipt of the letter dated **25/8/2010** he lodged a complaint to the National Land Commission. When referred to the Court order he had produced as **P. Exhibit 5**, he stated that the Municipal Council was the Defendant and not the School; that the Church came to the land before the School; that the allotment has not been cancelled to date and that Samaritan Academy occupied the land after the Church; that the Church was first to occupy the suit land.

8. On re-examination, he clarified that he was allowed by the trustees to file the case and that he was not called at the time their letter of allotment was cancelled.

9. **PW2, Henry Shikuku Barasa**, a preacher of the Plaintiff Church testified on **3/6/2021**. He adopted as evidence in Chief his witness

statement dated **31/10/2016**. His testimony was that the Church sought a plot from the (Kitale) Municipal Council; that it and was issued with an allotment Letter in **1995** in respect to **Plot No. KTL/10/94/128** together with a letter from the Physical Planning Department allowing the Church to be on the Plot as well as a Physical Development Plan (**P.D.P.**); that in **2005**, the Municipality went and disturbed the Church and it sued the Municipality. That in **2006** the Church obtained a permanent injunction against the Municipality because it had intended to demolish the church. He stressed that the plot belongs to the church.

10. Upon cross-examination by **Mr. Odongo**, State Counsel for the Defendant, he confirmed that he is not a registered trustee of the Church but he is a Bishop. Even so, he did not have any evidence to prove that. He also testified that there was an application for the allotment but did not produce it as an exhibit. Upon being shown **PMFI-4(a)**, the letter of allotment dated **1/11/1995**, he confirmed that it reads “Church Plot Kitale Municipality” and that, however, “**KTL/10/94/128**” is not reflected therein; that the Church was allocated Plot No. **KTL/10/94/198** which is a Plan Number but not Plot Number; he confirmed that he is the custodian of the cheques and they paid **Kshs. 6062.00/=** for the allotment but had no copy of payment produced in Court; he confirmed that he was not aware that in **1992** the suit land was reserved for educational purposes therefore it could not be allocated in **1993** (when the Church applied for allocation). He also confirmed that if a ground report was made, it could prevent the issuance of allotment letter having knowledge that the Plot was reserved for the School; he confirmed that the letter of allotment is not valid as it was cancelled by the Commissioner of Lands and that Masinde Muliro (School, the Defendant herein) has a letter of allotment for the entire parcel the church occupies and that there is no basis upon which to object to the title of the school.

11. On the same date, **PW3, Victoria Mbolole**, who described herself as a pastor of the Church also testified. She adopted her witness statement dated **31/10/2016** as her evidence in-chief. Her testimony largely echoed that of **PW1** and **PW2**.

12. The Plaintiff closed its case on the **22/7/2021** when both counsel agreed that way by consent. On the said date, the Plaintiffs’ document which had been marked for identification as “**PMFI 4 (a)**” was produced by consent as **P. Exhibit 4 (a)**.

THE DEFENDANT’S EVIDENCE

13. The Defendant called a number of witnesses, one of whom was **DW1, Beatrice Wangila**, a Director of Physical Planning at Trans-Nzoia County. Md. Beatrice Wangila testified on **1/7/2021**. She stated that her responsibilities in the County included forward planning, development control, enforcement and research. Her testimony was that she also was the custodian of the records of physical planning in the County on behalf of the Director of Planning. She stated that the process of drawing a Part Development Plan (**P.D.P.**) begins with a request (by a party) and it is followed by a visit to the site (in issue), thereafter the office delimits the parcel of land in question; it then seeks comments from other (relevant) offices; then advertises it and if there are no objections, the **P.D.P.** is approved. That as of now, the approvals take place at the County level; that, however, for this case, it was forwarded to the Director (of Physical Planning) for approval; that where land is reserved for public use, it is not easy to change it for other use unless there is express authority; that where the use has not been changed it is not possible to do a **P.D.P.** for an individual (private purposes); that such a parcel of land would not be available (for allocation) if it is reserved for public use. It is her testimony that the **P.D.P.** in her possession was in favour of Masinde Muliro Primary School. That it was done in **1992** as **Plan No. 1092/4** whereas in **2011**, a second one was done because it had not been recognized that the first one had been approved; and that after the second one of **2011**, that is to say, **KTL 10/2011/3** was commenced, it was realized that the first one was already approved by the Director (of Physical Planning) on **31/11/1995**. That for this reason, the second one could not be approved. That the Plan was approved by the Commissioner of Lands on **10/11/1995** and as at **1992**, the site was picked as an existing site for Masinde Muliro Primary School and if the **P.D.P.** was to be interpreted, the school existed as at **1992**. She testified that both Plans refer to the same site and the second plan was not approved. She produced the two Plans as “**D. Exhibit 1 (a)**” dated **29/1/1992**, and “**D. Exhibit 1(b)**” dated **14/12/2011**. She also had in her possession the Plan for **KTL/10/94/128**. She testified that according to their office records, the Plan was prepared on **19/12/1994** but it was not approved. She testified further that the reason for approving a **P.D.P.** is to establish that the land is available for allocation. She produced the Plan as “**D. Exhibit 2**”. She testified that the school visited her office to facilitate issuance of title; that she visited the site in **2011** and found that in the site designated as being for **Masinde Muliro Primary School** was a Savatia Academy occupying a parcel of land measuring approximately **2 Ha** which was fenced off, a semi-permanent church and a pastors’ house. Then there was Samaritans’ School Technical College and Seminary.

14. It was her testimony that she realized that the **1992 P.D.P.** had been approved (for Masinde Muliro Primary School as indicated in her testimony earlier) and that the one done in **2011** could not be approved; that she also noted that the other **P.D.P.s** created for the three institutions were all in respect to the site prepared for Masinde Muliro Primary School. That upon that realization, she prepared a letter dated **16/12/2011** which she produced as “**D. Exhibit 3**”; that the letter was written to the Director of Physical Planning, the (District Commissioner) D.C., the District Lands Officer, the District Surveyor and the Head teacher. She said that upon the addressees receiving the letter, they gave comments which she received but due to the older Plan of **1992**, she still could not proceed with preparing another **P.D.P.** She testified that she then left the matter to be dealt with by the Land Officer who then wrote a letter to that effect. She told the court that allocation of land does not fall within their jurisdiction. Further that, however, she had been following up with the lands office because the three (3) **P.D.P.s** were overlapping on the site and needed be cancelled. She produced the letter dated **17/3/2012** as “**D. Exhibit 4**” and another dated **25/8/2010** as “**D. Exhibit 5**”. These were addressed to the Church, requiring it to surrender the allotment and seek alternative land. They informed them that their allotment had been cancelled respectively; she then stated again that the site in “**D. Exhibit 1**” belongs to Masinde Muliro Primary School as it was the one which allocated the parcel of first or prior to others purporting it to be so.

15. On cross-examination by **Mr. Wafula Advocate**, she confirmed that the preparation of the **P.D.P.** has a time limit; that upon completion, it has to be submitted within 60 days; that as at **1992** the Physical Planning Act was not in force and the **P.D.P.s** prepared before then were only subjected to internal circulation; and that applications for them were made to the Commissioner of Lands who would ask them (the relevant offices) to do the **P.D.P.s**. She confirmed that the first Plan was in their file and after they received communication from Nairobi, they could not process the 2nd Plan; that **KTL/10/94/128** was prepared before Plan No. **10/92/4** was approved. She also confirmed that the other institutions (on the site for Masinde Muliro Primary School) were requested to surrender their allotments.

16. On re-examination by **Mr. Odongo** state Counsel, she clarified that “**D. Exhibit 2**” was not approved therefore cannot form basis of an allotment; that whether “**D. Exhibit 2**” has been approved or not, it cannot affect “**D. Exhibit 1**” which is in respect to an existing public utility.

17. On the same date, **DW2, Julius Matere Syaleka** a Headteacher at Masinde Muliro Primary School since 2018, March testified. He reiterated the evidence of **DW1**. In addition, he told testified that as a School they were issued with an allotment letter dated 5/2/1996. He produced it as “**D. Exhibit 6**”. He stated that after the issuance, the School paid all the requisite fees to facilitate the issuance of a lease. However, the process has been stalled by the instant suit. He stated that the allotment issued to the Church was cancelled therefore the Church should be evicted from the land. When shown an affidavit sworn by **John Mugo Shinyalu** on 12/9/2017 in which it is deponed about constructions being done by the Defendant, he stated that the construction was on **KTL/10/92/4** and not on **KTL/10/94/128**. He stated that **KTL/10/94/128** is within **KTL/92/4**.

18. Upon cross-examination by **Mr. Wafula Advocate**, he confirmed that the School is not sponsored by the Municipality. He testified that the cancellation of the Church’s allotment was done in 2010 after the Church was issued with it and that it appears that there were two allotments in place over the same land until the one for the Church was cancelled.

19. Similarly, **DW3, Vincent Nyongesa Lukorito**, a School Committee Member and Member Board of Management of Masinde Primary School since 1992 also testified on 1/7/2021. He adopted as his evidence in-chief his witness statement filed on 17/1/2017. His testimony was that the School was allocated the land in 1992 and began as a Public School. By that it was the Municipality in charge of parcels of land within its area. Later, parents to the School, through the area Councilor were shown the school land; that the land was unoccupied then; that thereafter, the land officers visited the land to demarcate it and surveyors fixed the beacons; that the Plaintiff/ Church was not thereon then but begun to claim land in 1995. As a result of that claim by the Church, the School went to Nairobi and saw the President. President Mwai Kibaki ordered titles to be issued to institutions. It was then that the School discovered that the church had been given an allocation but the School was given a letter demanding that the Church vacates the land or moves out of the land; that the Church occupied the land first before the surveyor fixed the beacons. However, there was no Physical Planner who visited the land.

20. That marked the close of the defence case.

SUBMISSIONS

21. The court gave directions for the parties to file their submissions. They did so. The Defendants filed theirs on the 24/8/2021 while the Plaintiff filed its on 10/9/2021.

DETERMINATION

22. The main issues for determination are:

- (a) *Who is the lawful owner of suit land, as between the Plaintiff and the Defendant?*
- (b) *What orders should issue?*
- (c) *Who bears the cost of the suit?*

23. This Court shall analyze the issues sequentially.

(a) *Who is the lawful owner of the suit land as between the Plaintiff and the Defendant?*

24. It is not disputed as between the parties that the suit land is that parcel of land known as **KTL/10/94/128**, measuring **0.46 Ha** or thereabouts. The issue between the is that one claims to be the lawful allottee of the same. From both the pleadings and the evidence on record, both Institutions occupy part of the suit land. Each of them alleges encroachment by the other on the suit land. It is trite law that whosoever asserts the existence of a legal right or liability is vested with the burden of proving the existence of that right or liability asserted. **Section 107 of the Evidence Act (Cap 80 Laws of Kenya)** provides:

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

25. **Section 108 of the Act (Cap 80 Laws of Kenya)** provides further thus:

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

26. The first question to consider as I discuss the issue is: how does a person or entity get to own land unalienated Government[[HD\(JOEN1\)](#)] land? An answer to this would demystify the mystery of the ‘two allocations’ herein. The allocations in issue herein were said, from the evidence on record, to have given in 1992 and 1995. The law applicable then in relation to alienation of Government Land was the Government Lands Act (now repealed). **Part III** of that Statute (containing **Sections 9 to 18B**) outlined the steps to be followed by government in disposing of land within townships. I have limited my observation to provisions which dealt with the process of alienation of land owned by government but which falls within townships because the parties herein are laying claim to land falling within the then Kitale township. That process is, what DW2 alluded to in part in her evidence before the Court. The said process was restated in the case of *Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR* by my brother, Angote J. It had been alluded to in part by the Court of Appeal in *Mombasa Technical & Training Institute vs Agnes Nyevu Charo & 106 others, Mombasa Civil Appeal Number 282 of 2010*, wherein their Lordships were clear that one who occupies Government land without permission (or to say proper allocation) remains a squatter on that land irrespective of how long he remains on that land: he has no legitimate expectation for allocation of that land. To the extent that the Plaintiff has not proved to have followed the legal steps towards being allocated the land it claims herein

their claim lacks a basis for success, as explained further below.

27. The Plaintiff herein claims to be the rightful owner of the Plot No. **KTL/10/94/128** and that the defendants are trespassers on their land. It is the duty of the plaintiff herein to prove those facts. The Defendant also claims, by way of Counterclaim, that the Plaintiff is the one which has encroached onto the said parcel of land which is owned by the School and that the allocation to the Plaintiff was cancelled on **25/08/2010**, the burden lies on it to prove that set of facts.

28. The Plaintiff testified that they were issued with an allotment letter dated **23/10/1995**. However, it came out from the evidence of both **PW1** and **PW 2** in cross-examination that it did not pay the requisite fee within the statutory time of **30** days. If it paid the fees, then it did not produce any evidence to that effect. It behooved the Plaintiff to produce documentary evidence of payment of the fees. Without it, it leaves the Court to infer that the Plaintiff did not pay the fee. The condition stated in the letter of offer (of allotment) at page two (2) thereof was that non-compliance of any of the terms would terminate the offer automatically. **PW1** in cross examination confirmed they did not pay (if any) the requisite fee within the stipulated time. Through **PW 2**, the plaintiff alleges to have paid a fee of **Kshs. 6062.00/=**. However, the witness did not produce any receipt to support that piece of evidence. The lack of it means that it does not exist and therefore the Plaintiff failed to comply with the set conditions and thus the offer of allotment lapsed automatically. In any event, since the evidence of **DW 1**, which I find credible, is that the land in question had been allocated to a public institution in 1992 and was thus not available, even if it would be found or true that the Plaintiffs paid to the Government the money as stated, it was for a non-existent allocation, since the **P.D.P.** for which the allocation was to be firmed on and a lease finally issued on was not approved. If it is true that the money was paid, the Plaintiff can only have the recourse for a refund thereof: it cannot form the basis of claiming the land they do claim.

29. In the case of *Rukaya Ali Mohamed -vs- David Gikonyo Nambachia & another Kisumu HCCA.9/2004* his Lordship held as follows:- **“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest”**.

30. The Plaintiff herein failed to meet the conditions set out in the allotment. By necessary implication, upon the non-compliance thereof the allotment lapsed, thus rendering the land available for allotment to another person. That would have been the net result were it not for the existence of the Defendant in the picture. Therefore, of importance to mention here was whether or not the land was available for allotment to the Plaintiff in the first place. **DW 1**, explained how land was allotted at the time by the Officer of the Commissioner for Lands. In the process, first, the office would receive a request for allotment, it would thereafter identify land that was available for allotment in the area requested for, then the office would visit the sites, draw **P.D.P.s** and proceed with the advising on further process of allocation.

31. On the other hand, the Defendant in its Counterclaim avers that it is the rightful allottee of land parcel No. **Plot No. KTL/10/92/4** after it was allocated to it. Their contention is that they were allocated the land in **1992** and paid for the allotment.

32. The facts advanced by the parties and witnesses herein, demonstrate that a number of allotment letters were issued in respect to the suit land. However, the first allotment letter which was issued in respect to the land was **Plot/No. KTL/10/92/4** belonging to the defendant.

33. The allotment which was issued in **1992** was the first to be issued and the defendant complied with the conditions set out in the offer. What was remaining was the registration of the lease. The process of acquiring the lease knocked at the door of the plaintiff and caused it to file the instant suit. It is then clear that the land was not available for allocation in **1994** when the Plaintiff was allocated the land; it was not available for allocation in **1994** since the same did not exist for allocation. That allocation was therefore a nullity and could not confer any right to the Plaintiff.

34. The Acting Director of Physical Planning, **DW1**, one **Beatrice Wangila**, in her testimony, was clear that there was an overlapping of **P.D.P.s** in respect of three Plots. She stated that for this reason she was following the matter to have the overlapping ones cancelled. She then Produced **D. Exhibit 4**, a letter dated **17/3/2012** by the Principal Land Administration Officer, Trans Nzoia/West Pokot District which required the Plaintiff to surrender the allotment letter to her office and seek an alternative site. She also produced **D. Exhibit 5**, a letter dated **25/08/2010** by the Commissioner of Lands addressed to the Plaintiff stating that **“I refer to my letter of allotment Ref. No. 20089/XXX1 of 25/10/1995 for the above Plot and hereby wish to inform you that the same has been cancelled.”** The referenced Plot was as **RE: UNS. CHURCH PLOT- KITALE MUNICIPALITY**. In her testimony, she stated further that the unapproved **P.D.P.s** could not be processed further because the Defendant which is a public institution had already been given an approved one. That the **P.D.P.** for plot No. **KTL/10/92/4** was among the three but it was the approved one, and it belonged to the Defendant. It was not to be cancelled, and it was the one that was claimed by the Plaintiff as encroaching on parcel No. **KTL/10/94/128**.

35. As stated immediately above, **DW1** confirmed that the allotment in respect to **Plot. No. KTL/10/94/128** had been cancelled by the letter dated **17/3/2012**. Thus, from the evidence, the Plot was non-existent.

36. This court finds that the land claimed by the Plaintiffs' was not available for allocation in **1994** because it had already been allocated to the Defendant in the year **1992**. Further that the allotment issued in **1992** in favour of the Defendant, had not been cancelled to pave way for the land to be allocated to the Plaintiff in **1994**.

37. For the foregoing reasons, I find that the Plaintiff has failed to prove its case against the Defendant on a balance of probabilities and I hereby dismiss it with Costs to the Defendant. I also find that Defendant has proved its Counterclaim on a balance of probabilities as against the Plaintiff. I therefore enter judgment in favour of the Defendant against the Plaintiff and issue the following orders:

(a) **A declaration is hereby made that the allotment for Plot No. KTL/10/94/128 in favour of the Plaintiff was duly canceled and that the said plot is no longer in existence.**

(b) **A declaration is hereby made that the Defendant (Masinde Muliro School) is the rightful and legal owner of Plot No.**

KTL/10/92/4.

(c) A permanent injunction is hereby issued against the Plaintiff from claiming or trespassing on Plot No. KTL/10/92/4 belonging to the defendant school.

(d) An order of eviction is hereby issued against the Plaintiff (Kenya Good News Outreach Church) from Plot No. KTL/10/92/4 forthwith.

(e) The Plaintiff shall bear the costs of the suit and Counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10TH DAY OF NOVEMBER, 2021.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE
