**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 2 OF 2011**

**1. JIMMY GICHUKI KIAGO**

**2. MICHAEL NATO MUKHEBI..... PLAINTIFFS**

**VERSUS**

**1. THE TRANSTIONAL AUTHORITY**

**2. INNOCENT ETYANG**

**3. REUBEN MALISHA**

**4. PETER KHAEMBA**

**5. CHRISTOPHER GEKONGE**

**6. DENNIS ARUMBA**

**7. MAURICE MUREI**

**8. THE COUNTY GOVERNMENT OF**

**TRANS-NZOIA.....DEFENDANTS**

**JUDGMENT**

**THE PLEADINGS**

**The Plaintiff's Case**

**1.** In the further amended plaint dated **9/6/2014** which was filed on **10/6/2014** the plaintiffs seek the following orders against the defendants:-

> **(a) A declaration that the allotment letters issued by the County Council of Trans Nzoia to the 2nd to 7th defendants or any other individuals are a nullity.**
>
> **(b) A declaration that the space in Land Parcel; No Trans Nzoia /Emoru/26 in which the 2nd to 7th defendants are erecting structures is meant for public utility as set out in paragraph 5 of the plaint thus the defendants be evicted;**
>
> **(c) A permanent injunction to restrain the 1st (a) and 8th defendant from issuing further allotment letters to the 2nd to 7th defendants from erecting structures on the disputed land or dealing with the disputed land in any manner against the intended purposes it was set aside for.**

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

**2.** According to the plaint the plaintiff sue under **Section 22** of the Constitution of Kenya.

**3.** Their claim is that they own parcels of land which resulted from subdivision of **LR Number 562- Trans Nzoia District**. They also

describe themselves as interested parties in land parcel Trans Nzoia Emoru/26 which was set apart during subdivision of LR 562- Trans Nzoia for a trading centre and other public utilities which include industrial area, nursery and primary school, open space, church administrative headquarters, cemetery, refuse disposal and elevated water land.

**4.** However the County Council of Nzoia (whose successors are the 1st and 8th defendants has issued allotment letters to the 2nd to 7th defendants who are now erecting structures for their own benefit on the area set aside for the public utilities. It is on the basis of those facts that the injunctive orders are sought as outlined hereinbefore.

**The Defendants' Case**

**5.** The defendants filed their defence dated **22/2/2011** on the **28/2/2011**. Therein they admit the suit land was reserved for a trading centre but deny that it was set aside for any other use; that the County Council of Trans-Nzoia (now County Government of Trans-Nzoia) is seized of constitutional and statutory powers to plan subdivide and allocate portions of the suit land to suitable persons for designated purposes and that the plaintiffs lack locus standi to bring these proceedings.

**THE EVIDENCE OF THE PARTIES**

**The Plaintiff's Evidence**

**6. PW1, Beatrice Wambui Wangila** he testified on behalf of the plaintiffs on **21/1/2013.** She stated that she was the Physical Planner in Charge, Trans Nzoia County and gave her qualifications. She testified that the suit land was set aside for the benefit of Emoru Settlement Scheme; that any area set aside for a public utility has to be subjected to physical planning; that the trading area was zoned; that **Zone 1** was set for a nursery school. There was a zone for a primary school. **Zone 44** was set aside for administration headquarters for the settlement scheme; that the suit land is traversed by roads of various sizes; that there are commercial and residential plots reserved for allocation; that the land is held by the government in trust for the public; that **zone 5** was set aside for commercial purposes; that as per her records, there has never been re-planning of the suit land; that her department had not recommended any plans for the development of the land by the 2nd to 7th defendants; that there has never been any allocation of land in the centre through the office of the Commissioner of Lands; the land, according to the witness therefore is unalienated government land.

**7. PW2 Jimmy Gichuki Kiago,** also the 1st plaintiff, testified on the same date as **PW1.** He testified that a larger parcel of land measuring **590 acres** was originally owned by a white settler but was later taken up by the government and distributed amongst **76** people whereby he got 5 acres; that the suit land is **Land Parcel No Trans Nzoia/Emoru/26** and it was reserved for public utilities; that there are various zones as shown on **PExh 2** set aside for a nursery school **(Zone 21),** primary school **(Zone 22),** administration headquarters **(Zone 44)** dispensary **(Zone 55).**

**8. PW2** also stated that the 2nd defendant has built between the area set aside for the administration block and a road reserve; that the 4th defendant has built a three roomed permanent building which is occupied by tenants; that the 5th defendant has built a shop and put up a corrugated iron sheet fence; that the 6th defendant has dug up a pit latrine on land reserved for a primary school; and that the 7th defendant has built on land reserved for a primary school.

**9. PW2** testified further that he has brought this suit in the public interest and expressed his concern that as time goes by there will be no more land left for public utilities. He added that a chief's office was desirable in the area and a temporary structure has been put up to house the nursery school. He prayed that the court do order the defendants out of the land so that the public can benefit from the land set aside for public utilities.

**10.** The witness added that the 2nd defendant defied the injunction issued by this court in **2010** and completed his house. A lawyer wrote on behalf of the plaintiffs to the persons who violated the court order and **PW2** also complained at the Nzoia County Council offices. The clerk to the council admitted having issued temporary letters of allotment but never showed him any letter.

**11.** The surveyor's report dated **11/4/2013** and filed in this matter on **12/4/2013** was adopted by consent on the **15th October, 2014** and the plaintiff's case was closed on the same date.

**The Defendant's Evidence**

**12.** The **4th Defendant Peter Wamalwa Khaemba** testified on **1/2/2016**. According to him the land was set aside for public utilities including a trading centre by the County Council of Trans Nzoia. The witness testified that he was aware of a **1983** part development plan the original of which had been produced in court by the plaintiffs.

**13.** In his opinion it showed the subdivision of the land into commercial plots, trading centre, primary and nursery school, slaughter house, cemetery, residential and light industry areas.

**14.** However he stated that in **2007** the County Council re-planned the area after a meeting which involved the local residents who requested for some public utility land to be converted so that they could have some commercial plots.

**15.** According to the witness, the county council, agreed to re-plan the area in a meeting of the council held on **30/6/2010**. It resolved to do away with things like a public cemetery in order to increase the revenue base of the county. Thereafter a new PDP was put in place on **19/8/2010**.

**16.** In his opinion the 1983 PDP had created very many public utilities. With the re-planning, the public utilities were reduced and the commercial plots were increased. He produced a copy of the minutes of the planning committee meeting of the county council as **DExh 1**. He was allocated **Plot Number 3** on **Block 31** in the new plan according to a letter of temporary allocation **DExh 3**. He paid for the plot and sold it to a third party. He stated that **plot number 20** on the old PDP corresponds to **plot no 60** in the new PDP and falls on an area reserved for commercial plots. He disputed the allegation that his plot is on a public utility plot. He averred that it was the clerk to the county council who was allocating land, and that the clerk told him that the temporary allocation letters were to be taken to the Commissioner of Lands for validation. However the names of the allottees were not forwarded to the Commissioner.

**17. DW2 Innocent Okaka Etyang** testified on **6/4/2016**. His evidence is that he is the current Assistant Commissioner Kajiado West. In **2009** he applied for a plot at Emoru trading centre and was allocated a corner plot slightly larger than 50 by 100 feet by the county council of Trans Nzoia. He produced the letter of allotment as **PExh 4** and stated that he paid **Ksh 18,000/=** to the county council. He stated that his plot is not captured in the **PDP** of **1983** as a residential plot. He denied that his plot is on a road reserve.

**18. DW3, Herman Malavi** testified on **24/10/2018.** His evidence is that he is a former councilor of Kaisagat Ward; that he was elected member of the Town Planning Committee in the then Trans Nzoia County Council; that at a meeting held on **30/6/2010** re-planning of some centres including the centre in which the suit land is located was discussed; that it was resolved that the centres be re-planned and public utility plots be converted into commercial plots; that the decision was implemented and a surveyor was appointed who came up with a new map; that plots were issued numbers and allocated; that **DExh 2** reflects the new planning that emanated from the implementation of that decision; that **DExh 2** preceded any other map there before made in respect of the land; that the council owned the plots in question and that it had authority to allocate them.

**DETERMINATION**

**Issues for Determination**

**19.** It is common ground that the suit land was set aside for a trading centre and public utilities: This is evident from the admissions contained in the testimony of **DW1** and **DW3.** The evidence on record shows that the suit land was zoned for residential (Zone 0), industrial (Zone 1), educational (Zone 2), recreational (Zone 3), public purposes (Zone 4), commercial (Zone 5), public utilities (Zone 6) and transportation purposes (Zone 7). All these purposes are reflected on the **Physical Development Plan Ref No. Eld/932/83/1** which **PW1** produced as **PExh 1.**

**20.** It is not disputed that the suit land had been carved out from the main parcel of land that was subdivided amongst the Emoru settlers and that it was set aside for the benefit of the Emoru Settlement Scheme. It is also not in contention that the 2nd - 7th defendants and many others not named as parties in this suit are beneficiaries of re-planning of the land which saw the number residential and commercial plots increase exponentially at the expense of the plots that had been earmarked for other purposes of a public nature.

**21. DExh 2** is the evidence of the defence showing the new layout of the plots created after the implementation of the resolution by the town planning committee.

**22.** A look at **DExh 2** shows that only small portions of the areas previously meant for an administration block, the market and the bus park had were left untouched. A new, relatively tiny plot created in the area meant for "public purposes" had been assigned a specific description of "dumpsite". All the rest had been turned into plots. All the land meant for a primary and nursery school was already subdivided into small plots. So was the land earlier earmarked for cemetery, abattoir, hides and skins banda, refuse disposal, and a dispensary.

**23.** In short, the land for all the other purposes (industrial, educational, recreational, public purposes and public utilities) had been subdivided into what the defendants call residential and commercial plots while the area meant for an administration block had been reduced to a very small fraction of its earlier size provided for under the **1983** Physical Development Plan.

**24.** However, **DExh 2** is not approved by the Commissioner of Lands. It is the evidence of **PW1** that any dealing that purports to re-plan public utility land has to have the approval of the Commissioner of Lands.

**25.** It is noteworthy that the purported re-planning was carried out while the office of the Commissioner of Lands was still in existence. Despite the direct challenge posed by the **PW1's** evidence the defendants never produced evidence of approval by the office of the Commissioner of Lands of **DExh 2.**

**26.** It is therefore evident that the re-planning exercise was carried out solely by the County Council. It is alleged that a meeting of the County Councils town planning committee held on **30/6/2010** resolved that the re-planning be implemented.

**27.** The surveyor's report filed in this court shows that the 2nd - 7th defendants have encroached on plots that have been carved out of land meant for public utilities such as schools and roads. I agree with the plaintiffs' submission that that there was no other expert report produced by the defendants to controvert that survey report. It must be taken to be correct.

**28.** In this court's view, the issues that now arise for determination in this suit are as follows:

***(a) Whether the minutes of the 8th defendant's Town Planning Committee were legally effective to re-plan the suit premises without recourse to the Ministry of Lands so as to convert the public utility plots into commercial and residential plots;***

***(b) Whether the allotment letters issued by the 8th defendant are a nullity;***

***(c) Whether a permanent injunction ought to issue to prevent the issuance of further allotment letters and to restrain the 2nd to 7th defendants from erecting structures on the suit land or dealing with it in any manner against the purpose it was set aside for.***

**29.** The plaintiff's evidence is to the effect that there has never been a re-planning of the suit land by the Physical Planning Department of the Ministry of Lands and that the Commissioner of Lands was the rightful office to issue allotment letters to the land in question. However the Commissioner never issued any allotment letters to any person. **DExh 2** was also said to lack any validity as it bore no signature even of the surveyor who prepared it, or of any approval by the Physical Planning Department. This evidence was not controverted by the defendants. In my view, **DExh 2** is of no evidential value to this court.

**30.** It is the plaintiff's submission that there was no need to create more commercial plots as they had already been provided for. They further state that as the population grows more schools or social amenities will be needed. In my view, the defendants never demonstrated that there was a sufficient number of schools in the neighbourhood, or that they were sufficient to cater for the expanding population to warrant the subdivision of land meant for future schools into residential and commercial plots.

**31.** It is all the more unfortunate that the subdivisions appear to have been commoditized by the allottees as is seen from **DExh 3**, an agreement evidencing the sale to a third party of the plot allotted the 4th defendant.

**32.** I have examined the **Minute Number 32/TPC/10** of the meeting held on **30/6/2010.**

**33.** Only one question by a councilor prompted the creation of a sub-committee to handle the purported re-planning of the suit land. That proposer also happened to be the chairman of the Town Markets and Planning Committee.

**34.** There was clearly no consideration by that meeting of the full ramifications of such a re-planning exercise which rendered the plaintiffs apprehensive enough to institute this suit.

**35.** The greatest vitiating factor in the whole exercise was the inclusion of the town planning committee chairman as an *ex officio* of the sub-committee of 6 members that was formed at the meeting to oversee the subdivision of the public utility land.

**36.** No technical expertise appears to have been sought beforehand and none was brought to the table for consideration as to the propriety of the re-planning exercise and the resultant subdivision.

**37.** No consultation of the Ministry of Lands' Physical Planning Department was deemed necessary by the town planning committee.

**38.** It is the submission of the 2nd to 7th defendants that once the land was relinquished by the owners to be utilized for a public purpose, it devolved to the then local authority, that is, County Council of Trans-Nzoia who could deal with it as they wished. It is averred that the council did a survey of the land in **1983** and subdivided it into plots for different purposes and that some of the plots were allocated and letters of allotment issued by the Commissioner of Lands. However this is denied by the plaintiffs and no evidence was put forward by the defendants. According to the defendants for a long time the area did not develop as desired hence the resolution that it be re-planned in the year 2010. This resulted in the doing away with some of the public utilities. The defendants justify the conversion of cemetery land into plots by saying that the surrounding land is freehold and the dead are buried in their own land. The justification given by the defendants for the subdivision of school land is that there are other schools, both public and private, within the vicinity and that it was not viable to put up another school. The same argument was advanced by the defendants for the alienation of the dispensary land: that there was a public health centre nearby. Lastly, the same argument was advanced in respect of the administration unit: the defendants averred that there is already an administration police post and a chief's camp nearby.

**39.** However this court notes the dearth of evidence to support such justifications: the purported existing schools and the public health centre were not named by the defendants and even the land reference numbers on which they were built were not given. I find this to be a serious omission on the part of the defendants that dented the credibility of their arguments.

**40.** The defendants assert that under **Section 29** of the **Physical Planning Act** the duty of physical planning lies with the local authority and that that Section gives the local authority exclusive mandate to control development within its area of jurisdiction. As such, it is argued, the Trans Nzoia County Council had mandate under the law and no individual who has not demonstrated any injury resulting from the exercise of such mandate could complain. They further argue that **Section 10** of the **Act** entitled persons aggrieved by the decisions of the Local authority or any liaison committee to appeal to the National Liaison Committee, and that since the law is couched in a mandatory language the only recourse is such an appeal. Such an appeal must be lodged within **14 days** and no such appeal was lodged in respect of the suit land, yet the instant suit was filed **9 years** after the decision to re-plan the suit land was made in the year **2010**. Of course the defendants' calculation is not correct as the delay between the decision to re-plan the land in 2010 and the institution of this suit in 2011 can not be nine years but only a few months.

**41.** The defendants also aver that the **1983** plan and the subsequent one were not approved by the time the suit was filed and that the approval in **2015** during the pendency of this suit was meant to defeat the defendant's claim.

**42.** It is submitted that the approval was irregular and overtaken by events following the council's resolutions that preceded it. It is also argued that allocation by the Commissioner of Lands begins with the kind of temporary letters of allocation that were given to the defendants by the council, after which the Commissioner gives out a formal letter of allotment and a certificate of lease.

**43.** It is the defendant's position that no letters of allotment have been issued by the 1st defendant as it does not have the capacity to issue any. It is said that the plaintiff is therefore attempting to curtail a process that has not matured and his suit is untenable.

**44. Section 29** of the **Physical Planning Act** states as follows:

> **"Subject to the provisions of this Act, each local authority shall have the power-**
>
> **(a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;**
>
> **(b) to control or prohibit the subdivision of land or existing plots into smaller areas;**
>
> **(c) to consider and approve all development applications and grant all development permissions;**
>
> **(d) to ensure the proper execution and implementation of approved physical development plans;**
>
> **(e) to formulate by-laws to regulate zoning in respect of use and density of development; and**
>
> **(f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.**

**45.** In my view the above provisions do not support the defendant's contention that the County Council of Trans-Nzoia had exclusive mandate to re-plan the suit land. If that were the case the office of the Director of Physical Planning would be an unnecessary and duplicitous burden upon the taxpayer.

**46.** In my view, under **Section 29** of the **Act**, the 1st defendant is empowered only in the following respects: development control, prevention of subdivision of land into smaller areas, consideration and approval of development applications, ensuring execution or proper implementation of approved development plans, formulation of bylaws to regulate zoning in respect of use and density of development and to protect or preserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

**47.** The defendants have failed to demonstrate that the matters being agitated by the plaintiffs here fall within the category of the matters set out in **Section 29** of the **Act**. I therefore find no succour for the defendants in the provisions of **Section 29** of the **Act.**

**48.** On the other hand, a look at **Section 5** of the **Act** will reveal who has mandate to cause a re-planning of any area. The said Section has the following provisions:

> **5 (1) The Director shall-**
>
> **(a) formulate national, regional and local physical development policies, guidelines and strategies;**
>
> ***(b) be responsible for the preparation of all regional and local physical development plans;***
>
> **(c) from time to time initiate, undertake or direct studies and research into matters concerning physical planning;**
>
> **(d) advise the Commissioner of Lands on matters concerning alienation of land under the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) respectively;**
>
> **(e) advise the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land; and**
>
> **(f) require local authorities to ensure the proper execution of physical development control and preservation orders.**
>
> **(2) The Director may delegate in writing any of his functions under this Act, either generally or specially to any officer appointed under section 4(1) and may at any time revoke or vary such delegation:**
>
> **Provided that no such delegation shall be deemed to have divested the Director of all or any of his functions, and he may, if he thinks fit, perform such functions notwithstanding that he had delegated those functions. [Emphasis mine].**

**49.** From the provisions set out above, the function of planning is therefore the mandate of the Director of Physical Planning who may delegate such duties as he may find appropriate.

**50.** In view of the above stated provisions, the decision made by the Town Planning and Markets Committee of the County Council of Trans-Nzoia to re-plan the suit land was therefore wholly without jurisdiction and therefore illegal.

**51.** The minutes and resolution of **30/6/2010** of the County Council's Town Planning Committee were therefore not legally effective or rather capable of re-planning the suit premises without recourse to the Ministry of Lands so as to convert the public utility plots into commercial and residential plots if that could have been deemed necessary by the latter office.

**52.** Even if it were assumed, and only for argument's sake, that the steps that whatever steps the County Council of Trans-Nzoia took were the inchoate stages of a full planning process that was to mature in time with the subsequent involvement of the Physical Planning Department, it the decision was haphazardly taken without any assessment or consideration of very elementary issues such that it is if left to stand, likely to make a mockery of ordinary planning procedures.

**53.** Further, the subject land had been surrendered for public utilities. In ***Niaz Mohamed Janmohamed Vs the Commissioner of Lands and 4 others 1996 eKLR,*** the facts were that the applicant's land was compulsorily acquired for a public utility. When part of it was purportedly allocated to an individual he sued inter alia the Commissioner of Lands and the local authority. The court upheld his claim and held that the land acquired for a public purpose can not be alienated transferred or used in any other way than for the set public purpose.

**54.** In my view the actions that were undertaken by the defendants reek of the element of the so called "land grabbing", a phenomenon in which reserved public utility land is taken over by persons euphemistically referred to as "private developers" usually for a pittance for their own selfish gain.

**55.** The land in the instant suit includes portions reserved for a dispensary, but in my view the other public utilities provided for are equally important. It is only proper to look at the bigger picture and assume that if the same element of land grabbing affected a thousand similar plans across our republic, what a disaster it would be especially for modern youth who with the changing lifestyles have become acquainted with the value of recreational facilities to relieve the stresses of modern life. In the absence of any study by persons in the position of the defendants, who knows, with the current demographic growth what population the area may hold in the near future? Should all the citizens travel to towns far away to access recreational parks, hospitals abbatoirs, schools, and other facilities? The answer is an emphatic "no". These facilities will be needed close to the persons for whom they were originally meant, and placing them at a pittance in the hands of the so called private developers will rob entire future generations of their use. To make it worse, it may with time possibly lead to compensation of the very same developers in process of their re-acquisition for the original intended purpose.

**56.** In ***Mureithi & 2 Others Vs Attorney General And 5 Others Nbi HCMA No 158 Of 2005 (2006)1KLR 443*** the court stated as follows:

> **"Should the land acquisition act give shelter to the land grabbers of public land or the courts going to invent equally strong public interest vehicle to counter this? Should individual land rights supersede the communal land, catchments and forests? How for instance are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principles of indefeasibility of title? are the courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility of title by holding that such a title perhaps issued in order to grab public utility plot such as a hospital by an individual violates the public and national interest and therefor a violation of the constitution? I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins."**

**57.** I have noted that the purported amendment of the original plan that is **PDP No. ELD/932/83/1** also leads to loss of some public utility land. In particular, **plot no 4(3)** which was special purpose plots were converted into proposed commercial plots. So have plots **2(1)** and **3(1)** which were in the **1983 PDP** meant for a nursery school and an open space respectively. **DW1** did not produce any justification for the conversion of those public utilities into commercial plots.

**58.** Though the mandate of the Director of Physical Planning is recognized by this court, the exercise thereof must meet some minimum standards such as justification and public participation when it comes to converting public utility plots into commercial plots. The amendment vide **PDP No ELD./932/83/1A** also stands to fall on the basis of the fact that no justification and no evidence of public participation in respect of that amendment was produced before this court by the plaintiffs.

**59.** It is time so called allottees of public land, euphemistically called "private developers" knew that even open spaces specifically provided for as public utilities, such as **plot 3(1)** in **PDP No ELD./932/83/1** in the instant suit, merely for their aesthetic purpose, should be protected by this court if they serve a public purpose.

**60.** I also find that the changes proposed are major changes in land use which required an environmental impact assessment report, and possibly study to be submitted to the National Environment Management Authority as required by **Section 58** of the **Environmental Management and Co-Ordination Act 1999.** That section was not complied with by either the Director of Physical Planning or by the defendants before the change of the original use assigned the plots.

**61.** It is interesting that the issue of public participation in the whole process was first mentioned by the **DW3,** Herman Malavi Kahi and only during cross examination by Mr. Barongo. No minutes or other record of any public awareness meeting or public participation drive in respect of the re-planning exercise were produced by the defendants. It is therefore not credible that there was any public participation exercise.

**62.** The third argument advanced by the defendants is that there was no appeal lodged by the plaintiffs under **Section 10** of the Act and this suit is coming too late in the day. However, it must be first noted that this issue never arose from the pleadings but this court will deal with it in so far as it is a legal issue.

**63. Section 10** of the Act provides as follows:

> **"10 (1) The functions of the National Physical Planning Liaison Committee shall be -**
>
> **(a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;**

**(b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;**

**(c) to advise the Minister on broad physical planning policies, planning standards and economic viability of any proposed subdivision of urban or agricultural land; and**

**(d) to study and give guidance and recommendations on issues relating to physical planning which transcend more than one local authority for purposes of co-ordination and integration of physical development.**

**(2) The functions of other liaison committees shall be-**

**(a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act."**

**64.** This court having found that the purported re-planning of the suit land by the 8th defendant was without jurisdiction, that action remains a nullity *ab initio*.

**65.** In the instant case, I find that the plaintiffs did not need appeal against the said decision as the same never fell within the mandate of the County Council of Trans-Nzoia under the Act.

**66.** If the action of the defendant had been authorized by the law, then failure on the part of the plaintiffs to invoke the proper procedures may have rendered it possible to strike out the suit or dismiss it, for as seen in the persuasive case of ***Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR*** it is not proper for this court to be seen to arbitrarily take up and determine matters in respect of which other dispute resolution mechanisms are legally provided for.

**67.** It goes without saying therefore that in view of the above findings the proposed change of user of the public utility land subject matter of this suit and the purported letters of allotment issued to the 2nd to 7th defendants are a nullity and incapable of transferring any interest to them or to any third parties who may purport to have purchased such interest from them.

**CONCLUSION**

**68.** In the circumstances outlined above I find that the change of user should be nullified and that a permanent injunction ought to issue to prevent the issuance of further allotment letters and to restrain the 2nd to 7th defendants or any other person purporting to have received any allotment letter from the County Council of Trans-Nzoia from erecting structures on the suit land or dealing with it in any manner against the purpose it was set aside for.

**69.** I therefore find that the plaintiff's claim has merit. I enter judgment for the plaintiffs against the defendants jointly and severally and issue the following orders:

**(a) That the purported change of use of the public utility land identified in PDP No ELD./932/83/1 is illegal.**

**(b) A declaration that the allotment letters issued by the County Council Of Trans Nzoia to the 2nd to 7th defendants or any other individuals are a nullity;**

**(c) A declaration that the spaces in Land Parcel No Trans Nzoia /Emoru/26 meant for public utilities as indicated in the PDP No ELD./932/83/1 shall be retained for such purposes.**

**(d) An order that the amendment to convert Plots Nos. 4(3), 2(1) and 3(1) which were meant for a Special Purpose Plot, Nursery School and an Open Space respectively in PDP No ELD./932/83/1 is hereby nullified, and the only valid PDP to be used in respect of the suit land is the PDP No ELD./932/83/1.**

**(e) The PDP No ELD./932/83/1A is declared null and void.**

**(f) An order that the 2nd to 7th defendants and any other person who has encroached on the suit land pursuant to letters of allotment issued by the 1st defendant shall remove themselves and their property from the suit land and in default be evicted from the suit land;**

**(g) An order of a permanent injunction to restrain the 1st defendant from issuing further allotment letters to the 2nd to 7th defendants from erecting structures on the disputed land or dealing with the disputed land in any manner against the intended purposes it was set aside for.**

**(h) The defendants shall bear the costs of the suit.**

It is so ordered.

**Dated, signed and delivered at Kitale on this 31st day of January, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**31/01/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kaosa holding brie for Barongo for the plaintiffs

Mr. Karani for 2nd - 7th defendants

N/A for the defendants 1 and 8

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**31/01/2019**