

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. 51 OF 2020

KIBOS DISTILLERS LTD.....
PLAINTIFF

VERSUS

WANAHEWA HOUSING COOPERATIVE
SOCIETY LIMITED.....1ST
DEFENDANT

THE COUNTY GOVERNMENT OF KISUMU.....2ND
DEFENDANT

THE CABINET SECRETARY
MINISTRY OF LANDS AND PHYSICAL PLANNING.....3RD
DEFENDANT

AND

NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY.....INTERESTED
PARTY

JUDGEMENT

The Plaintiff brought this suit through a plaint dated 19th August 2020, filed on 24th August 2020. The plaint was later amended on 4th June 2024. The Plaintiff averred that it was the registered proprietor of all that parcel of land known as L.R. No. 654/23 situated within Kibos area in Kisumu County, Muhoroni Sub-County (hereinafter referred to

as “the Plaintiff’s property”). The Plaintiff averred that the suit property was within a designated industrial zone in the Kisumu County Physical Plan. The Plaintiff averred that the 1st Defendant was the registered proprietor of all that parcel of land known as L.R. No. 654/21, which is situated adjacent to the Plaintiff’s property (hereinafter referred to as “the suit property”).

The Plaintiff averred that it was engaged in distilling industrial alcohol, among other products, and that it had been engaged in the business since it was established in 2014. The Plaintiff averred that in carrying out its manufacturing and distillery works, its factory uses chemicals whose reaction produces high-decibel noises and pungent smells as well as corrosive dust and other air pollutants. The Plaintiff averred that the 1st Defendant had subdivided the suit property into about 106 portions (parcels) with the aim of developing a residential estate within the boundaries of the suit property. The Plaintiff averred that the 1st Defendant had already sold some of the portions to private individuals. The Plaintiff averred that in subdividing the suit property and proposing to develop a residential estate thereon, the 1st Defendant did not and had not carried out an Environmental

Impact Assessment study to establish whether the area was suitable for the development of a residential estate.

The Plaintiff averred that the 3rd Defendant approved and sanctioned the subdivision of the suit property into about 106 portions without establishing whether the area was suitable and/or approved for the development of a residential estate. The Plaintiff averred that the 3rd Defendant failed in its mandate to reject/disapprove the subdivision of the suit property by the 1st Defendant. The Plaintiff averred that it had raised the issue of the intended development with the 1st Defendant and lodged an objection with the 2nd Defendant, but the same had not deterred the 1st Defendant from proceeding with its plan.

The Plaintiff averred that the 2nd Defendant, in conjunction with the National Government, had proposed to establish a Special Economic Zone within the same industrial area, and should that project take off, the entire area shall be an industrial zone and not suitable for residential purposes. The Plaintiff averred that it built and commissioned its distillery plant in 2016 and had been distilling industrial alcohol since then. The Plaintiff averred that in the

distillation of its products, its plant, which uses both chemical and biological reactions, produces both high-decibel noise and pungent smell that are bound to be a nuisance to residents within the industrial zone.

The Plaintiff averred that the suit property, on which the 1st Defendant intended to develop a residential estate, was almost at the centre of the properties owned by several companies associated with the Plaintiff and that the said companies intended to establish and construct industries/factories in their respective parcels of land. The Plaintiff averred that it was likely that the development of a residential estate within the industrial zone would result in unending litigation between the would-be residents/or residents and the Plaintiff. The Plaintiff averred that Kenya Railways Corporation was also upgrading the railway line to Kisumu through Kibos. The Plaintiff averred that the Kenya Ports Authority ICT station was also situated within the industrial zone in Kibos.

The Plaintiff averred that the Kenya National Highway Authority was working on the Mamboleo-Muhoroni By-pass Road, which would open up the Kibos area for further industrial development and the

establishment of manufacturing plants within the industrial area. The Plaintiff averred that the 2nd Defendant which was charged with the duty and responsibility of urban planning including zoning of areas for particular land use, without calling for and carrying on a public participation exercise and without seeking the professional advice and without consulting the National Environmental Management Authority, (the Interested Party) approved the change of use of the suit property from industrial to residential.

The Plaintiff averred that the 2nd Defendant had the statutory powers to stop the 1st Defendant from erecting/constructing, and or building residential units within an industrial zone, but had failed to do so, notwithstanding its position that the area was zoned off for industrial development only. The Plaintiff averred that the suit property, which the 1st Defendant had subdivided into about 106 parcels and sold or was in the process of selling to third parties, fell within the Kibos area earmarked as an industrial zone. The Plaintiff averred that should the 1st Defendant proceed with erecting residential premises on the suit property, there would be a large influx of population into the area, who would require more infrastructure in terms of solid and liquid

waste management (sewer line) and water, which did not exist in the area.

The Plaintiff averred that the development/erection/construction of residential units in an industrial zone was contrary to building rules, laws, and regulations because a housing estate could not exist in the middle of an industrial zone. The Plaintiff averred that it undertook an Air Dispersal Modelling on emissions from its Kibos Sugar and Allied Industries Ltd. through independent consultants registered with National Environment Management Authority (NEMA), and a report was made by M/s Ecoscience Engineering Limited which report indicated the fallout area for its emissions fell within the suit parcels of land and the cumulative effect of the fallout on the area was not suitable for development of a residential estate. The Plaintiff averred that it also undertook a noise audit of its factory by an independent auditor. The Plaintiff averred that according to the said auditor's noise report, the noise that was produced from the Plaintiff's distillery was way beyond that which was allowed for a residential estate, and hence the persons who would inhabit the residential estate intended by the 1st Defendant would be directly and adversely affected by the noise.

The Plaintiff averred that there was no water and sewer line in the area, and hence it would be a health hazard to allow the 1st Defendant/Respondent to commence development of a residential estate within the area. The Plaintiff averred further that the intended development would cause intermittent and unending suits by the persons who would have developed their residential premises within the area in question. The Plaintiff averred that the actions of the 1st Defendant were based on a fraudulent misrepresentation that it was the owner of the suit property, hence the entire project was illegal, unlawful, and fraudulent. The Plaintiff averred that the actions, commissions and/or steps taken by the 1st Defendant in applying for change of user, subdividing, selling, disposing of, conveyancing and in any other way dealing with the suit property were null and void, illegal, unlawful as the same amounted to dealing with the property of deceased persons in breach of Section 45 of the Law of Succession Act. The Plaintiff averred that the doctrine of *nemo dat quod non habet* applied to the facts and circumstances of the case.

The Plaintiff averred that the development/erection/construction of residential houses in an industrial zone was contrary to and in breach of the Plaintiff's constitutional right to private property under Article

40 of the Constitution, the right to a clean environment as provided for in Article 42 of the Constitution, the right to economic and social rights as set out under Article 43 of the Constitution and building rules, laws and regulations. The Plaintiff reiterated that a housing estate could not exist in the middle of an industrial zone. The Plaintiff reiterated that Kibos area was a designated industrial zone. The Plaintiff averred that there were several industries established in the area, such as Kibos Sugar & Allied Industries Ltd, Babubhai Construction Ltd, Tamtam Bakers and Sweets Factory, Nyanza Cotton Mills, MajiQ, Imma Charcoal Briquettes, White Coal Tamua Ltd, Kibos Sugar Refinery Ltd, Kibos Paper & Packaging Limited, Kibos Fertilizer Ltd, Channan Agricultural Contractors Ltd, Kibos Beverage Ltd. and Kibos Bottles Ltd. The Plaintiff averred that the actions of the 1st Defendant amounted to it knowingly and deliberately moving into the Plaintiff's area of operation and creating a cause of action based on nuisance.

The Plaintiff averred that the County Assembly of Kisumu through its Water, Environment and Natural Resources Committee undertook a fact finding exercise and came up with a report in July 2019 in which there was a recommendation that "The area around the factory at

Kibos is beginning to draw many investors and the County Government should submit proposals to the County Assembly to gazette it as an industrial zone with speed so as to encourage more investors away from the CBD and into the area exclusive of residential settlement". The Plaintiff averred that its claim was based on its intention to stop the development of a residential estate within the suit property to avoid disputes based on land use, and litigation based on pollution of the environment through smell, noise, and other environmental pollutants.

The Plaintiff averred that should the 1st Defendant be allowed to proceed and develop a residential estate in the area as intended, such development would be the genesis of perennial and unending litigation between the Plaintiff and the other industries/factories in the area on the one side and the residents on the other. The Plaintiff prayed for judgment against the Defendants for;

1. A permanent injunction restraining the 1st Defendant, by itself, its agents, servants, employees and or any person claiming through its authority from subdividing the suit property, offering for sale, transferring, leasing and or in any other way

transferring proprietary interests to third parties of any resultant parcels of land and developing, erecting structures, building and constructing residential houses within the boundaries of the suit property or any parcels of land resulting from any subdivision thereof.

2. A finding that the 1st Defendant has no lawful, legal and substantive ownership/proprietorship rights over/in and in respect of the suit properties and that the 1st Defendant's purported acquisition of the same was illegal, irregular, and unlawful, and the same could not bestow a good title.
3. A declaration that the area within which the 1st Defendant intended to develop a residential settlement/estate, and within which the Plaintiff and its associated industries own parcels of land and operate, is an industrial zone and not suitable for residential settlement.
4. An order that no residential settlement shall be developed within the industrial zone.
5. A declaration that the actions, commissions and any steps taken by the 1st Defendant in dealing with the suit property by way of application for change of user, subdivision, sale, disposal,

transfer and or any form of conveyance are null and void given that the said actions, commissions and or steps amounted to dealing with the deceased persons property contrary to Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya hence the doctrine of *nemo dat quod non habet* applied on the facts and circumstances of the case.

6. An order that the authority and direction/permit, license, or leave granted and issued to the 1st Defendant by the 2nd Defendant for change of use of the suit property and all resultant subdivisions and/ or parcels of land are revoked/cancelled, null and void, and of no legal consequence.
7. Costs of the suit.
8. Interest on 7 above.

The 1st Defendant filed a statement of defence dated 16th November 2022, on 21st November 2022. The 1st Defendant averred that there was a special condition on the title of the Plaintiff's alleged parcel of land that the land shall be used for agricultural and residential purposes. The 1st Defendant averred that it was the registered owner and proprietor of all those parcels of land known as L.R. No. 654/21 and 654/2(together referred to as "the suit properties" where the

context so permits) before their subdivision into 120 portions, out of which the 1st Defendant acquired 115 portions and subsequently sold the same to third parties who had obtained titles to the same.

The 1st Defendant averred that it procedurally sought and was issued with the necessary approvals by the relevant authorities for the change of use of the suit properties. The 1st Defendant averred that in March 2018, it made an application to the County Government of Kisumu and other authorities for amalgamation, change of use, and subdivision of the suit property and LR. No. 654/2. The 1st Defendant averred that it made the said application in accordance with the provisions of the Physical Planning Act, Chapter 286 Laws of Kenya, which required the grant of necessary planning approvals before the implementation of the purpose for which it wanted to utilise the suit properties.

The 1st Defendant averred that before the subdivision of the suit properties into 115 1/8 of an acre plots/parcels and 3 agricultural plots measuring 14 acres each, the suit properties, which were no longer in existence pursuant to the subdivision, measured approximately 56 acres and were held as freehold agricultural land.

The 1st Defendant averred that its justification and subsequent applications, which were approved by the relevant authorities, were on the basis that the use of the suit properties was agricultural and residential and that there were social activities in the area, including prison services, schools, and colleges. The 1st Defendant averred that the planning department was mandated under the Constitution of Kenya, the County Government Act 2012, and the Physical and Land Use Planning Act 2019 to plan and issue a change of use where appropriate to enhance development to sustain the growing population, on which basis its applications were approved upon following due process.

The 1st Defendant averred that the 2nd Defendant, through the 3rd Defendant, having satisfied itself on the suitability of the 1st Defendant's development plan, gave the development permission to the 1st Defendant, notwithstanding the Plaintiff's objection, which was unwarranted. The 1st Defendant averred that on 26th March 2018, it placed the necessary notice in the Daily Nation Newspaper pursuant to the Physical Planning Act, Chapter 286 Laws of Kenya, where it notified the public of its intention to apply for a change of use and subdivision of the suit properties. The 1st Defendant averred that the

Plaintiff did not lodge an objection as required by the law within the prescribed timelines. The 1st Defendant averred that its applications for amalgamation, change of use, and subdivision were procedurally done and allowed.

The 1st Defendant averred that it was issued with letters of approval dated 19th April 2018 and 10th August 2018 by the County Physical Planning office, Kisumu County and/or Ministry of Lands and Physical Planning office, Kisumu County and/or Ministry of Lands and Physical Planning. The 1st Defendant averred that the approvals were for amalgamation, subdivision, and change of use from agricultural to residential cum commercial. The 1st Defendant averred that it received a letter of approval dated 19th April 2018 from the County Survey office, Kisumu County, not objecting to the proposed amalgamation and change of use. The 1st Defendant averred that it was issued with Form PPA 2 dated 23rd April 2018, indicating notification of approval and permission to amalgamate, subdivide, and change the use of the suit properties from agricultural to residential cum commercial.

The 1st Defendant averred that the Plaintiff's allegation and position that the area was an industrial zone was not only false but was also misleading. The 1st Defendant averred that the area was designated for agricultural and residential purposes. The 1st Defendant averred that all the activities carried out by it on the suit properties, which included the subdivision of the properties, were done in strict compliance with the law and all the necessary approvals were obtained from the relevant authorities. The 1st Defendant averred that the Plaintiff's claim, which was intended to stop the development of a residential estate on the suit property, was misplaced, noting that the court did not have jurisdiction to adjudicate on the issues raised in the suit, which should have been referred to the County Physical and Land Use Planning Liaison Committee.

The 1st Defendant averred that the suit was misconceived, frivolous, and an abuse of the court process, and accordingly, the orders sought by the Plaintiff should not be granted, noting that the Plaintiff had admitted having lodged an objection in the forum it should have gone before filing the suit. The 1st Defendant prayed that the suit be dismissed with costs.

The 2nd Defendant entered an appearance but failed to file a statement of defence. The 3rd Defendant neither entered an appearance nor filed a statement of defence. The Interested Party filed a notice of appointment of advocates but never participated in the hearing of the suit.

At the trial, the Plaintiff called one witness, EPAINTO AONO OKOYO (PW1). PW1 adopted his undated witness statement as part of his evidence in chief and stated further as follows in his evidence in chief: He was a manager with the Plaintiff. The dispute before the court was over the housing estate that the 1st Defendant wanted to put up around the Plaintiff's factory that deals with distillation. The Plaintiff sued the 1st Defendant because if the 1st Defendant puts up the houses, the 1st Defendant would subject the Plaintiff to litigation in view of its activities. When the Plaintiff carried out investigations, it discovered that the development approval given to the 1st Defendant by the 2nd Defendant was illegally issued, and that there was no public participation. If the public participation had been done, the Plaintiff would have engaged the 1st Defendant. He had seen the 1st Defendant's title. The title deed that the 1st Defendant produced was in the name of several people. At the time the 1st Defendant

sought development approval in the form of a change of use, one of the owners of the suit properties was deceased, and there was no grant of letters of administration issued in respect of the deceased's estate. PW1 produced the documents attached to the affidavit of Joyce Opondo, sworn on 19th August 2020, in support of the Plaintiff's Notice of Motion application filed on 24th May 2020, as P.EXH. 1 to 10 respectively.

PW1 told the court that the Plaintiff had also sued the Interested Party. He stated that he had not seen any Environmental Impact Assessment (EIA) license issued to the 1st Defendant. He stated that Plaintiff's prayer was for the court to stop the 1st Defendant's project until the 1st Defendant complies with the law. He stated that the Plaintiff's operations will affect the residents of the houses that the 1st Defendant intended to put up. He stated that the Plaintiff's factory produces foul smells and noise, which will affect the residents of the houses. He produced a copy of the Death Certificate attached to his statement as an exhibit as P.EXH.11.

On cross-examination by the advocate for the 1st Defendant, PW1 stated that, according to the Plaintiff's title for the Plaintiff's property,

the land was to be used for agricultural and residential purposes. PW1 stated that the Plaintiff's undertaking was industrial. He stated that the Plaintiff applied for a change of use but had not obtained it as of the time of filing the suit. He told the court that at the time of filing the suit, the Plaintiff was aware that the 1st Defendant had subdivided the suit property and sold portions thereof to third parties. He admitted that the Plaintiff had not sued the third parties. PW1 stated that the Plaintiff lodged an objection with the 2nd Defendant. He stated that he did not produce a copy of the objection. He admitted further that he had no evidence of the activities mentioned in paragraphs 20,21, and 22 of the amended plaint. He stated that the Plaintiff had no claim or interest in the 1st Defendant's property. He stated that the 2nd Defendant's County Assembly made some recommendations which were not published in any report. He stated that he was not privy to the process through which the 1st Defendant amalgamated the suit properties and obtained a change of use. He stated that the process was illegal because of environmental concerns and also because the property was in the name of a deceased person, a fact that was not disclosed. He stated that he was

not aware that the 1st Defendant applied for amalgamation, change of user, and subdivision.

PW1 was shown the 1st Defendant's list and bundle of documents. He was shown the planning brief at page 8 of the 1st Defendant's bundle. He stated that the planning brief produced by the 1st Defendant concerned a proposed amalgamation, change of use, and subdivision of the suit properties. He stated that the Plaintiff filed an objection when the 1st Defendant advertised the application in the newspaper. He stated that he did not have a copy of the objection by the Plaintiff. He admitted that the suit properties were not in an industrial area. He stated that he had evidence that the 1st Defendant dealt with the property of a deceased person without a grant of letters of administration, contrary to the law. PW1 stated that the disputed land had already been subdivided and portions sold to third parties.

On re-examination, PW1 stated that it was the 1st Defendant which was developing the suit properties and not the third parties referred to by the 1st Defendant. He stated that as at 10th August 2018, when one Simeon Otiende Awuor and others were purportedly given approval for the change of use of the suit properties, and to

amalgamate and subdivide the same, Simeon Otiende Awuor was deceased. He stated that he had not seen an application for change of use by the 1st Defendant or an application for EIA license made to the Interested Party (NEMA). He stated that the certificate of confirmation of grant of letters of administration in respect of the estate of Simeon Otiende Awuor did not refer to any parcel of land and, as such, did not authorise Gordon Otiende Matengo to deal with any land. He stated that Gordon Otiende Matengo sold to the 1st Defendant L.R. No. 654/2 in respect of which he had no interest. He stated that if Gordon Otiende Matengo was the administrator of the estate of his father, he could have dealt only with L.R. No. 654/51 in respect of which there was no agreement of sale.

PW1 stated that he had not seen a title in the name of the 1st Defendant in respect of the suit properties. He stated that he had not seen any document conferring upon the 1st Defendant an interest or title to the two properties. He stated that the planning brief produced by the 1st Defendant referred to the parcels of land registered in the names of Simeon Otiende Awuor and 3 others. He stated that he had not seen a transfer executed by the registered owners of the suit properties in favour of the 1st Defendant, although it was the 1st

Defendant that applied for planning approval. PW1 stated that he had not seen a document amalgamating L.R. No. 654/2 and 654/21. He stated that the information that was given to the 2nd Defendant by the 1st Defendant was fraudulent. He stated that it was the registered owners of the suit properties who should have applied for approval for amalgamation and change of use of the suit properties, and the amalgamation should have been of L.R. No. 654/51, 52, 53, and 54. He stated that he had not seen an application for amalgamation of the four (4) parcels of land. He stated that the planning brief was signed by one Ken Pundo Advocate, who did not disclose in what capacity he signed the document. He stated that he had not seen a statement by an official of the 1st Defendant, or a statement from the 2nd Defendant.

The 1st Defendant called PATRICK OPIYO ADERO (DW1) as its sole witness. DW1 told the court that he was a licensed land surveyor. He adopted his witness statement dated 14th November 2022 as part of his evidence in chief with an amendment on paragraph 4 of the statement to read that “The 1st defendant purchased 14 acres of the suit property and were never registered directly as proprietors of the said parcel of land on the basis that after purchase and subdivision,

the subsequent titles were transferred to third parties”. He produced as exhibits the documents attached to the 1st Defendant’s list of documents dated 16th November 2022 filed on 21st November 2022, list of documents dated 28th October 2024 filed through the CTS on 30th October 2024 and the list of documents dated 14th February 2025, as bundles as D.EXH. 1, D.EXH.2 and D.EXH.3 respectively. He stated that there was a piece of land within Kibos area which was agricultural. The land was owned by Simeon Otiende Awuor, Robert Otiemo Okuku, Philip Dickens Oricho Mbom and Zephaniah Opere Mwalo as tenants in common in equal shares.

DW1 stated that the 1st Defendant bought the share of Simeon Otiende Awuor measuring 14 acres. The land was agricultural and the 1st Defendant wanted to use the land for residential and commercial purposes. This called for a change of use of the land. The 1st Defendant applied for change of use and the application was approved. He stated that he subdivided the land after obtaining subdivision approval and titles were issued to the beneficiaries of the land. He told the court that Simeon Otiende Awuor whose share was purchased by the 1st Defendant was deceased at the time of the purchase but his son Gordon Otiende had done succession and had

acquired the interest of his father in the land. He stated that the dispute before the court was over the use of the land, and had nothing to do with the ownership of the land.

On cross-examination by the Plaintiff's advocate, DW1 stated as follows: The land purchased by the 1st Defendant measured 14 acres and not 56 acres as stated in his statement. The total land measured 56 acres and was subdivided into 14 acres each. The last 14 acres was subdivided into 115 plots by the 1st Defendant. He saw the agreement of sale dated 31st August 2017. The interest sold was leasehold and not freehold as stated in his statement. His statement did not capture correctly the interest that was sold. The interest of Simeon Otiende Awuor was taken care of by Gordon Otiende Awuor. The grant of letters of administration in favour of Gordon Otiende did not show the land he was administering nor the other beneficiaries of the estate. He did not have a document authorising Gordon Otiende to administer the land measuring 14 acres. The land sold was a portion of L.R. No. 654/2 measuring 14 acres. The developer of the suit property was the 1st Defendant according to his planning brief. The land was not in the name of the 1st Defendant. The 1st Defendant had no land to subdivide. He did not see a document transferring L.R.

No. 654/2 measuring 14 acres by Gordon Otiende to the 1st Defendant.

DW1 stated that the application for change of use was made by the 1st Defendant although the land was not in the 1st Defendant's name. The change of use approval was made in favour of the four registered owners of the suit properties; Simeon Otiende Awuor and 3 others. At the time three of the owners were deceased and not represented. The administrators of the estates of the deceased owners did not participate in the change of use process. He stated that the approval given in the name of deceased persons was irregular. He stated that there was an oversight on the part of the County Government. He stated that the 1st Defendant did not apply for EIA license from NEMA because the 1st Defendant was at the subdivision stage, and had not started developing the land. He stated that the letter dated 20th August 2020 by NEMA attached to its replying affidavit referred to an environmental restoration order on proposed establishment of the 1st Defendant's houses on Miwani Block 4 Kibos Area, Kisumu County. He stated that the letter was not brought to his attention by the 1st Defendant. He stated that the letter was a stop order against development. He stated that he had no document on the zoning of

the area. He stated that there were two parcels of land, L.R. No. 654/2 and L.R. No. 654/21 owned by the four families in equal shares. He stated that the 1st Defendant applied for amalgamation of the two parcels although it did not own the same. He stated that the 1st Defendant was just a purchaser which supported the application for amalgamation of the two parcels of land. He stated that there was no agreement of sale of L.R. No. 654/21. He stated that L.R. No. 654/21 was 6 acres and L.R. No. 654/2 was 50 acres totaling 56 acres. He stated that he made the application for amalgamation in March 2018. He stated that he had a document of amalgamation which he had not filed. He stated that he had not filed any document in court to show the existence of the 115 sub-plots. He stated that he had not produced a document showing that the two parcels of land were subdivided into four portions.

On re-examination, DW1 stated that the Plaintiff had admitted in its amended plaint that the 1st Defendant had subdivided the suit properties into about 106 portions and sold some of them to third parties. DW1 stated that he had evidence showing that the land was subdivided into 115 portions but he had not produced the same. He stated that the Plaintiff also acknowledged L.R. No. 654/21 in the

amended plaint. He stated that the agreement referred to LR. No. 654/2. He stated that in the planning brief, he described the proposed development, and acknowledged the four families. He stated that none of the families had challenged the planning brief. He stated that all the families were involved and each got a title. He stated that there was no evidence that the letter from NEMA dated 20th August 2020 was received by the 1st Defendant. He stated that the Plaintiff's suit was filed on 24th August 2020. He stated that by the end of 2018, the Director of Surveys had already approved the subdivision of the suit properties and forwarded the approval to the Chief Land Registrar for processing of titles. He stated that the letter of 20th August 2020 was written after the subdivision had been completed. He stated that when he was doing the subdivision, the land was agricultural, and he applied for a change of use from agricultural to residential/commercial.

After the close of evidence, the court directed the parties to make closing submissions in writing.

The Plaintiff's submissions

The Plaintiff filed submissions dated 18th February 2025. The Plaintiff framed the following issues for determination;

- a) The Plaintiff's right to sue and the jurisdiction of the court.
- b) Whether the 1st Defendant had ever been the owner /proprietor of L.R. No. 654/2 and L.R. No. 654/21 to entitle it to exercise any rights over the same.
- c) Was the application(s) for change of user of L.R. No. 654/2 and L.R. No. 654/21 and the resultant approvals legal and regular?
- d) Did the 1st Defendant have the mandatory statutory approval of the Interested Party (NEMA) to undertake the project of construction/development of residential/commercial houses on L.R. No. 654/2 and L.R. No. 654/21?
- e) Is the Plaintiff entitled to the orders/prayers set out in the plaint?
- f) Who bears the costs of this suit?

The Plaintiff cited Article 70 of the Constitution and submitted that although the issues raised could be determined by the County Physical and Land Use Planning Liaison Committee, that did not take away the Plaintiff's right to institute this suit, nor did it oust the jurisdiction of this court to entertain, hear, and determine the suit.

The Plaintiff submitted that at the time of the institution of the suit, the County Physical and Land Use Planning Liaison Committee had not been established for Kisumu County.

The Plaintiff submitted that although the 1st Defendant entered into an agreement of sale of land dated 31st August 2017 with the administrator of the estate of the late Simeon Otiende Awuor, the land sold, allegedly measuring 14 acres, was never transferred to the 1st Defendant. The Plaintiff submitted that neither the suit properties (L.R. No. 654/2 and L.R. No. 654/21) nor any portions thereof were ever transferred and subsequently registered in the name of the 1st Defendant. The Plaintiff submitted that the 1st Defendant did not have proprietary rights over the suit properties and their actions were in breach of Section 24 of the Land Registration Act.

The Plaintiff submitted that the 1st Defendant had never been the proprietor/owner of the suit properties and, as such, could not purport to exercise proprietary rights set out under Section 24 of the Land Registration Act. The Plaintiff submitted that the said parcels were registered in the names of the four deceased persons, namely, Simeon Otiende Awuor, Robert Otieno Okuku, Philip Dickens Oricho

Mbom and Sephaniah Opere Mwalo, and only one deceased person had a legal representative of his estate who could deal with his interest in the properties upon such grant being confirmed. The Plaintiff cited Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya, and submitted that dealing with the free property of a deceased person without being the administrator of the estate of the deceased person is a criminal offence. The Plaintiff submitted that in dealing with the free property of the deceased by seeking approvals for amalgamation and subsequent subdivision of the suit properties, the 1st Defendant committed a criminal offence. The Plaintiff cited Benjamin Leonard McFoy v. United Africa Company Limited [1961] All ER 1169, Union of India & Others v. Major General Madan Lal Yadav [1996] AIR 1340 and Gabriel Mbui v. Mukindia Maranya [1993] eKLR in support of this submission.

The Plaintiff submitted that the applications for approvals by the 1st Defendant and the approvals granted, if any, were null and void, as they stemmed from a criminal act.

The Plaintiff submitted that under section 69 (1) of the Environmental Management and Coordination Act 1999 (EMCA), NEMA in

consultation with other lead agencies is charged with the duty of monitoring all environmental phenomena with a view to making an assessment of any possible changes in the environment and the possible impact or operation of any projects or activity with a view to determining its immediate and long-term effects on the environment. The Plaintiff submitted that according to the Interested Party, its environmental inspectors came across a project for the establishment of Wanahewa Housing Society Houses, Miwani Block 4, Kibos area and upon establishing that the proponent of the project had not submitted an environmental and Social Impact Assessment to the Interested Party and upon reading a document by the CEC Industrialization Energy and Enterprise Development dated 8th March 2016, it issued an Environmental Restoration Order. The Plaintiff submitted that from the documents submitted by the Interested Party, the designation of the area as an industrial zone was done in 2016, long before the purported acquisition of the suit properties by the 1st Defendant and its applications for amalgamation and subdivision approvals. The Plaintiff submitted that the actions of the 1st Defendant were in breach of the Integrated Urban Development Plan (ISUD) Kisumu County Act 2015-Physical Planning and Spatial Plans. The Plaintiff

submitted that the proposed development by the 1st Defendant was in contravention of the law and could not be allowed to stand or continue.

The 1st Defendant's submissions

The 1st Defendant filed submissions dated 24th March 2025. The 1st Defendant framed the following issues for determination;

- a) Whether the Plaintiff has a proprietary interest in the suit properties and/ or who can challenge the legality of title, and whether the Plaintiff is entitled to the reliefs sought.
- b) Whether the 1st Defendant followed the proper procedure for amalgamation, change of use, and subdivision of the suit properties.

On the first issue, the 1st Defendant submitted that the court had held in numerous decisions that a legal right is enforceable against any person who takes the property of another. The 1st Defendant submitted that it was undisputed that the Plaintiff did not establish any legal right to the suit properties as it was not the registered proprietor thereof and was not claiming beneficial interest in the same. The 1st Defendant submitted that the Plaintiff did not have the

locus standi to challenge the validity of the process of acquisition of the suit properties, which did not even exist as at the time of filing of the suit, nor was the 1st Defendant the registered proprietor of the same. In support of this submission, the 1st Defendant cited Johnson Kinyua v. Simon Gitura, Civil Appeal No.265 of 2005. The 1st Defendant submitted that the Plaintiff averred in its amended plaint that it was the registered owner and proprietor of all that parcel of land known as L.R. No. 654/23(the Plaintiff's property). The 1st Defendant submitted that the Plaintiff did not establish any legal right to the suit properties. The 1st Defendant submitted that the Plaintiff lacked the *locus standi* to institute this suit. The 1st Defendant submitted that the Plaintiff was not the registered proprietor of the suit properties, nor had it established any other proprietary interest in the suit properties that could enable it to challenge the validity of the acquisition of the same by the 1st Defendant.

The 1st Defendant submitted that the Plaintiff was contesting the manner in which the 1st Defendant acquired the title to the suit properties, raising concerns about the legitimacy and procedural regularity of the transfer. The 1st Defendant submitted that the Plaintiff had not clearly articulated the specific legal or equitable

interest they held in the properties or how the 1st Defendant's acquisition thereof adversely affected their rights. The 1st Defendant submitted that the Plaintiff must establish a direct stake in the properties, such as prior ownership, an overriding interest, fraud, misrepresentation, or irregularities in the transfer process that would justify judicial intervention. The Plaintiff submitted that without such proof, the mere assertion that the 1st Defendant obtained the title improperly would not suffice to impeach its validity. In support of this submission, the 1st Defendant relied on Law Society of Kenya v. Commissioner of Lands & Others, Nakuru HCCC No. 464 of 2000 and Julian Adoyo Onyango v. Francis Kiberenge Abano [2015]eKLR.

The 1st Defendant submitted that it was undisputed that the 1st Defendant purchased land measuring 14 acres out of the 56 acres comprised in the suit properties, which was subsequently, upon application, subdivided into 115 portions or thereabout. The 1st Defendant submitted that the said portions of the land measuring 14 acres were directly transferred and/or transmitted to third parties who had titles thereto, even as at the time of filing of this suit. The 1st Defendant submitted that the said third parties were not made parties to this suit by the Plaintiff, who was aware of their existence

as admitted under paragraphs 10 and 25 of the amended plaint. The 1st Defendant submitted that a party is bound by its pleadings and the evidence it adduces in court. In support of this submission, the 1st Defendant cited Gichinga Kibutha v. Caroline Nduku 2018KEELC3981 [KLR], where the court held that the purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to settle issues for determination. The 1st Defendant submitted that the court cannot grant orders against a third party who is not a party to the suit before it. The 1st Defendant submitted that the Plaintiff, having admitted knowing that the properties in issue were owned by the other persons, it would have been prudent for the Plaintiff to make the said persons parties to the suit. The 1st Defendant submitted that in the absence of such parties, the suit was unsustainable. The 1st Defendant cited Order 1 Rule 3 of the Civil Procedure Rules and submitted that the power to choose on who to sue or not to sue as a defendant lay with the Plaintiff. The 1st Defendant submitted that the Plaintiff, for no good reason, chose not to sue the third parties who were the registered proprietors of the suit properties to enable them to be heard before any drastic orders are issued against them. In support of this submission, the 1st Defendant

cited W Karania Shah v. Kaplan Stratton Advocates 2005KEHC2550(KLR).

The 1st Defendant submitted that the Plaintiff, under paragraph 30A and 30B of the amended plaint and at paragraph 2(a) of its submission, had claimed that the acquisition of the suit property by the 1st Defendant was tainted with fraud and illegalities. The 1st Defendant submitted that it is settled law that fraud is a serious accusation which has to be pleaded and proved to a standard above a balance of probabilities, but not beyond a reasonable doubt. In support of this submission, the 1st Defendant cited Mombasa HCCC No. 135 of 1998, Insurance Company of East Africa v. The Attorney General & 3 Others, Civil Appeal No. 246 of 2013, Arthi Highway Developers Limited v. West End Butchery Limited and Others, Koinange and 13 others v. Koinange [1986] KLR 23, Ratilal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314 and Ulmila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR. The 1st Defendant submitted that the Plaintiff did not tender any evidence in proof of the alleged fraud.

The 1st Defendant submitted that the estate of Simeon Otiende Awuor, who passed away on 2nd July 1980, was administered through a grant of letters of administration issued on 10th July 1985, and a certificate of confirmation of grant dated 23rd April 1986, in favor of Gordon Otiende Matengo. The 1st Defendant submitted that Gordon Otiende Matengo legally sold a portion of L.R. No. 654/2 to the 1st Defendant on 31st August 2017, which property was subsequently directly transmitted to third parties. The 1st Defendant submitted that the sale of the property was lawful, procedural, and executed by a duly authorised beneficiary of the deceased's estate who had the legal authority to transfer the property. The 1st Defendant submitted that the issues raised by the Plaintiff, particularly regarding the administration of the estates of deceased persons and allegations of fraudulent dealings with properties belonging to deceased persons, fell within the jurisdiction of the probate court. In support of this submission, the 1st Defendant cited Sections 79 and 80 of the Law of Succession Act and In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR.

On the second issue, the 1st Defendant submitted that the Physical and Land Use Planning Act 2019, which replaced the Physical

Planning Act, Chapter 286 Laws of Kenya, provides the legal framework for changing the designated use of land in Kenya. The 1st Defendant submitted that it complied with the provisions of the Act in relation to the change of use, amalgamation, and subdivision of the suit properties. The 1st Defendant submitted that the Plaintiff did not object to its application for change of use as required by the law within the prescribed timelines. The 1st Defendant submitted that its applications for amalgamation, change of use and subdivision approvals were procedurally done and allowed accordingly by the relevant authorities. The 1st Defendant submitted that it fully complied with the legal and procedural requirements governing the change of use, amalgamation, and subdivision of the suit properties as set out in the Physical and Land Use Planning Act 2019. The 1st Defendant submitted that the approvals issued to it by the relevant authorities remained valid and were lawfully obtained after due consideration and compliance with applicable planning and environmental laws.

The 1st Defendant cited Mutanga Tea & Coffee Company Ltd. v. Shikara limited & another [2015] KECA 469 (KLR), where the Court of Appeal held that Section 58, as read with the Second Schedule of

EMCA, requires an EIA license where a project involves activities out of character with the surrounding environment, large-scale structures, or significant land-use changes, and submitted that the Plaintiff's attempt to halt the 1st Defendant's development was not only legally untenable but also an abuse of the court process. The 1st Defendant submitted that no evidence had been tendered by the Plaintiff to prove that there existed a valid basis for setting aside the approvals that were procedurally and properly granted through due process.

The 1st Defendant submitted that the Plaintiff had not proved its case to the required standard and therefore was not deserving of the prayers sought in its amended plaint. The 1st Defendant prayed that the suit be dismissed with costs to the 1st Defendant.

Analysis and Determination

I have considered the pleadings, the evidence adduced, and the submissions filed by the parties. The Plaintiff came to court to challenge the planning approvals for amalgamation, subdivision, and change of use of the suit properties granted by the 2nd Defendant to Patrick Opiyo, who had been engaged by the 1st Defendant to make

the application. The Plaintiff thereafter amended the plaint to challenge also the legality of the interest, if any, that the 1st Defendant acquired in the suit properties. In my view, the issues arising for determination in this suit are the following;

1. Whether the approval granted by the 2nd Defendant under the Physical Planning Act 1996 for the amalgamation, sub-division, and change of user of the suit properties, L.R. No. 654/21 and L.R. No. 654/2 from agricultural to residential cum commercial was fraudulent, illegal, null, and void.
2. Whether the 1st Defendant acquired any lawful interest in the suit properties.
3. Whether the Plaintiff is entitled to the orders sought in the amended plaint.
4. Who should bear the costs of the suit?

I will consider all these issues together as they are intertwined. The burden of proof was upon the Plaintiff. The Plaintiff challenged the planning/development approval given by the 2nd Defendant on several grounds. The Plaintiff claimed that it was the registered owner of L.R. No. 654/23 (the Plaintiff's property), while the 1st Defendant was the

registered owner of L.R. No. 654/21 (the suit property). The Plaintiff claimed that the Plaintiff's property and the suit property were situated in Kibos area, which was designated as an industrial zone. The Plaintiff contended that the 2nd Defendant acted unlawfully in granting the 1st Defendant approval to develop residential premises in an industrial zone. The Plaintiff also contended that the approvals were granted based on misrepresentation and illegality. Finally, the Plaintiff contended that the approval was granted without an EIA license from NEMA.

There is no evidence that the 1st Defendant was at any time registered as the owner of the suit property and/or the suit properties (L.R. No. 654/21 and L.R. No. 654/2) or any parts thereof. The Plaintiff did not rebut the 1st Defendant's contention that it purchased only a portion of the suit properties measuring 14 acres, which was subdivided into 115 portions and transferred directly to third parties. The evidence on record shows that the application for planning approval was made by Patrick Opiyo (DW1). The evidence on record also shows that Patrick Opiyo was engaged to make the application by the 1st Defendant. In the planning brief dated March 2018 (D.EXH.1), prepared by him (Patrick Opiyo) as the Planning Assistant

and Professor Caleb Mireri as the Principal Planner, the 1st Defendant is indicated as the “Client” and Simon Otiende Awuor, Robert Otieno Okuku, Dickens Oricho Mbom, and Sepheniah Opere Mwalo as the owners of the suit properties. There is no evidence of any nature that the 1st Defendant applied for planning approval as the proprietor of the suit properties. The planning brief is clear that the 1st Defendant’s involvement in the planning approval was as a purchaser of a 14-acre portion of the suit properties, which it wished to subdivide and sell to its members. The advertisement of the application for planning approval in the newspapers on 26th March 2018 by the 2nd Defendant was clear that the application for change of use and subdivision was made by the proprietors of the suit properties.

I am also of the view that to challenge the planning approval granted in respect of the suit properties, which measured a total of 56 acres owned by four people, the Plaintiff needed to join the other owners of the suit properties to the suit. From the evidence, the 1st Defendant acquired the interest of only one of the registered owners of the suit properties, whose legal representative sold his share in the amalgamated land measuring 14 acres to the 1st Defendant. The other three registered owners remained with land measuring 42

acres, divided into 14 acres each between them. The attack on the amalgamation, subdivision, and change of user of the suit properties would affect crystallized interests of the other owners of the remaining portion of the suit properties who are not parties to the suit.

I also find the Plaintiff's claim that the suit properties are situated in an area designated as an industrial zone not proved. The Plaintiff did not rebut the evidence adduced by the 1st Defendant that the suit properties were agricultural land before the change of use. The Grant No. I.R. 139073 for L.R. No. 654/23, said to be owned by the Plaintiff, has a special condition that the land shall be used for agricultural and residential purposes only. I have stated "said to be owned by the Plaintiff" because, according to the Grant No. I.R. 139073 for L.R. No. 654/23 produced in evidence by the Plaintiff, the land is owned by Kibos Paper and Packaging Limited, which is different from the Plaintiff. There is no evidence that the use of the Plaintiff's property was ever changed from agricultural and residential purposes to industrial or commercial purposes.

In my view, the Plaintiff's claim that Kibos area where the Plaintiff's land is situated is designated as an industrial zone is based on the letter dated 8th March 2016 by the County Executive Committee Member, Industrialization, Energy and Enterprise Development, Kisumu County to the Plaintiff in which the CEC Member for Industrialization, Energy and Enterprise Development stated that the Plaintiff's factory was constructed in an area "*duly designated as the Industrial Zone based on the Integrated Strategic Urban Development Plan (ISUD) Kisumu County Act 2015.*" The Kisumu County Integrated Strategic Urban Development Plan referred to in this letter was not produced in evidence if it existed, nor was the Kisumu County Act 2015. The background to this letter is that the Plaintiff wrote to the 2nd Defendant on 3rd March 2016 requesting the 2nd Defendant's "support" on its application for registration for excise duty with the Domestic Taxes Department of KRA. The KRA had asked the Plaintiff to confirm that the factory was located in an industrial zone. The Plaintiff therefore requested the 2nd Defendant to write a "*letter of support*" to the effect that the factory was located in a designated industrial area. It was based on this request that the 2nd Defendant's letter, now relied on by the Plaintiff as proof that the Plaintiff's

property and the suit properties are situated in an industrial zone, was written. An area does not become an industrial zone simply because it has been declared so by a CEC Member for Industrialization, Energy and Enterprise Development of a county government. Zoning of a town or an area is a legal process. In the absence of any evidence of the process through which the Kibos area was designated as an industrial zone, I find no basis for the Plaintiff's contention that the area is not open for residential and other commercial activities.

Interestingly, the Plaintiff also produced in evidence a report by the County Assembly of Kisumu dated July 2019 on the pollution of rivers by Kibos Sugar and Allied Industries Limited. In the report, the County Assembly Committee on Water, Environment and Natural Resources stated that *"The area around the factory at Kibos is beginning to draw many investors and the County Government should submit proposals to the County Assembly to gazette it as an industrial zone with speed so as to encourage more investment away from the CBD and into the area, exclusive of residential settlements"*. If the area was already designated as an industrial zone in 2016 when the Plaintiff was setting up its distillery plant, why would the County Assembly still call

for its gazettment as such in 2019? In the absence of evidence that the suit properties are situated in an industrial zone, the Plaintiff's objection to the planning/development approval on that ground has no basis.

Concerning the Plaintiff's contention that the said approvals were given without an EIA license, I am of the view that such a license was not required. Section 58 of the Environmental Management and Co-ordination Act 1999 (EMCA) provides as follows;

“(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.”

The relevant part of the Second Schedule referred to in Section 58 (2) of EMCA provides as follows:

“SECOND SCHEDULE

[Section 58(1), (4)]

PROJECTS TO UNDERGO ENVIRONMENTAL IMPACT ASSESSMENT

1. General—

- (a) an activity out of character with its surrounding;**
- (b) any structure of a scale not in keeping with its surrounding;**
- (c) major changes in land use.**

2. Urban Development including—

- (a) designation of new townships;**
- (b) establishment of industrial estates;**
- (c) establishment or expansion of recreational areas;**
- (d) establishment or expansion of recreational townships in mountain areas, national parks and game reserves;**
- (e) shopping centres and complexes”**

The Plaintiff has not persuaded this court that the application for amalgamation, subdivision, and change of user of the suit properties required an EIA license.

About the Plaintiff's claim that the approval was granted through fraudulent misrepresentation and illegality. The Plaintiff claimed that the 1st Defendant misrepresented to the 2nd Defendant that it was the registered owner of the suit properties and failed to disclose that the owners of the suit properties were all deceased. As mentioned earlier in the judgment, the 1st Defendant purchased only 14 acres, which belonged to one deceased co-owner of the suit properties. The 1st Defendant purchased this share from the legal representative of the deceased co-owner of the suit properties. Nowhere in the application for planning approval did the 1st Defendant present itself as the registered owner of the suit properties. As mentioned earlier, the planning brief prepared by DW1 for the 2nd Defendant clearly mentioned the registered owners of the suit properties. The 1st Defendant's interest was only in the share of Simeon Otiende Awuor in the suit properties. Although Simeon Otiende Awuor was deceased, a grant of letters of administration in respect of his estate had already been issued to his son, Gordon Otiende Matengo, and

confirmed on 23rd April 1986. I can see no illegality or fraud in the amalgamation and partitioning of the suit properties so that each of the four families could have separate titles. In any event, there is no evidence that any of the co-owners of the suit properties have complained about the severance of the tenancy in common. The only persons who could have been defrauded were the then registered owners of the suit properties. If they are not complaining 7 years after the amalgamation, subdivision, and change of user, which only affected the portion purchased by the 1st Defendant, why is the Plaintiff complaining? The Plaintiff has not proved the fraud and illegality alleged against the 1st Defendant. The term fraud is defined in Black's Law Dictionary, 9th Edition, as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal

or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

In Vijay Morjaria v. Nansingh Madhusingh Darbar & another [2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

On the second issue, whether the 1st Defendant acquired any valid interest in the suit properties, I agree with the 1st Defendant that the Plaintiff has *no locus standi* to challenge the 1st Defendant’s title, if any, in the suit properties. This is because the Plaintiff has not demonstrated that it has any proprietary interest in the suit properties whatsoever. The Plaintiff has not even demonstrated that it owns the land on which its factory is situated. In any event, the 1st Defendant purchased only a portion of the suit properties from Gordon Otiende Matengo, the administrator of the estate of Simeon

Otiende Awuor. Any challenge to the sale of the said portion of the suit properties to the 1st Defendant must involve the administrator of the estate of Simeon Otiende Awuor, who is not a party to this suit. The determination by the court of the validity of the sale agreement between the 1st Defendant and Gordon Otiende Matengo would affect Gordon Otiende Matengo. The court cannot make a decision affecting a party not before it. In the Court of Appeal case of Richard Nchapi Leiyangu v IEBC & 2 others, Civil Appeal No. 18 of 2013, the court stated in part that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law.”

Due to the foregoing, I find no basis for the Plaintiff’s challenge to the 1st Defendant’s interest in the suit property.

On the third issue, the Plaintiff sought several reliefs in its amended plaint. For reasons I have given above, none of the orders sought are available to the Plaintiff. The Plaintiff admitted in the amended plaint that the 1st Defendant had already subdivided the suit properties, L.R. No. 654/21 and L.R. No. 654/2. The Plaintiff produced in evidence the subdivision plan for these properties showing how they were

subdivided. This means that the suit properties do not exist. The same had been amalgamated and subdivided. A permanent injunction cannot, therefore, issue to restrain activities on non-existent parcels of land. The court cannot also issue a declaration that the 1st Defendant has no ownership rights over the said parcels of land.

I have made a finding that the Plaintiff failed to prove that the suit properties are situated in an industrial zone. A declaration sought to that effect by the Plaintiff, and an order that no residential settlement shall be developed on the suit properties cannot therefore be granted. I am also unable to grant a declaration that all dealings by the 1st Defendant with the suit properties were null and void. As mentioned earlier, such a declaration would affect the rights of third parties not before the court. I have also held that the Plaintiff has no *locus standi* to challenge the legality or otherwise of the 1st Defendant's interest or title, if any, in the suit properties. The declaration of nullity sought by the Plaintiff on the ground of the 1st Defendant having dealt with properties of deceased persons cannot therefore be granted.

I have found no illegality or irregularity in the process through which the 2nd Defendant issued planning approval in respect of the suit properties. I find no basis, therefore, for revoking the said approval and actions taken pursuant thereto. I wish to add that such action would affect several third parties who are not before the court, whom the court cannot condemn unheard.

Conclusion

In conclusion, it is my finding that the Plaintiff has not proved its case against the Defendants to the required standard. The Plaintiff's suit is also procedurally flawed due to non-joinder. The suit is dismissed accordingly with costs to the 1st Defendant.

Dated and signed at Kisumu on this 16th day of October 2025

**S. OKONG'O
JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Ms. Onsongo for the Plaintiff

Ms. Tusiime for the 1st Defendant

Ms. Awuor for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the Interested Party

Ms. J. Omondi-Court Assistant

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