Aly (As Trustee of the Wakf of Ali Bin Mohamed alias Muses Mohamed & 2 others v Islamic Foundation (Civil Appeal E064 of 2023) [2026] KECA 62 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 62 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E064 OF 2023

AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

JANUARY 30, 2026

BETWEEN

MOHAMED NAAMAN ALY (AS TRUSTEE OF THE WAKF OF ALI BIN MOHAMED ALIAS MUSES MOHAMED ..... 1ST APPELLANT

ABDALLA MOHAMED ALY MUSES ..... 2ND APPELLANT

ALY KHAN ALY MUSES ..... 3RD APPELLANT

AND

THE ISLAMIC FOUNDATION ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) delivered on 18{{^th}} October 2022 in E.L.C Case No. 219 of 2016)

JUDGMENT

1. The appeal before us is from the judgment of the Environment and Land Court (the ELC) at Mombasa dated 18th October 2022 in which L. L. Naikuni, J. determined the suit filed by the appellants (Mohamed Naaman Aly, Abdalla Mohamed Aly Muses and Aly Khan Aly Muses) in Mombasa ELC Case No. 219 of 2016 against the respondent, the Islamic Foundation. The subject matter of the dispute in the suit aforesaid concerned the Waqf established by Ali bin Mohamed a.k.a. Muses Mohamed (the deceased) on 12th November 1941.

2. For the sake of clarity, the word waqf must be understood to mean "a religious, charitable or benevolent endowment or dedication of any property in accordance with Islamic law" as defined in section 2 of the Waqf Act, Cap. 109. For the avoidance of doubt, we will shortly pronounce ourselves on the various forms of Waqf or trusts in Islamic law.

3. The appellants' case, as pleaded in their plaint dated 11th August 2016 and amended on 4th October 2017, was that they instituted proceedings in ELCC No. 219 of 2016 in their capacity as trustees of

the Waqf properties of the deceased; that the Waqf was consecrated over the property known as Plot No. 9 Section III measuring 162 acres and registered as CR No. 5792/1 (the Waqf property); that the Waqf was a family-administered trust for the benefit of the Naima Mosque situated at Amkeni area of Kikambala in the then Coast Province; that, sometime in or about the month of March 2009, the respondent approached the 1st appellant, Mohamed Naaman Aly Muses, seeking a grant of 50 acres of land comprised of the Waqf property; and that the discussions between the respondent and the 1st appellant culminated in the letter of offer dated 23rd March 2009 in terms of which the respondent was purportedly granted 50 acres of the Waqf property.

4. The appellants further averred that, at a subsequent meeting of all the trustees and heirs of the Waqf convened for the purpose of deliberating on the proposed grant, they discovered that the Waqf Deed did not provide for such grants, and that the grant would have been illegal and against the provisions of the trust; that the letter of offer erroneously issued to the respondent was thus retracted and no further documents were executed to give the respondent any rights over any part of the Waqf property; and that the letter of offer aforesaid could not effectively transfer any legal interest in any portion of the Waqf property for the reasons that:

> " a) A portion of the land to be transferred to the defendant has not been measured in size or exactly identified out of a total area of 166 acres approximately as comprise the plaintiff's Trust Land.
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> b. The nature of the interest to be transferred, whether freehold or leasehold has not been stated.
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> c. No consideration or leasehold rent has been given as agreed.
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> d. If the interest to be transferred is leasehold, no terms and conditions of the proposed lease have been identified or agreed, nor has the amount of and rent purchase price agreed.
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> e. No survey portion to or subdivision of the land excising the portion to be transferred to the defendant has taken place and/or been approved by the Government of Kenya through its survey of Kenya or otherwise at all.
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> f. No permission has been obtained at the time or since such transfer from the Divisional Land Control Board of the area and the plaintiff submits that without such consent any transfer or disposition of land is invalid and void in all.
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> e. The plaintiff as Mutawali or Trustee of the plaintiff Trust or Wakfs was not empowered to give away any of the wakf Land.
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> f. Similarly, he was likewise not empowered so to do under the *Wakf Commissioners Act* of the Laws of Kenya."

5. In addition to the foregoing, the appellants averred that, to their surprise and distress, they discovered that despite the retraction of the letter of offer and refusal to execute any further documents, the respondent had encroached onto approximately 2 acres of the Waqf property and proceeded to carry out construction thereon without the appellants' knowledge or consent, and without approvals from NEMA or the Kilifi County Council; that the respondent was a trespasser and in illegal occupation of the Waqf property; and that it continued to build structures thereon without any proper or legal sanction.

6. By reason of the matters aforesaid, the appellants prayed for a declaration and orders that:

> " a) The defendant is illegally in occupation of the Plaintiffs' land as a trespasser, and in breach of the powers given to the plaintiff under that Wakf or under the relevant legislation of the Country such as the *Land Control Act*.
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> b. The defendant be evicted from the suit premises and vacant possession of the suit premises to be delivered to the Plaintiffs, with the assistance of the Police.
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> c. That all works being presently carried on by the defendant on the plaintiff's land be stopped immediately, and that all contractors, sub- contractors, workmen, mechanics and fundis be ordered to leave the suit premises immediately and an ex-parte order to that effect be issued and a date be fixed for interpartes hearing.
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> d. That all other activities of the defendant being carried on from the Plaintiff's land be stopped with immediate effect.
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> e. Damages for illegal occupation of the property for 2 acres in the sum of Kenya Shillings Four Hundred and Fifty Thousand (Ksh. 450,000/=) per acre encroached upon, for each year of illegal occupation, with interest at court rates on delayed payment, until payment in full.
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> f. Any other relief which the court deems fit in the circumstances.
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> g. Costs of and incidental to and of these proceedings."

7. In its defence and counterclaim dated 16th September 2016 and amended on 18th November 2017, the respondent denied each and every allegation contained in the amended plaint. The respondent averred that the grant to the respondent of 50 acres of the Waqf property for the purpose of constructing an Islamic Institution was in consonance and in accordance with the terms of the Waqf, and that the same was valid and lawful; that the letter of offer was not issued in error, and was not retracted as alleged; that the letter of offer was properly executed and issued by the trustees of the Waqf and by other heirs and beneficiaries of the estate; that the same was duly witnessed by the Chief Kadhi; that each party signed the agreement at his own will and volition, and not at the behest of the 1st appellant; that the 1st appellant had the necessary legal capacity, mandate and/or authority to grant the respondent the 50 acres parcel of land since, at the time, he was "the Trustee of the Waqf then"; that, among the fundamental terms of the Agreement, and which were titled "conditions precedent", were that a senior trustee of the Waqf was to be a member of the Board of the Institution; and that the heirs pledged that, during the subsistence of the University, they would not evict or cause the Foundation to vacate the Waqf property, or in any way interfere with the day-to-day running of the University.

8. The respondent further averred that it complied with the fundamental terms of the Agreement, and that the 1st appellant was appointed as a member of the Board of the University under a Trust Deed created on 26th November 2014; that it was the legal and beneficial owner of the 50 acres parcel of land annexed from the Waqf property; and that it obtained all the requisite permissions to construct the University. It prayed that the appellants' suit be dismissed with costs.

9. In its counterclaim, the respondent reiterated the contents of its defence and further averred that, as early as 1995, the 1st appellant granted the respondent the subject parcel of land to construct a University for the purpose of advancement of Islamic teachings and dissemination of Islamic knowledge; that the grant was made under an oral agreement; that, pursuant to the oral agreement,

the respondent started preparing building plans for the University and procuring approvals thereof; that, sometime in the year 1997, its plan to build the University was approved by the relevant local authority; that it halted its project in order to allow the parties time to formally enter into a written agreement for the grant of the 50 acres parcel of land, which culminated in execution of the Agreement dated 23rd March 2009; and that, pursuant to the said Agreement, the respondent embarked on the construction of the Islamic University and invested more than Kshs. 200,000,000 in the project.

10. The respondent further averred that, even though the 50 acres parcel had not been formally subdivided from the larger Waqf property, it was expressly agreed, as the 1st respondent confirmed, that the process of subdivision and documentation would be done; that it had a proprietary and beneficial interest in the 50 acres of land allegedly granted to it, and that the non-completion of the process of subdivision did not in any way take away its rights and interests in the parcel of land; and that, since the appellant contend that they lacked capacity to grant the 50 acres parcel of land, it shall seek compensation by the appellants as it invested a total sum of Kshs. 200,000,000 based on their misrepresentation that they had the capacity to grant it.

11. Accordingly, the respondent prayed for:

> " 1. A declaration that the Plaintiff had the legal capacity, authority and or mandate to grant the Defendant the 50 acres Parcel of land from the Wakf Property created by Muses Mohamed.
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> 2. An Order that the 50 acres Parcel of Land granted to the Defendant pursuant to the Agreement of 23rd March 2009 be annexed and sub- divided from the Larger Portion of Plot No 9 Section III measuring 162 acres being CR No 5792/1 and subsequently the same be transferred to the Defendant.
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> 3. Costs of this Suit."

12. In their defence and defence to counterclaim dated 8th February 2019, the appellants denied the allegations contained in the respondent's counterclaim and prayed that it be dismissed with costs.

13. In its judgment dated 18th October 2022, the ELC (L. L. Naikuni, J.) dismissed the appellants' suit and allowed the respondent's counterclaim as prayed. In addition, the learned Judge gave orders directing the Land Registrar, Mombasa, to hive off and/or excise a portion measuring 50 acres from the larger portion of the Waqf property and, subsequently, transfer it to the respondent at its own costs within 60 days of his judgment.

14. Aggrieved by the learned Judge's decision, the appellants moved to this Court on appeal on a whopping 13 grounds contained in their Memorandum of Appeal dated 3rd May 2023. According to the appellants:

    1. The learned Judge erred in law and in fact having found that the Appellants were Trustees of a Wakf, could make a Grant of Fifty (50) acres of land to the Respondent contrary to the powers set out in the Wakf Deed.

    2. The learned Judge erred in law and in fact in having found that the Appellants could give away land by way of a Grant whereas the Wakf Deed limited the power of the Trustees to giving out leases not exceeding Three (3) years.

    3. The learned Judge erred in law and in fact in elevating the doctrine of legitimate expectation above the objects and powers set out in the Wakf Deed or the general objects of the law and/or Trusts.

4. The learned Judge erred in law and in fact in failing as the Environment and Land Court to exercise its jurisdiction in equity to protect the objects of the Trust created by the Wakf Deed, and by allowing the Counter-claim which diminished the Trust.

5. The learned Judge erred in law and in fact in failing to consider and find that a Muslim Charitable Trust known as a Wakf cannot give any land meant to benefit a mosque, to any other institution.

6. The learned Judge erred in law and in fact in failing to find that when the Trustees of the Wakf acted in excess of their powers as Trustees, or contrary to the objects set out in the Wakf Deed, their acts were invalid and a nullity and incapable of being effected in an action against the Wakf.

7. The learned Judge erred in law and in fact in failing to consider and make a finding that the decision of Trustees of a Wakf have to be unanimous or in the majority to be binding upon the Wakf.

8. The learned Judge erred in law and in fact in failing to consider and find that the remedy available to a party granted land by the Trustee of a Wakf contrary to the said Wakf Deed would be against the Trustee and not the Wakf or its properties.

9. The learned Judge erred in law and in fact in allowing the Respondent's Counterclaim and granting the orders of specific performance for the hiving off and subdividing the Wakf property and transferring Fifty (50) acres to the Respondent.

10. The learned Judge erred in law and in fact in ignoring, misapprehending or failing to appreciate the unique status of a Muslim Charitable Trust or Wakf in Kenya and thus fell into an error.

11. The learned Judge erred in law and in fact in failing to appreciate and apply the legal precedents and law cited by the Appellants in their closing submissions.

12. The learned Judge erred in law and in fact in misdirecting himself in all the circumstances of the case and thereof failed to exercise his discretion judiciously.

13. The learned Judge erred in law and in fact in conducting a wrong analysis of the facts and the law in this matter and as a result fell into error and arrived at a wrong decision."

15. On the grounds aforesaid, learned counsel for the appellant, M/s. Njoroge & Katisya, in their written submissions dated 19th April 2024, invited the Court to pronounce itself on the following three issues, namely: whether the Trustees of the Waqf could give away by way of a Grant a portion of the Waqf properties; whether the decisions of the Trustees have to be unanimous or in the majority to be binding upon the Waqf; and whether, in ignoring, misapprehending or failing to appreciate the unique status of an Islamic charitable Trust or Waqf in Kenya, the trial court reached an erroneous decision.

16. Counsel relied on several judicial decisions cited in their submissions, list of authorities and case digest of even date, including Syed Mohd. Salie Labbai v Mohd. Hanifa & Others (1976) AIR 1569 where the Supreme Court of India was cited for the proposition that the creation of a Waqf signifies removing the property from the owner and extinguishing his or her rights whereby it becomes the property of God; that such a property cannot be disposed of by way of a gift or sale; and that it cannot also be inherited; Hazi Safiuddin Ahmed v the Administrator of Waqfs Bangladesh & Others Writ Petition No. 12032 of 2013 (unreported) for the proposition that a public Waqf is ordinarily created for a religious or charitable purpose; and that a Mutawalli or trustee has no right to the property belonging to the Waqf as it does not vest in him; and that a Mutawalli is not a trustee in the technical sense, but merely a

superintendent or manager; and H. Idayathulla & Others v Larabsha Dharga Panruti W.A. No. 1810 of 2005 (unreported) for the proposition that there can be no permanent lease over Waqf property; that a Mutawalli cannot grant a lease contrary to statute law; that a Mutawalli has no power to extinguish the Waqf once it is created; that a Mosque erected illegally on a Waqf land is liable to demolition since it has encroached on Waqf property; and Ali Mohamad Ali Darani & Another v Khadija Shaffi & 3 Others [2015] eKLR, in support of the principle that a Waqf is intended to be perpetual and last forever, unless terminated as envisaged in Islamic law. They prayed that the appeal be allowed.

17. In rebuttal, learned counsel for the respondent, M/s. Khalid Salim & Company, filed written submissions and a list of authorities dated 17th December 2024 citing the cases of Pius Kimaiyo Langat v Co-Operative Bank of Kenya Limited [2017] eKLR for the proposition that parties are bound by their contracts, and that courts cannot rewrite a contract between parties unless coercion, fraud or undue influence are pleaded or proved; Titus Muiruri Doge v Kenya Canners Ltd [1988] eKLR for the proposition that, if a party is made to believe in a certain state of facts and acts on those facts to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand;

Evans Onguso & 2 Others v Peter Mbuga & 4 Others [2020] eKLR; and David Waweru Mbugua v William Adero Goga & 5 Others [2018] eKLR where the ELC held that, even though the donation/gift of land made by the plaintiff to the defendants may not have been perfected, the actions and conduct of the parties made it clear that the donations/gifts were intended to take effect. Counsel urged us to dismiss the appeal.

18. This Court's mandate on 1st appeal was espoused in Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. This mandate was underscored in the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 as follows: "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

20. However, we are conscious as cautioned by the predecessor to this Court in Peters v Sunday Post Ltd [1958] EA 424 that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.

But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

21. Having considered the record, the grounds of appeal and the respective submissions of learned counsel, we form the considered view that the main issues that fall for determination in this appeal are: (i) whether, under the terms of the Waqf Deed, a grant of any part of the Waqf property could be made to any person or institution;

(ii) whether the Mtawalli or trustees acted in accordance with the Waqf and the law, and whether their action to grant the respondent a portion of the Waqf property was enforceable at law in an action against the Waqf; and (iii) if the answer to (ii) is in the affirmative, whether the doctrine of legitimate expectation applies to this case so as to justify a finding that the respondent had acquired proprietary or beneficial interest in the contested portion of the Waqf property.

22. On the 1st issue, the decisive question is whether the Mtawalli or trustees had power or authority under the terms and conditions of the Waqf Deed to grant to any person or institution a portion of the Wakf property. In the impugned judgment, the learned Judge held that:

> " 51. ... ... although the property was created under Wakf trust deed in the year 1941 and therefore governed by the Wakf Commissions Act the same was never leased off to the Defendants. They were only given as a grant for 50 acres for purposes of constructing an institution for teaching Islamic knowledge which was purely in conformity with the terms of the Wakf Deed. It was not sold off as there was no consideration. Besides one of the Trustees was incorporated as a Board of Director to the Islamic Foundation University.
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> ... .
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> 53... The Court fully concurs with the Learned Counsel for the Plaintiff and Wakf Deed that it only limits a Lease upto a period of three (3) years and from sale, and/or transfer of the suit property. But the Letter of Offer gives a grant of a land for 50 acres and does not specify the period."

23. Taking issue with the learned Judge's decision, counsel for the appellants submitted that waqf means detention of a property so that its produce or income may always be available for beneficiaries named therein for charitable purposes; that waqf property is a property of God, indeed, a religious and a benevolent endowment; that, once the Settlor declares and consecrates the property to a waqf, it ceases to belong to him or his family/heirs or descendants, and that it is no longer available to him or his Trustees or beneficiaries for sale, transfer or gift by way of a grant.

24. As learned counsel further submitted, the Mutawalli or Trustee has no right in the property; that his/her power would be that of a Manager or Superintendent, and not more; and that the rationale behind the Settlor limiting the leases under the Waqf Deed to three

(3) years was to avoid parting with possession of the Waqf property and the associated problems brought about by long leases, which invited occupation or developments of a permanent nature.

25. In rebuttal, counsel for the respondent submitted that the parties herein entered into an agreement granting the respondent part of the Waqf property; that a letter of offer was consequently issued on 23rd March 2009 offering 50 acres to the respondent; that the said letter was signed by the heirs of the Late Ali Bin Mohamed alias Muses Mohamed and witnessed by the then Chief Kadhi; that the letter

was also witnessed by an advocate and received by the then Lands Registrar; that the terms of the letter were explicitly stated, and were to be legally binding; and that the veracity of the letter and signatures thereon have not been challenged, and that it remains authentic.

26. Counsel argued that, although the Wakf Deed expressly prohibits the leasing of the property for more than 3 years, it does not in any way prohibit and restrict the sale, grant and or transfer of the property or any part thereof; and that the letter of offer constituted a grant of 50 acres of the subject property to the respondent, and not a lease or sale.

27. The instant appeal calls for a clear understanding of waqf endowments in their diverse forms and intent, and of the specific category into which the deceased's Waqf falls, and which determines the legal effect of its terms and conditions under Islamic law on religious trusts. Section 2 of the Waqf Act, Cap. 109 (which replaced the repealed *Wakf Commissioners Act*, 1951 in 2022) provides definitions of key terms relating to wakf endowments as follows:

> " waaqif" means a person who endows his property or cash as the subject of a waqf;
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> "waqf" means a religious, charitable or benevolent endowment or dedication of any property in accordance with Islamic law, and "awqaf" means more than one waqf;
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> "waqf ahli" means a waqf made for the benefit of an individual or a family, or for the performance of a rite or ceremony that is recognised by Islamic law;
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> "waqf khairi" means a waqf, other than a waqf ahli, made for a public purpose recognised by Islamic law;
>
> "waqf mushtaraq" means a waqf which is made in part for the benefit of an individual or a family and in part for a public purpose that is recognised by Islamic law;

28. In their book titled Islamic Social Finance: Waqf, Endowment, and SMEs (Edward Elgar Publishing 2023) at p. 3, Ismail S, Hassan K and Rahmat S further classify waqf khairi as being either general or specific, and observe thus:

> " First, waqf khairy or religious waqf is commonly allocated for mosques and religious schools. Waqf khairy is classified into two forms: waqf mutlak (general waqf) and waqf muqayyad (special waqf). Waqf mutlak refers to the practice of handing over waqf without a specific purpose in waqf state property. The property can be developed for any purpose as long as it does not conflict with Islamic law. Waqf Muqayyad is the waqf of dedicating a property where the donor states the giving of waqf for specific purposes, while dedicating the property and its ownership to be used only for the purpose stated by the waqif …."

29. The trust in issue in the instant appeal is a Waqf Khairi (a religious waqf) established by the deceased and consecrated over the Waqf property for the benefit of Naima Mosque in terms and conditions contained in the Waqf Deed aforesaid. The permanent nature of the dedication is noteworthy.

30. The learned authors of Mulla's Principles of Mahomedan Law (19th Edn) make the following observations on the permanent nature of a Waqf at section 174:

> " The dedication must be permanent. A wakf, therefore, for a limited period, e.g., twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character."

31. We take to mind the fact that there is a fundamental difference between trusts under Islamic law and English law, and their peculiar legal effects. In Nawab Zain Yar Jung and Others v The Director of Endowments and Others 1963 AIR 985, the Supreme Court of India held that:

> " ... the Muslim law relating to trusts differs fundamentally from the English law. According to Mr. Ameer Ali [of the Privy Council in Vidya Varuthi Thirtha v Balusami Ayyar and others [1921] UKPC 78], 'the Mohammadan laws owes its origin to a rule laid down by the Prophet of Islam; and means "the tying" up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' As a result of the creation of a wakf, the right of wakif is extinguished and the ownership is transferred to the Almighty."

32. The Wakf Deed executed by Ali bin Mohamed alias Muses Mohamed on 12th November 1941 provided that:

> " .... I, the said Ali bin Mohamed alias Muses Mohamed do hereby wakf the said pieces or parcels of land with improvements thereon and declare that the income thereof under deduction of rates, taxes and expenses of all necessary and proper repairs and outgoings in respect of the said properties from time to time from the date of these presents shall be utilised for the benefit of the Mosque known as "NAIMA" situate at Amkeni and encouraging the worship therein by payment of salaries to Muathin, Imam and Mudarris and purchase of Volumes of the Holy Koran and other religious books and such like objects AND I hereby declare that the Mutawali or Trustee for the time being shall not grant a lease of any of the premises for a period of more than three years at any one time ...."

33. It is clear from the Waqf Deed that the Waqf was a special waqf dedicating the Waqf property and its ownership to be used only for the specific purpose stated by the deceased waaqif. The Waqf Deed specified the objects of the Waqf as consecrated for the benefit of the Naima Mosque, and for encouraging worship therein. The pertinent question that arises is whether a waqf property specifically dedicated for the purpose of a mosque may be utilised for any other purpose not ancillary to the main object.

34. It is instructive that a waqf dedicated for the purpose of a mosque is absolute and irrevocable. As elucidated in Mulla's Principles of Mahomedan Law (supra) at section 188:

> " In order to create a valid dedication of a public nature, the following conditions must be satisfied: (1) the founder must declare his intention to dedicate a property for the purpose of a mosque ...; (2) the founder must divest himself completely from the ownership of the property ...; and (3) the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.
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> As regards the adjuncts, the law is that where a mosque is built or dedicated for the public, if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque."

35. The unconditional nature and the inalienability of any part of such a waqf property were elucidated in Syed Mohd. Salie Labbai v Mohd. Hanifa and Ors (supra) where the Supreme Court of India held that:

> " It is also provided by the Shariat that once a musjid has been established by dedication no condition can be attached by the founder and if any such condition is attached the said condition would be void: Vide the following observations of Baillie in his Digest of Moohummudan Law, 2nd Edn., at p. 617:
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> 'When a man has made his land a musjid, and stipulated for something out of it to himself, it is not valid, according to all. It is also generally agreed that if a man make a musjid on condition that he shall have an option, the wakf is lawful, and the condition void.'
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> ... .
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> Ameer Ali in his book "Muhammadan Law", Vol. 1, 3rd Edn., has given several instances of a complete and irrevocable dedication made by the wakif or the founder and the consequences flowing from the same. Ameer Ali observed as follows:
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> 'The proprietary right of the wakif in a building or ground set apart for prayers becomes extinguished either on the declaration of the wakif that he has constituted it a mosque or musalla or consecrated it for worship, or on the performance of prayers therein or thereon.'
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> Thus the moment a building is set apart for offering prayers the proprietary right of the wakif is completely extinguished.
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> ... .
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> In Jewun Doss Sahoo v. Shah Kubeer-ood-Deen (1) the Judicial Committee explained the significance of the word 'dedication' and observed thus:
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> 'According to the two disciples, "Wakif" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a Mutwaly, (or procurator), and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it ....'" [Emphasis ours].

36. In view of the foregoing, it is indubitable that a waqf specifically dedicating property for purposes of a mosque extinguishes all proprietary rights of the settlor or founder of the Waqf over the property with immediate effect, and ownership thereof is considered to be vested in God the Almighty. Accordingly, the Waqf property cannot be subject to inheritance or disposition by gift or sale.

37. Even though the learned Judge correctly noted that the property was never leased off to the respondent; and that the construction of an institution for teaching Islamic knowledge may have been complementary to the objects of the Waqf, it must be borne in mind that the letter of offer sought to grant 50 acres of the Waqf property to the respondent, and transfer ownership of the 50 acres to the respondent, yet all proprietary rights over the entire Waqf property had already been extinguished, and was therefore not transferrable to any person or institution in the manner decreed in the impugned judgment.

38. In view of the foregoing, we form the respectful view that the learned Judge was at fault in concluding that a grant of a portion of the Waqf property could be issued to the respondent in terms of the offer

letter aforesaid. Moreover, the Judge did not take into account that the Waqf Deed only permitted temporary leases of the property for a maximum period of 3 years, and for purposes that accord with the terms and conditions of the Waqf Deed. Simply put, no grant of any part of the Waqf property could be lawfully made to any person or institution.

39. Turning to the 2nd issue as to whether the Mtawalli or trustees acted in accordance with the Waqf and the law, and whether their attempt to grant the respondent a portion of the Waqf property was enforceable at law in an action against the Waqf, we pay particular attention to the learned Judge's decision and reasons rendered in the following words:

> " 55. In a nut shell, this honorable court finds the assertion of the applicability of Wakf Deed, and *Wakf Commissioners Act* rather misplaced for the following grounds:-
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> Firstly, although the property was created under Wakf trust deed in the year 1941 and therefore governed by the Wakf Commissions Act the same was never leased off to the Defendants. They were only given as a grant for 50 acres for purposes of constructing an institution for teaching Islamic knowledge which was purely in conformity with the terms of the Wakf Deed. It was not sold off as there was no consideration. Besides one of the Trustees was incorporated as a Board of Director to the Islamic Foundation University.
>
> Secondly, as a quick follow up to the above assertions, this court keeps on wondering why the Plaintiffs would take all these years from 2009 when the Defendant acquired the land until the year 2016 – close to seven (7) years to have filed this suit – and realized that there were [several] illegalities and wrongfulness created by the terms and condition of the duly executed Letters of Offer against the provisions of the Wakf Trust Deed and the Wakf Commission Act – making it a nullity and void. In my own view, this was purely an afterthought and needs to be disregarded altogether..."

40. Taking issue with the learned Judge's decision, counsel for the appellants made the following submissions: that the trial Judge misapprehended the law by comparing an Islamic Trust to a common English Trust, especially as to the powers of the trustees to bind the Trust; that, in as much as the Waqf was an Islamic family trust, it did not benefit the settlor's family as it was not part of his estate and could not be distributed to his heirs; that it merely restricted the trustees to the lineage of the settlor; that the trustees could not part with possession of the Waqf property as the Trust Deed specifically restrained them from granting leases exceeding three (3) years; and that the trustees are akin to Managers or Superintendents and, therefore, could not sell the Waqf property as they do not possess such powers as are held by a trustee in a common law trust.

41. According to learned counsel, the trial court appeared to be of the view that a grant of land does not mean a disposition or a parting with possession and, therefore, not excluded by the Trust Deed. Counsel drew our attention to the *Land Act*, 2012 which defines a disposition to include a grant of land. They further submitted that section 14 of the repealed *Wakf Commissioners Act* had an express provision prohibiting sale or lease of waqf properties without the sanction of the Wakf Commissioners; and that this sanction was expanded and retained in section 18 of the Waqf Act and, accordingly, such disposition can only be with the consent of the Commission and orders of the Environment and Land Court, such orders being mandatory.

42. According to counsel, section 18 (3) of the Waqf Act makes it an offence to sell or part with possession of waqf property contrary to the laid down statutory provisions. Counsel further submitted that there was no evidence that the letter of offer in issue was ever sanctioned by the Wakf Commissioners; and that it remains void on account of failure to comply with express statutory requirements.

43. In rebuttal, counsel for the respondent submitted thus: that the parties entered into a binding agreement after the letter of offer was executed by all relevant parties to the agreement; that the terms and conditions of the letter of offer were met; that the appellants' claim that the Waqf Deed prohibited the leasing of properties for more than 3 years after entering into the agreement was nothing but a blatant ploy to illegally rescind the binding contract they willingly entered into, and whose intentions were very clear; that there was no proof that the letter of offer was ever rescinded; and that the 1st appellant, the head trustee, is deemed to have been aware that the Waqf Deed prohibited leasing of the property for more than 3 years, and yet went ahead and appended his signature on the letter of offer.

44. The decisive question is whether the appellants or any of them, in their capacity as trustees (Mutawalli) of the deceased's Waqf, were vested with power or authority in law to enter into the agreement in issue and grant a portion of the Waqf property to the respondent. The authors of Mulla's Principles of Mahomedan Law (supra) elucidated on the role and powers of the waqf trustees at section 202 as follows:

> " Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakif and vest in the Almighty. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and is not a trustee in the technical sense. He is merely a superintendent or manager ....
>
> Although the wakf property is not vested in the mutawalli he has the same rights of management as individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not the objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque." (See Syed Ahmad v Hafiz Zahid Husain and Ors. AIR 1934 ALL 732) [Emphasis added]

45. As further observed in Mulla's Principles of Mahomedan Law (supra) at sections 207 and 208:

> " A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.
>
> A mutawalli of a wakf although not a trustee in the true sense of the term is still bound by the various obligations of a trustee. He like a trustee or a person standing in a fiduciary capacity, cannot advance his own interests or the interests of his close relations by virtue of the position held by him ....
>
> Where a mutawalli makes an unauthorized alienation of wakf property, any beneficiary has the right to bring a suit for possession. It is not necessary to file a representative suit." [Emphasis ours]

46. In the same vein, the Supreme Court of India in Nawab Zain Yar Jung and Others v The Director of Endowments and Others (supra) held that:

> " The manager of the wakf is the mutawalli, the governor, superintendent, or curator. But in that capacity, he has no right in the property belong into the wakf; the property is not vested in him and he is not a trustee in the legal sense. Therefore, there is no doubt that the wakf to which the Act applies is, in essential features, different from the trust as is known to English law."

47. On the authority of the afore-cited cases, the informed views of learned authors and the law, we find that the trustees of the Waqf property expressly dedicated to the Naima Mosque, lacked the power and authority to grant 50 acres of the Waqf property to the respondent. Such a grant was not authorised under the terms of the Waqf Deed. In addition, the letter of offer ought to have been subjected to scrutiny and approval by the Wakf Commissioners before the parties took any further action.

48. Section 14 of the repealed *Wakf Commissioners Act* provided that:

49. Contracts or agreements relating to wakf property for more than one year must be sanctioned by commissioners.

> No contract or agreement of any description whatsoever purporting to sell or to lease or otherwise alienate any property the subject of any wakf for any period exceeding one year shall be valid unless the sanction in writing of the Wakf Commissioners has first been obtained.

50. Section 18 of the Waqf Act also contains a similar provision:

> 18. Agreements relating to waqf property
>
> 1. An agreement purporting to lease or otherwise alienate waqf property for any period exceeding one year shall be valid only if it is authorised in writing by the Commission.
>
> 2. A person who intends to sell immovable waqf property shall make an application to the Environment and Land Court and the Environment and Land Court may allow the application or issue any other order it deems appropriate.
>
> 3. A trustee who enters into an agreement contrary to the provisions of this section commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year.

51. It is instructive that the parties were in breach of section 18(1) of the Waqf Act by agreeing to alienate 50 acres of the Waqf property by way of a Grant to the respondent. While the disposition did not specify whether it was a sale or lease, it nonetheless offended the terms of the Waqf and the law. For the avoidance of doubt, section 2 of the *Land Act* Cap 280 clearly defines "alienation of land" as the sale or other disposal of the rights to land; and "disposition" means any sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer, and includes the disclaimer or the creation of an easement, a usufructuary right, or other servitude or any other interest in a land or a lease and any other act by the owner of land or under a lease where the owner's rights over that land or lease are affected, or an agreement to undertake any of the dispositions aforesaid.

52. More significantly, there is no evidence on record to show that the appellants sought and obtained authority from the Wakf Commissioners to grant the respondent a portion of the Waqf property. Neither did they apply for and obtain orders from the Environment and Land Court to hive off and

grant 50 acres of the Waqf property to the respondent. Accordingly, the appellants had no power or authority under the Waqf Deed or at law to extend the grant in issue and, consequently, the agreement on which the grant was founded is unenforceable at law as against the Waqf.

53. While our holding on the 2nd issue conclusively determines the appeal before us, it would nonetheless be remiss of us not to clarify the law on the respondent's alleged legitimate expectation to have 50 acres of the Waqf property conveyed to it. Accordingly, we turn to the 3rd and final issue as to whether the doctrine of legitimate expectation was applicable to the circumstances of this case so as to justify a finding that the respondent had acquired any proprietary or beneficial interest in the contested portion of the Waqf property as did the learned Judge.

54. In the impugned Judgment, the learned Judge held that, based on the terms and conditions of the duly executed letter of offer, legitimate expectation was created upon the respondent by the appellants; that it is from that expectation created by the appellants that the respondent proceeded with the construction of the Islamic University and invested substantially to a tune of Kshs. 200,000,000 in the project; and that, had it not been for the said Transfer and/or Grant of the land to it by the appellants and the heirs to the deceased's estate, they would not have proceeded to invest and/or build a University on the Waqf property.

55. Relying on the provisions of Article 159(1) and (2) of *the Constitution*, sections 1A, 1, 3 and 3A of the *Civil Procedure Act* (Cap.21)

And sections 3 and 13 of the Environment and *Land Act*, 2011 the learned Judge formed the view that the Court has power to invoke and apply, which he did, the Doctrine of proprietary Estoppel.

56. As the learned Judge observed:

> " 50. It is my own view that the Letter of Offer dated 23rd March, 2009 legally constitutes a legal and enforceable agreement terms and conditions stipulated thereof as per the definition of the Laws of Contract Cap. 23 of Laws of Kenya...
>
> 51... For these reasons, I find that the Defendant is not a trespasser at all on the suit land. On the contrary, the Defendant was an owner with proprietary interest, title and/or beneficial interest vested in them by effluxion of time ...."

57. On the question as to whether the doctrine of legitimate expectation applied to the circumstances of this case, counsel for the appellants submitted that the doctrine cannot counter the provisions of section 14 of the repealed *Wakf Commissioners Act*; that the application of prescriptive rights and adverse possession is also expressly excluded from waqf properties by section 15 of the repealed Act; that the trial court was looking at the facts of the case with the prism or lenses of enforcing a contract between parties without considering whether the letter of offer gave rise to a contract over waqf properties; that the trial court was not alive to the sanctity of a waqf; and that the Waqf property was God's property.

58. On their part, counsel for the respondent submitted that, by their actions before the letter of offer was signed, the appellants intimated that the respondent's construction of the university was something that the parties had agreed to; that the letter of offer materialized this agreement and solidified it; and that, by the appellants' conduct, it was evident that they had no objection to the construction and the grant of the 50 acres until the year 2015 when the 3rd appellant testified that he came to learn of the respondent and rejected its request.

59. Counsel further submitted that the respondent constructed and set up the university over a period of more than 6 years on the basis of its agreement with the head trustee and the beneficiaries of the Waqf; that this was done without as much as a demand letter from the trustees or the beneficiaries of the Waqf asking them to stop construction; that a legitimate expectation for the construction of said university on the property and the grant of the 50 acres had been created by execution of the letter of offer by the two parties; that the appellants cannot go back on the agreement and seek legal redress claiming trespass.

60. According to counsel, the Letter of Offer met the tenets of a valid agreement under Section 38 of the *Land Act*, 2016 and the Law of Contract and, therefore, was valid and effective. Counsel contended that the respondent had acquired a legal interest in the land and all benefits accruing therefrom; that the letter of offer did not constitute a lease agreement, but granted the 50 acres of land to the respondent, a disposition that the Waqf Deed did not prohibit; and that the appellants cannot therefore rely on the argument that the property was sold so as to require sanctioning by the Wakf Commissioners.

61. It is instructive that the relationship between the appellants and the respondent was purely contractual as regards the terms of the letter of offer which, as we have already observed, went against the grain of both the Waqf and statute law. In Wataari & 11 others v Registered Trustees of Telposta Pension Scheme [2023] KECA 1171 (KLR), this Court expressed its reluctance to extend the doctrine of legitimate expectation beyond the domain of public law and into contractual disputes between private parties in the following words:

> " 27. As a general common law principle, Legitimate Expectation applies to every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual (subject of course to clear statutory language or necessary implication to the contrary). On the other hand, creation of contract is governed by the *Law of Contract Act*, which falls in the domain of private law. However, it can correctly be argued that the doctrine of Legitimate Expectation is no longer a common law doctrine, but a constitutional tool to enforce both substantive justice and procedural fairness. Actually, the doctrine has found recognition in modern Constitutions. In Kenya, the doctrine enjoys constitutional and statutory underpinning, courtesy of Article 47 of *the Constitution* and the *Fair Administrative Action Act*...
>
> 29. However, *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. The governing law in the instant dispute is the *Law of Contract Act*. This brings into focus the doctrine of constitutional avoidance, which is defined as a preference of deciding a case on any other basis other than one, which involves a constitutional issue being resolved...
>
> 30. Courts are generally loathe to determine a constitutional issue in the face of alternative remedies. Courts would rather skirt and avoid the constitutional issue and resort to the available alternative remedies...
>
> 29. We reject the appellants' attempt to invoke the doctrine of Legitimate Expectation in a contract dispute, and proceed to lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed."

62. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR), the Supreme Court held that:

> " (263) "Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council, [1986] A.C. 668 at 692 (Lord Bridge):
>
> ...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation' ....
>
> (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation ....
>
> 268. An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, South African Veterinary Council v. Szymanski 2003(4) S.A. 42 (SCA) at [paragraph 28]: the Court held as follows:
>
> 'The law does not protect every expectation but only those which are 'legitimate ....'
>
> 268. The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous ... ;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

63. Having clarified the nature and import of the doctrine of legitimate expectation, we hasten to observe that, in the instant case, it would be worthless to pronounce ourselves substantively to the question as to whether legitimate expectation arose on the part of the respondent in the face of the contract that was tainted by illegality thereby lacking in legitimacy, and therefore void ab initio and unenforceable as it contravened, inter alia, the terms and conditions of the Waqf; the provisions of section 14 of the repealed Act, which required the grant in issue to be first sanctioned by the Wakf Commissioners in order to be valid; and the established principles of Islamic law, which underscore the inalienable and irrevocable nature of the Waqf property dedicated for purposes of a mosque. Furthermore, the agreement under which the grant was purportedly made was purely a private arrangement which did not belong to the realm of administrative law.

64. In Patel v Singh [1987] KECA 21 (KLR), Nyarangi, JA. quoted with approval the following passage by Devlin, LJ. (as he then was) in Archbolds (Freightage) Ltd v Spanglett Ltd [1961] 1 QB 374:

> " The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common,

it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."

65. In David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR), this Court held that:

> " No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point. In Mapis Investment (k) LtdV Kenya Railways Corporation[2005] 2 KLR 410, this Court cited with approval Lindley L.J in Scott V Brown, Doering, MCNAB & CO (3) [1892] 2 QB 724 at 728 as follows:
>
> 'Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.' (Emphasis added)."

66. As the grant went against the clear provisions of the Waqf and the law; and as it was not competent and lawful for the trustees of the Waqf to make a representation that they could grant 50 acres of the Waqf property to the respondent, a legitimate expectation could not have arisen in the circumstances of this case.

67. In addition to the foregoing, we are of the considered view that the learned Judge's conclusion that the respondent was an owner with proprietary interest, title and/or beneficial interest of 50 acres of Waqf property that vested in it by effluxion of time was erroneous and does not hold. With all due respect, the learned Judge's view runs contrary to the provisions of section 15 of the repealed Act which provides that:

> 15. Titles to wakf property shall not be acquired by prescription or adverse possession after commencement of Act Notwithstanding anything to the contrary in any Act or law for the time being in force, no title to any property the subject of a wakf shall, after the commencement of this Act, be acquired by any person by reason of that person having been in adverse possession thereof or by reason of any law of prescription.

68. Likewise, section 19 of the Waqf Act provides:

> 19. Title to waqf property
>
> Notwithstanding anything to the contrary in any written law for the time being in force, no title to any waqf property shall be acquired by any person by adverse possession or by reason of the law of prescription.

69. On the afore-cited judicial authorities, legal principles and statute law, we reach the inescapable conclusion that the learned Judge was at fault in holding that a legitimate expectation arose in this case, and that settles the 3rd issue.

70. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned judgment, the rival submissions of learned counsel, the cited authorities and the law, we find that the appeal succeeds and is hereby allowed as prayed.

71. Consequently, and mindful of the raft of the reliefs sought in the appellants' amended plaint in the trial court as well as the respondent's counterclaim, we hereby order and direct that:

    a. the judgment and decree of the ELC (L. L. Naikuni, J.) dated 18th October 2022 in ELC Case No. E219 of 2016 be and is hereby set aside;

    b. accordingly, the respondent's counterclaim against the Waqf shall stand dismissed;

    c. the appellants be and are hereby allowed to secure possession of the Waqf property, including the disputed 50 acres portion thereof, and administer it in accordance with the terms and conditions therein contained and in compliance with the fundamental principles of Islamic law on religious trusts; and

    d. in view of the public nature of the dispute leading to the instant appeal, we hereby direct that each party shall bear their own costs of the appeal and of the suit and counterclaim in the trial court.

    Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JANUARY 2026.

A. K. MURGOR

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR