

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC CASE No. 11 OF 2016
(FORMERLY HCCC No. 48 OF 1998)

PAUL CHEBIEGO1ST

PLAINTIFF

JACOB BARMAO2ND

PLAINTIFF

MICHAEL MAIYO.....3RD

PLAINTIFF

VERSUS

KIPSAT AYABEI 1ST

DEFENDANT

KANGONGO CHEBIATOR 2ND

DEFENDANT

NATIONAL LAND COMMISSION 3RD

DEFENDANT

LAND REGISTRAR UASIN GISHU COUNTY 4TH

DEFENDANT

JUDGMENT:

1. Vide the further Amended Plaint dated 16th January, 2019 the Plaintiffs herein brought this suit against the Defendants seeking the following orders:

- a) A declaration that Plateau/Chepkongony Block 2(Sumbeiyo)/65 was fraudulently transferred to numbers Plateau/Chepkongony Block 2(Sumbeiyo)/72 and 73 hence

null and void and that the Sumbeiywo Primary School is the rightful owner over that portion to be reversed to the school.

- b) Permanent injunction grant (sic) to the 1st and 2nd Defendants restraining them by themselves, agents and/or servants from occupying, alienating, selling, or in any way dealing with the suit land.
 - c) Special damages as in paragraph 7 above.
 - d) General damages.
 - e) Costs of and incidental to this suit together with interest thereon at court rates.
 - f) Mesne profits.
 - g) Any further or other relief this Honourable Court deems fit and expedient to grant.
2. The Plaintiffs described themselves as the Chairman, Treasurer and Secretary respectively of the Committee/Management of Sumbeiywo Farm then known as L.R. No. 11127/1. The Plaintiffs averred that after the allocation to Sumbeiywo Farm to its 63 members, the said members resolved to contribute portions of their land for public utilities including the establishment of Sumbeiywo Primary School on plot no. Plateau/Chepkongony Block 2(Sumbeiywo)/65 (the suit property herein). The Plaintiffs alleged that the 1st and 2nd Defendants fraudulently obtained registration in their names as owners of the suit property.
3. The Plaintiffs aver that the 1st and 2nd Defendants fraudulently registered the land as Plateau/Chepkongony Block 2(Sumbeiywo)/72 and 73 without their knowledge, consent or authority, and they set out the particulars of the alleged fraud & illegality. The Plaintiffs averred that their claim in this suit is for recovery of the suit land. The Plaintiffs also claim that the 1st

and 2nd Defendants destroyed three fully built and equipped classrooms and an office, for which the Plaintiffs seek special damages in the sum of KShs. 233,400/-. The Plaintiffs averred that despite notice being issued, the Defendants have refused to surrender the land hence this suit.

4. The 1st Defendant filed an Amended Statement of Defence dated 4th December, 2019 claiming that the Plaintiffs had no capacity/locus standi to sue. The 1st Defendant averred that none of the members of Sumbeiywo Farm agreed to designate any portions of their land for public utilities or establishment of Sumbeiywo Primary School. The 1st Defendant denied the particulars of fraud attributed to him and averred that he is a bona fide purchaser for value of the suit land alongside the 2nd Defendant for KShs. 1,500/- each. That they were allocated the suit property as Plot No. 201 in 1973 after survey and are thus entitled to peaceful and quiet possession thereof.
5. The 1st Defendant averred that the original area list for Mosop & Soy Small holders Sumbeiywo LR No. 11127/2 did not have the numbers alleged by the Plaintiffs. He asserted that he was given plot no. 201 and has been living thereon since 1973. He averred that the members were allotted their portions of LR No. 11127/1 commensurate to their shares. The first Defendant set out the members, their shares, contributions and plot numbers allocated to them, and asserted that no portion was set aside for public utilities or a school. That in 1979 the members started processing their titles, with the trustees overseeing the process and they obtained Land Control Board (LCB) Consent dated 26th July, 1979 from the Uasin Gishu LCB for subdivision of LR No. 111721/1.

6. The 1st Defendant avers that without authority, the Plaintiffs herein called a meeting on 20th April, 1983 at which members allegedly agreed to donate portions of their land to establish a school. The 1st Defendant asserted that he did not agree to surrender his portion of plot no. 201 for the alleged purpose. The 1st Defendant accused the Plaintiffs of purporting to illegally change all the plot numbers and issue new numbers disregarding the old area list, and designated the 1st Defendant's land as a school with the number Plateau/Chepkongony Block 2(Sumbeiywo)/65.
7. The 1st Defendant avers that there was no time when the portions of land owned by members in the area list of Mosop & Soy Small Holders Sumbeiywo were altered to create the 22-Acre portion that was allegedly set aside to establish a school. He accused the Plaintiffs of putting up structures on the land purporting to be a school and used the police to curtail his peaceful and quiet enjoyment of land. The 1st Defendant claims the Ministry of Education investigated and ascertained that the structures were illegally and unlawfully established on his land. That it also ascertained that the District Education Board and the District Development Committee never approved the school as required by law, government policy, procedure and practice, and that there was no evidence that the land was available for a school.
8. The 1st Defendant averred that there is no school registered with the Ministry of Education known as Sumbeiywo Primary School and no structures erected for it, thus it does not exist. That neither is there a Committee nor Management of Sumbeiywo Primary School in existence comprising of the

Plaintiffs herein. Further, that no other member of the community have offered any portion of their land for the purported school, and no offer was made to purchase the 1st Defendant's land. He averred that the suit is an attempt by the Plaintiffs to unjustly enrich themselves with the 1st Defendant's land. He concluded that this suit is unfounded, misconceived, frivolous, vexatious and an abuse of the court process, and asked that the suit be dismissed with costs.

9. The 3rd Defendant on its part filed a Written Defence and Cross-claim dated 18th July, 2019 denying the allegations in the Amended Plaint, and also denied the particulars of fraud and illegality attributed to it. The 3rd Defendant claims that it conducted investigations and a public hearing and determined that the land is public land surrendered to the Government of Kenya upon the subdivision of LR No. 11127/1 Plateau/Chepkongony Block 2 Sumbeiyu Farm. The 3rd Defendant averred that even though the public school established on the land was closed, the land remains public land under its management, and claimed it as against the Defendants.
10. The 3rd Defendant's cross-claim was against the Plaintiffs and the other Defendants. The 3rd Defendant reiterated that its investigations revealed that the land was public land set aside for a public purpose. That it was surrendered to the Government upon subdivision of LR No. 11127/1 Plateau/Chepkongony Block 2 formerly known as Sumbeiyu Farm. Further that the suit land came about as a statutory pre-condition for any subdivision of a large farm wherein certain portions must be set aside for public purpose and be duly

surrendered. That the land remains un-alienated government land and any transfer or registration in the name of any individual other than the Government of Kenya without due process is null and void and of no proprietary interest. The 3rd Defendant sought the following reliefs:-

- (1) A declaration that the suit land originally known as LR No. 11127/1 of LR No. Plateau/Chepkongony Block 2 (Sumbeiywo)/65 is public land set aside for a public purpose.
- (2) Cancellation of all entries in the name of any individual and an order for the land to be registered in the name of the principal secretary National Treasury as a custodian.
- (3) Any other relief that this court may deem fit.

11. The 4th Defendant also filed a Statement of Defence and Counterclaim dated 18th July, 2019. The 4th Defendant denied all the allegations in the Amended Plaintiff and denied knowledge of the alleged fraud as well as the particulars of fraud pleaded thereunder. The 4th Defendant averred that vide letter dated 2-10-2015, the 3rd Defendant recommended that title to the suit property be revoked as it is public land. The 4th Defendant averred that it acted in good faith and based on documents submitted for registration in transferring the suit land to the 1st and 2nd Defendants.

12. The 4th Defendant stated that in view of the 3rd Defendant's findings, the 3rd Defendant claimed that it was misled and/or misrepresented into issuing the impugned title. The 4th Defendant further averred that in the circumstances, the title was issued by mistake and adopted the 4th Defendant's cross-claim. The 4th Defendant asserted that it acted in good faith

upon exercising due diligence and pursuant to its statutory and constitutional authority. That it was not party to the alleged fraud, and would comply with any order/direction given in this matter.

13. However, the 3rd Defendant later filed a notice of withdrawal of its cross-claim against the defendants.
14. The 1st Defendant filed a Defence to the Cross-claim dated 4th December, 2019 and reiterated the contents of the Amended Defence and Counterclaim. The 1st Defendant alleged that the public hearing alluded to in the Cross-claim was irregular, sub-judice and non-compliant with fair administrative process provided in the Constitution by failing to give him a fair hearing. That the purported hearing by the 4th Defendant was stopped vide orders issued by this court on 19th July, 2016 and thus there is no legal basis for the allegation that the suit land was public land. The 1st Defendant accused the 4th Defendant of bias against him during the hearing, and denied the allegation that the suit land came about as a result of statutory requirements.
15. The 1st Defendant averred that the suit land was part of LR No. 11127/1 which was private land purchased by Members of Mosop & Soy Small Holders Sumbeiywo from Flax Limited. He reiterated that he is a bona fide purchaser of the suit land alongside the 2nd Defendant, having paid KShs. 1,5000/- and was allotted plot no. 201. The 1st Defendant reproduced the list of members of Mosop & Soy Small Holders Sumbeiywo LR No. 11127/1. He claimed that the entire mother title was allotted to the members, and no portion thereof was set aside for public utilities. He denied surrendering any portion of his land to establish a school. He reiterated that he has been living on the

land since 1973 and averred that the cross-claim was an attempt to unjustly compulsorily acquire his property without compensating him. He termed the cross claim inter alia unfounded and an abuse of court, and asked that it be dismissed with costs.

Hearing and Evidence:

The Plaintiff's Case;

16. Hearing of the case commenced on 14th February, 2022 with the 4th Plaintiff testifying on oath as PW1 and adopted his witness statement dated 21st March, 2019 as his evidence. He introduced himself as the secretary of Sumbeiywo Farm since 1974. He testified the people currently occupying the suit property were supposed to be on plot no. 49. He testified that upon survey, the suit land was set aside for Sumbeiywo Primary School on advice from the area chief at a meeting held on 20th April, 1993. He produced the area list as PEXb1 and the list of names and plots as PEXb2. PW1 also produced the minutes of the Chief's meeting as PEXb3.
17. PW1 also produced a letter from the Land Registrar to the Officials of Sumbeiywo dated 4th August, 1998 as PEXb4, a surrender document as PEXb5 and a letter of consent as PEXb6. PW1 testified that Sumbeiywo Primary School was set up in 1987 on the suit property and ran for 4 years before it was closed at the instigation of the 1st and 2nd Defendants, and he produced a bundle of documents relating to the said school as PEXb7. PW1 testified that the 1st and 2nd Defendants were residing on the suit land before the survey, after which they were moved to plot nos. 49 and 50 but they refused to leave

the suit land. PW1 produced minutes of the Ainabkoi LCB as PEXb8 and another set of minutes dated 7th January, 2009 as PEXb9.

18. PW1 produced the Caution dated 6th January, 2009 as PEXb10 and testified that he is the one who signed the said caution. PW1 also produced a Certificate of Official Search dated 29th January, 1991 as PEXb11, an order as PEXb12 and Affidavit of Service as PEXb13. PW1 testified that the school had 22 Acres, which are now occupied by the 1st and 2nd Defendants. He explained that 1 share in the farm was equivalent to 10 Acres. He testified that the school buildings were demolished by the 1st and 2nd Defendants.
19. On cross-examination by Mr. Ochieng, PW1 testified that the 2nd Plaintiff died and they did not inform the court. He admitted that he had no document to show he was elected secretary of Sumbeiywo Farm. He testified that the surrender was made by the trustees, and he was not among the trustees who did the surrender. He was referred to the area list in the Plaintiff's bundle and testified that he joined Sumbeiywo Farm in 1974 and there were 61 members. That the members chose the plot numbers through balloting. He confirmed that the 1st and 2nd Defendants were both allocated plot no. 201, but at the time they had not set aside land for the school.
20. PW1 testified that only 44 members attended the Chief's meeting on 20.04.1983 and the chief told them they had to set aside land for public utilities. He admitted that plot no. 201 is what became plot no. 65, however the 1st and 2nd Defendants were moved to plot nos. 49 & 50 to create land for the school and at the meeting, they agreed to move. That the 1st

Defendant never left even after the school was established in 1987. PW1 testified that the school was closed by one Andrew Rotich, a school inspector. PW1 testified that the 1st Defendant sold his land in 1995. He also confirmed that the title deed to the suit land was issued to the 1st and 2nd Defendants on 2/12/1995. He further admitted that he had never seen titles for plot nos. 49 and 50 in the names of the 1st and 2nd Defendants. PW1 also admitted that the minutes of the Ainabkoi Land Control Board were neither signed nor stamped.

21. PW1 was cross-examined by Mr. Odongo and he testified that the land was initially known as LR No. 11127/1 and was purchased by the four trustees of Sumbeiywo Farm from a white settler. He explained that every member was entitled to 2 shares and the land was subdivided in 1983. He stated that the public utilities set aside were a public school at plot no. 65, dip at plot no. 67, water point at plot no. 69 and dam, whose plots were contributed by the members and are still intact. He testified that the suit property is occupied by private individuals, being the 1st and 2nd Defendants herein. He testified that the 3rd Defendant investigated how the suit property was converted from public to private use, but he did not know its decision on the same.
22. Under re-examination, PW1 testified that they had set aside the suit property for Sumbeiywo Primary School. He testified that the 1st Defendant obtained consent to sell plot no. 49. He asserted that per the minutes produced as PEXb3, the 1st and 2nd Defendants attended the chief's baraza of 20th April, 1983 and that at the time they were residing on the suit property. He testified that plot no. 201 allotted to the 1st and 2nd Defendants

does not exist. He testified that the survey was done after the chief's baraza, and that the 1st Defendant did move to plot 49 but he later sold it.

23. Benjamin Kiyao Nyongi testified on oath as PW2 and adopted his witness statement dated 12th July, 2021 as his evidence. He testified that he owns 20 Acres of land at Sumbeiywo Farm known as Plot No. 1 which he bought for KShs. 3,000/-. He testified that he has title to the suit land. PW2 testified that the land set aside for the school was in the middle of the farm. He testified that during the survey, some people were moved from where they had settled, and all owners were given titles. He claimed that the 1st and 2nd Defendant left their plots to their sons who sold them off. He conceded that Sumbeiywo Primary School is not existing. That the 1st and 2nd Defendants' children reside on the school land, and they are the ones who removed school children from the school land.
24. On cross-examination by Mr. Ochieng, PW2 could not tell which parcel of land the 1st Defendant took possession of. He also could not tell the people who were moved from their land during the survey process, but claimed that he was also moved. PW2 did not know who occupied the school land, but that they agreed to move from the land as long as they were given land equivalent to the area they were occupying. PW2 did not know whether plot nos. 49 and 50 were in the original area list. In an interesting twist, PW2 testified that it was the 1st and 2nd Defendants who occupied the suit land and they were moved to plot nos. 49 and 50, for which they obtained titles. PW1 again testified that the 1st and 2nd Defendants used to reside on the land in 1973.

25. PW2 was cross-examined by Mr. Odongo and he testified that the 1st and 2nd Defendants purchased plot nos. 49 and 50 respectively, but he was not aware that these two plots are what became plot no. 201 upon survey. He stated that the members of Sumbeiywo Farm contributed the land allocated to the school. He claimed that the school consisted of class 1 to 3 and had government teachers. He claimed that the 1st and 2nd Defendants did not protest when the school was being put up. He reiterated that the 1st and 2nd Defendants' sons sold the land that they relocated to, but he did not know their names.
26. During re-examination, PW2 testified that the 1st and 2nd Defendants were residing on the school land. That the 1st and 2nd Defendant were at the meeting where it was resolved to set aside land for the school. That they also did not protest the relocation and actually took up the alternative plots, but they sold them and went back to the school land. He did not know who purchased the Defendants' plot.
27. PW3 was Paul Kiplagat Chebiego who testified on oath and adopted his witness statement dated 21st May, 2019 as his evidence-in-chief. He introduced himself as the current Chairman of Sumbeiywo Farm having taken over from the late Kipsaina Komen. He explained that he owns plot no. 33 measuring 20 Acres which he purchased for KShs. 3,000/-. He testified that the 1st and 2nd Defendants have their own land but had refused to move out of the suit property which belongs to the school. He testified that the area chief called a meeting and informed them that survey cannot be complete unless they reserved land for public utilities, which is why they set aside 22 Acres for the School and produced a green card as PEXb14.

28. PW3 was referred to PEXb 11 and testified that it showed the land was reserved for the school. He also testified that the 1st and 2nd Defendants were moved to plot nos. 49 and 50, but their sons moved back to the school land and demolished the school. PW3 claimed that the 1st and 2nd Defendants were charged with trespass and found guilty. He testified that they reported the demolition of the school to the police and the DC but got no assistance. That they then approached the NLC who prepared a report that he produced as PEXb15, and a letter from the Uasin Gishu Land Management Board dated 2nd October, 2015 as PEXb16.
29. PW3 testified that the NLC found that the land belonged to the school. He was referred to the minutes of the Ainabkoi LCB and testified that the 1st Defendant sold his land to one Chumo Cherop. He however noted that the transfer was deferred due to a pending dispute. PW3 claimed that after selling the land, the 1st and 2nd Defendants went back to the school land and have refused to vacate. He also admitted that there was no change of user with respect to the school land. PW3 asked that the school land be restored and the 1st & 2nd Defendants be evicted.
30. PW3 was cross-examined by Mr. Ochieng and he testified that he was shown the suit property by the previous officials, although he could not recall when he took possession of it. PW3 testified that the 1st Defendant and his children have been staying on the suit land since 1972. He testified that the 1st Defendant's land is plot no. 49 and 50, which his family sold to Chumo Cherop, whereas plot no. 65 belongs to Sumbeiywo Primary School. PW3 was referred to the minutes of the LCB

produced as PEXb8 and testified that the land was sold in 1995. He however had no evidence to show that the 1st Defendant owned plot no. 49. PW3 explained the 22 Acres for the school were donated by members of Sumbeiywo and were set aside after survey. PW3 told this court that the titles for plot nos. 49 and 50 came out in the name of Chumo Cherop.

31. On cross-examination by Mr. Odongo, PW3 testified that he was an official of Sumbeiywo right from the beginning. He testified that he could not recall the original numbers of plot nos. 49 and 50 before the survey. PW3 however admitted that the 1st and 2nd Defendants each paid KShs. 1,500/- and were allocated plot no. 201. He testified that the 1st and 2nd Defendants were present at the chief's meeting which resolved the setting aside of land for a school and did not protest. PW3 told this court that upon investigation, it was recommended that the title for the suit property be cancelled and a new one be issued in the name of Sumbeiywo Primary School, which decision has never been overturned. PW3 was referred to PEXb14 and testified that he did not know how the land was transferred from the government to the 1st and 2nd Defendants. He explained that the suit property was subdivided into plot nos. 72 and 73 without their involvement.
32. PW3 was re-examined and he testified that the initial land for Sumbeiywo was LR No. 11127/2 out of which the 1st Defendant bought 10 Acres comprised in plot no. 49. He testified that he has never seen the 1st Defendant's title. PW3 insisted that the 1st Defendant approached the LCB for consent to sell his 10 Acres to Chumo Cherop, and the consent was given in 1995 and both plot 49 and 50 were transferred on 11th January, 1996.

PW3 was referred to the Green Card for the suit property and testified that the Government of Kenya appears at entry no. 1 while the 1st and 2nd Defendants' names appear at entry no. 2. PW3 clarified that the decision of the NLC has not been acted upon. He testified that the suit land was reserved for the school and asked the court to grant the orders sought.

33. Moses Kipkemboi Komen an employee of Teachers Service Commission, Curriculum Support Office and secretary of Sumbeiywo Farm testified on oath as PW4. He testified that he comes from Sumbeiywo Farm and adopted his witness statement dated 24th March, 2019 as his evidence-in-chief. He testified that he was a parent at Sumbeiywo Primary School, and was forced to donate land for the school. PW4 testified that it is the Land Registrar who informed the members of Sumbeiywo that they must provide for public utilities, and they agreed to cede portions of their land to make up the 22 Acres for the school. He testified that some members like Chumo Cherop had fenced off more land than they had purchased.
34. PW4 testified that Sumbeiywo Primary School Primary School was allocated land which was at no. 65. He stated that the 1st and 2nd Defendants are currently in possession of the said land. He referred to minutes of the Chief's meeting of 20th April, 1983 and testified that the members agreed to set aside 22 acres for the school, and that the 1st and 2nd Defendants attended. PW4 said that the school was put up, but then demolished in 1989 by the 1st and 2nd Defendants. He testified that the 1st and 2nd Defendants were shown plot nos. 49 and 50 but obtained consent to sell to Chumo Cherop, and the plots transferred to him on 11th January, 1996.

35. PW4 claimed that plot no. 201 refers to the larger Mosop and Soy Farm land. PW4 testified that plot no. 65 no longer exists as it was subdivided into plot nos. 72 and 73. PW4 produced two maps showing that the suit land was reserved for the school as PEXb17(a) & (b). PW4 confirmed that the suit land is now owned by the 1st and 2nd Defendants, who were at some point charged and found guilty of trespass. PW4 testified that there was no resolution to have the land revert from the school to private individuals. Further, that there is no plot no. 201 as plot numbers end at 69.
36. On cross-examination by Mr. Ochieng, PW4 testified that the original area list was prepared before the land was surrendered and it did not provide for public utilities. PW4 was referred to the green card at page 97 of the Plaintiff's bundle and testified that it does not show that the land was transferred to Chumo Cherop. He claimed that to his knowledge, the 1st Defendant moved into the suit land in 1980 and not 1972.
37. PW4 stated that he did not know if the 1st Defendant's conviction on the charge of trespass was quashed by the High Court. PW4 further testified that the demolition of the school was done by the 1st and 2nd Defendants' families, but was supervised by the District Education Officer. That they complained about his conduct to the EACC, however the Ministry of Education released the land to the owners. PW4 was aware that the 1st Defendant obtained title to the land, but claimed that the Commissioner of Lands acted fraudulently in issuing the said title.
38. When he was cross-examined by Mr. Odongo, PW4 testified that Sumbeiywo farm was among four blocks of land purchased by

the members, all of which were private farms. He testified that plot no. 49 and 50 that were given to the 1st and 2nd Defendants after survey, and that they measured 4.168 Ha which translates to 10.42 Acres. PW4 claimed that the land reserved for the school was public land. PW4 was referred to the letter dated 2nd October, 2015 from the County Land Management Board which recommended cancellation of the 1st and 2nd Defendants' titles. PW4 claimed that the District Education Officer conducted investigations which confirmed that the land belonged to the school.

39. During re-examination, PW4 testified that the map he produced does not show plot no. 65, and further, that the provisional plot numbers do not correspond with those on the list used to process the titles. He admitted that the title to the suit property was issued to the 1st and 2nd Defendants on 2nd December, 1994. He testified that the 1st Defendant ceased to be a member of Sumbeiywo Farm the moment he sold his land to Chumo Cherop. He conceded that the suit property is occupied by the 1st and 2nd Defendants' families.
40. PW4 was referred to page 71 of the Plaintiff's bundle and testified that the NLC recommended that the 1st and 2nd Defendants' titles be revoked and a new one be issued to the school. Further that the list at page 6 of the Plaintiff's bundle was the list that was used to generate titles. PW4 clarified that the persons convicted of trespass were Ben Kimeli Aiyabei and Simon Kiprotich Katam. At the end of this testimony, the Plaintiffs closed their case.

The 1st Defendants' Case;

41. The 1st Defendant testified on oath as DW1 and adopted his witness statement dated 6th December, 2019 as his evidence-in-chief. DW1 produced the documents in his list of documents as DEXb 1-44 respectively. DW1 testified that he joined Sumbeiywo Farm in 1966. That they were required to pay for their shares through Standard Chartered Bank. He testified that he paid KShs. 1,500/- and thereafter, they balloted and he and his brother got plot no. 201. That the plot was shown to them by the then officials in the company of a surveyor. DW1 testified that once he was shown the land, he sunk a borehole and fenced the land and has been staying there to date. He could not recall whether they set aside land for a school at the time.
42. DW1 testified that he owns no other land at Sumbeywo Farm and he denied being moved to plot no. 50. He also denied attending any meeting in 1983. DW1 admitted that he and his son were once arrested for trespass, and that his son was convicted of the crime. DW1 testified that at one point, the management of the farm wanted to move him but he refused. He could not recall when he obtained title to the land. DW1 denied selling any land to Chumo Cherop. He explained that this suit had previously been heard and judgment pronounced in his favour, that he was the owner of the land. DW1 further testified that he has not been compensated for the land set aside for the school.
43. DW1 was cross-examined by Mr. Ogongo and he testified that he and the 2nd Defendant both purchased 1 share and were allocated plot no. 201 measuring 20 Acres, which they later subdivided and each got 10 Acres. DW1 testified that he had been given plot no. 65 according to the title he was given. DW1

testified that he had no other land which he could have sold to Chumo Cherop. He said that when Sumbeiywo farm was purchased, there was already a school known as Flax which had existed even before the white settler left. He further stated that there is Chesogol Primary School within Sumbeiywo Farm. DW1 testified that the 2nd and 3rd Plaintiffs were officials of Sumbeiywo farm, while the 1st Plaintiff came in recently.

44. DW1 reiterated that he never attended the meeting of 20th April, 1983 or any meeting where the issue of processing of titles was discussed. DW1 could not recall when the school was put up. He explained that he stayed in one portion of Plot. 201 while the school was built on another portion of the land. He added that the school was put up by the officials of the farm. DW1 was referred to the report of the District Officer, Uasin Gishu and testified that it made a finding that the land belonged to the school. He testified that members of Sumbeiywo farm contributed portions of their land for construction of Sumbeirwo farm. DW1 was referred to PEXb17(a) and he testified that the name of Sumbeiywo Primary School was indicated on the map. He also testified that Plot no. 65 measures 9.75 Ha which translates to 24 Acres.

45. On cross-examination by Mr. Odongo, DW1 testified that Sumbeiywo farm was private land owned by a white settler. That he was shown the land by a surveyor before he settled on it. He testified that Chumo Cherop was also a member of Sumbeiywo Farm, who purchased 30 Acres and was allocated plot no. 188. He testified that he was not aware that plot no. 201 became plot nos. 49 and 50. He once again denied attending the meeting of 20th April, 1983 and stated that he was

unaware his name appeared in the minutes as no. 33, but that he had not reported this to the police. He denied the allegation that they set aside land for the school at the said meeting. He testified that only the members had authority to change land ownership.

46. DW1 testified that he did not know the DO called Mr. Abdullah or the fact that he is the one who removed his and the 2nd Defendant's name and entered the name of Chumo Cherop. DW1 acknowledged that Chumo Cherop was given 50 Acres instead of the 30 Acres he had purchased, but denied selling him any land. DW1 testified that the school was built while he and his son were in custody. He admitted that he had written a letter of complaint to the Permanent Secretary. DW1 testified that he was aware that the District Education Office had conducted investigations on the land, but denied knowledge that it found the land belonged to the school.
47. DW1 also conceded that the school was closed due to his land ownership dispute with its management. He stated that he was taken before the NLC, and that they were summoned by the NLC to Nairobi, but they did not testify as the matter was pending in court. He also testified that the County Land Management Board recommended that his title be cancelled, and that he and the 2nd Defendant should vacate the land. He confirmed that the decision of the board has not been overturned and is still intact. DW1 conceded that he had not brought Chumo Cherop to court to clarify that he did not purchase land from him and the 2nd Defendant.
48. On re-examination, DW1 testified that he was not given any other land elsewhere in Sumbeiywo farm. He reiterated that he

entered the suit land in 1972 when they did the balloting. That he and the 2nd Defendant have no interest in plot nos. 49 and 50. He could not tell if there was balloting done for the school. He testified that he pursued processing of his title without any assistance from the officials. He stated that he never obtained title for plot no. 49.

49. DW2 was George Kimilei Rotich, who adopted his witness statement dated 6th December, 2019 as part of his evidence-in-chief. He testified that he was the secretary of Mosop and Soy Smallholders under the then chairman, Kiprono Kimutai. That as secretary, his role was to record the names of the members. DW2 testified that the 1st Defendant paid KShs. 1,500/- which was worth 1 share and entitled him to 10 Acres. That thereafter, they balloted and each shareholder got their portion according to the ballot picked. He explained that the land was surveyed in 1972 by one Mr. Wilson Tanui, after which each member was shown their parcel. He further explained that his role ended after they showed each member their land.
50. DW2 confirmed that he was present when the 1st Defendant was shown plot No. 201. He testified that the 1st Defendant's children are the ones using the portion which was showed to their father. DW2 testified that the 1st Defendant was never moved from parcel no. 201 to another parcel. He testified that there was no provision for a school, and that he had never heard that the 1st Defendant sold his land to someone else. He concluded by stating that no one moved from the allocated land.
51. DW2 was cross-examined by Mr. Ogongo and he testified that his duty was to record the amounts paid by the members. He

explained that he paid for 1 share and got 10 Acres at Tachasis Block comprised in plot 244 thereof. He testified that he was not related to the 1st Defendant and may not know that he sold his land. He was also not aware that the 1st Defendant's land was plot no. 49. He was referred to PEXb17 and confirmed that plot no. 201 was not shown therein. DW2 testified that he was not aware that the 1st and 2nd Defendants grabbed school property. DW2 did not know of any meetings held over the school land.

52. DW2 was then cross-examined by Mr. Odongo and he testified that the survey was done by Wilson Tanui, but he was not a registered surveyor and his work was reversed. He was referred to page 6 of the Plaintiffs' bundle and testified that this was the list used to prepare titles, and plot nos. 64-69 were set aside for public purposes. He stated that it is not possible for a person to be given public land.
53. On re-examination, DW2 testified that there was no provision for a nursery school, primary school or a watering point in the original area list. He was again referred to page 6 of the Plaintiffs' bundle and testified that the name of the person who prepared that area list was not indicated. He reiterated that he was not aware that the 1st Defendant had been moved from the portion he was occupying.

The 3rd Defendant's Case;

54. The court marked the 3rd Defendant's case as closed on 7th October, 2025. Equally, its counterclaim was dismissed for non-attendance.

The 4th Defendant's Case;

55. The 4th Defendant closed its case on 7th October, 2025 without having called any witnesses to testify on its behalf.

Submissions:

56. At the close of the 3rd and 4th Defendants' cases, the court directed the parties to file their final written submissions on the matter. The Plaintiffs complied and filed their submissions dated 10th December, 2025. The 1st Defendant's submissions are also dated 10th December, 2025. The 4th Defendant also complied and filed submissions dated 3rd January, 2026.

Analysis and Determination:

57. I have considered the pleadings filed in this suit, the witness testimonies adduced and evidence produced herein, as well as the submissions of the parties and cited authorities, and find that the issues to be determined are:-

- i. Whether the Plaintiffs have locus standi to bring the instant suit in their capacity*
- ii. Whether the 1st and 2nd Defendants acquired registration to the suit property fraudulently*
- iii. Whether the suit property was properly acquired by the Government of Kenya for establishment of Sumbeiywo Primary School*
- iv. Whether there exists a school known as Sumbeiywo primary School?*
- v. Who shall bear the costs of this suit?*

(a) Whether the Plaintiffs have locus standi to bring the instant suit in their capacity

58. The Plaintiffs described themselves as the Chairman, Treasurer and Secretary respectively of the Committee/Management of Sumbeiywo Farm, which appears to have been a land buying society. Section 10 of the Societies Act, CAP 195 LOK provides as follows with regards to the registration of societies:-

10. Manner of effecting registration or exemption from registration

(1) Upon application being made in the prescribed manner for registration of a society, the Registrar shall, subject to this Act, register the society by entering in the register of societies, kept for the purpose, the prescribed particulars and the date of the entry.

(2) Upon application being made in the prescribed manner for exemption of a society from registration, the Registrar may, with the approval of the Cabinet Secretary, so exempt the society, and if he does not so exempt the society he shall treat the application as an application for registration and shall, subject to the provisions of this Act, register the society.

(3) Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.

59. That aside, once registered, a society is required to file annual returns with Registrar of Societies in compliance with Section 30 thereof, which provides that:-

30. Annual returns

(1) Every registered society shall furnish annually to the Registrar, on or before the prescribed date, such returns, accounts and other documents as may be prescribed.

(2) If any return, account or other document furnished under subsection (1) of this section is incomplete in any material particular, it shall be taken not to have been furnished for the purposes of subsection (1) of this section.

(3) Any registered society which contravenes subsection (1) of this section shall be guilty of an offence...

60. However, in this case, I see no certificate of registration of the said entity presented before this court. If at all it was duly registered at the time of formation, I also see no annual returns filed on its behalf. There is no evidence that the entity known as Sumbeiywo Farm was ever registered, or if it was, that it is still in existence, which means that the Plaintiff herein are purporting to represent a non-existent entity.

61. In addition, there is nothing to show that the entity known as Sumbeiywo Farm is a body corporate of any manner or form recognised in this jurisdiction, that is capable of suing or being sued in its name. That being the case, the Plaintiffs should have either sued in their individual capacities if they were personally aggrieved, or all members of the group ought to have been enjoined as Plaintiffs. In the alternative, the Plaintiffs should have filed a representative suit under Order 1 Rule 8 of the Civil Procedure Rules. The Plaintiffs therefore cannot claim to have

authority to act for an entity that does not exist in law, and consequently have no locus standi to represent it.

62. Further, although the plaintiffs described themselves as chairman, Treasurer and Secretary of the Committee/Management of Sumbeiywo Farm then known as L.R. No. 11127/1, they did not produce minutes to show that they were such officials and had been mandated by the entire farm community to file this suit on their behalf. There is also nothing on record that was produced to confirm that they still had the mandate to represent the said farm, considering that the land had been shared out to members and titles issued in their names as shareholders upon surrender of the original title.
63. However, seeing as the Plaintiffs claim to be advancing the claim on behalf of the public with regard to the school known as Sumbeiywo Primary School, I think it is in the interest of justice that the matters raised herein be determined on merit.

(b) Whether the 1st and 2nd Defendants acquired registration to the suit property fraudulently

64. It is the Plaintiffs' case that the 1st and 2nd Defendants acquired registration as owners of the suit land fraudulently. The Plaintiffs claim that it is not clear how the land moved from being registered in the name of the Government to private individuals. It is for this reason that they seek a declaration that the transfer in favour of the 1st and 2nd Defendants is null and void and the land reverts back to Sumbeiywo Primary School.
65. However, the suit land having been registered in the 1st and 2nd Defendants names made them the registered owners under the Registered Land Act now repealed and governed by the Land Act, 2012 and the Land Registration Act, 2012. Indeed, the law

is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

66. It is clear that the law is extremely protective of title and provides only two instances for the challenge of the same. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The effect of Section 26 (1)(b) is that the title of an innocent person is impeachable

so long as that title was obtained illegally, un-procedurally or through a corrupt scheme, whether or not the title holder contributed to the vitiating factors.

67. It is on the basis of this provision that where a title has been challenged on any of the aforementioned grounds, then the court must undertake an investigation into the root of the title, to determine that it was acquired legally and procedurally, before it can be upheld and protected under Article 40 of the Constitution of Kenya, 2010. This was very aptly explained by the Court of Appeal in **Maina vs Maina (Civil Appeal 239 of 2009) (2013) KECA 94 (KLR)**, where it was held that:-

“17. ... We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

68. In this instance case, the Plaintiffs claim that the 1st and 2nd Defendants were allocated the suit property initially, but upon the resolution to set aside land for public utilities, they were settled elsewhere and have no interest in the suit land. However, the 1st Defendant has alleged that no such alternative land was given to him or his brother the 2nd Defendant. He has vehemently denied any fraud in the acquisition of their title. He testified that he lives on the land that was originally allotted to

him during the balloting process, and that was shown to him upon survey, and which was Plot No. 201.

69. It appears that after balloting, an area list was prepared showing the names of the members, the shares they purchased and the plot that had been allocated to them. On that original area list, the 1st and 2nd Defendants were allocated plot no. 201. I note from the testimony tendered, that PW1 admitted that plot no. 201 allocated to the 1st and 2nd Defendants is what became plot no. 65. From the evidence presented before this court, this is not the area list that was used to generate the titles for the members. This court was told repeatedly that the area list at page 6 of the Plaintiffs' bundle of documents is what was used to generate the titles. PW4 testified during re-examination that the area list at page 6 and the one at page 11 correspond. Indeed, both area list show that plot no. 65 was for a Primary School.
70. There is no dispute that the suit land emanates from Sumbeiywo LR No. 11127/1, which was clearly private land having initially been owned by a white settler as claimed. The entity known as Mosop & Soy Smallholders purchased the land as private land with the intention of subdividing the same to its members. The allegation that the land could not have been registered to the 1st and 2nd defendants since it had been surrendered to the Government is therefore untrue. At page 1 of the Plaintiffs' Bundle is a Surrender duly signed by the Trustees of Sumbeiywo Farm. The said document is clear that the title was being surrendered in consideration of the approval of a subdivision scheme in respect thereof.

71. I have also seen the minutes of the meeting held on 20th April, 1983. I note that the members agreed that there was a remainder of 22 Acres which they agreed would be for a school. There was no resolution therein that the members would contribute portions of their land to create 22 Acres for a school as alleged. In any event, I see no evidence that any other member's land was reduced to contribute land for the school. The Plaintiffs cannot thus claim that members contributed land for the school, when in effect, only the 1st and 2nd Defendants were expected to relinquish their land for establishment of the school.
72. It is evident that as early as 1983, the 1st Defendant had already erected a house on the suit property as evidenced by the letter from the chief dated 23rd September, 1983 requiring him to demolish his said house on the land. I have no doubt in my mind therefore, that the 1st and 2nd Defendants were the original owners of the suit property, having been allocated the same as members of Sumbeiywo Farm before it was allegedly set aside for the purpose of establishing a school.
73. The Plaintiffs claim that the 1st and 2nd Defendants were allotted the alternative portions being plot nos. 49 & 50 in the same Sumbeiywo farm. It is also alleged, that they sold the land to one Chumo Cherop. There has been no evidence produced to show that they indeed sold land to the said Chumo Cherop by way of a sale agreement or transfer forms with respect to the said land. Furthermore, I have seen no evidence that plot nos. 49 and 50 indeed belonged to the Defendants. No titles or even a search was presented before this court to show that the two plots ever belonged to the 1st and 2nd Defendants. From the

green cards of Plot nos. 49 and 50 produced before this court, the first entry therein is the said Chumo Cherop. There is no indication from the two registers that the land was transferred to him by the 1st and 2nd Defendants herein.

74. Sections 107, 108 and 109 of the Evidence Act provides as follows:-

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

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

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

75. It is an important tenet of the law that he who alleges must prove. The Plaintiffs wanted this court to believe that the 1st and 2nd Defendants were given alternative land, but they refused to occupy that land, and instead, sold it. The Plaintiffs therefore had the duty to call Chumo Cherop to come and testify before this court that he indeed purchased land from the 1st and 2nd

Defendants, and provide proof of this alleged purchase, but they did not do so.

76. The 1st and 2nd Defendants on the other hand, included at page 47 of their List of Documents an Affidavit sworn by Kobilo Chumo, wife of Chumo Cherop (Deceased). She deponed at paragraph 2 thereof that her late husband and his brother Tuitoek Cherop had jointly acquired 50 Acres of the Sumbeiywo Farm LR No. 11127/1. At paragraph 11 thereof she deponed that as far as she is concerned, they did not buy land from the 1st and 2nd Defendants at all, but that they bought from Flax Limited through Mosop & Soy Small Holders. In fact, at page 53 of the Defendant's list of documents is a demand letter from Chumo Cherop to the 1st and 2nd Defendants dated 8th March, 1995 claiming that plot no. 49 and 50 had erroneously been allocated to them, and asking them to surrender the titles to the same to him.
77. In the original area list, Chumo Cherop and Tuitoek Cherop are members of Sumbeiywo Farm and bought a total of 50 Acres between them. Moreover, from the area lists produced, Chumo Cherop had purchased 3 shares and paid KShs. 4,500/- for them. He was therefore at the very least entitled to approximately 30 Acres of the land known as LR No. 11127/1.
78. The Plaintiffs' witnesses indeed testified that some members who had more than 2 shares bought the extra shares from other members. However, the fact that Chumo Cherop has more than the shares he purchased directly from the Sumbeiywo Farm/Mosop & Soy Small Holders, is not proof enough that he must have purchased the parcels known as Plot nos. 49 & 50 allegedly allocated to the 1st and 2nd Defendants

herein. It is entirely possible that he may have purchased his additional land from any other member of the group, and not necessarily the 1st Defendant and his brother.

79. I note also that there is another list running from pages 45-48 of the Plaintiff's bundle. At page 46 of this same list, the names of the 1st and 2nd Defendants were cancelled and replaced with the name of Chumo Cherop. This cancellation was done by the District Officer, but none of the witnesses could give the reason for the cancellation of the 1st and 2nd Defendants' names as against plot nos. 49 and 50. On the same list, the name of Sumbeiywo Primary School was cancelled at plot no. 65 and the 1st and 2nd Defendants' names were entered in its place. Again, no reason has been given for this change in favour of the 1st and 2nd Defendants. However, there is no proof that the said cancellations were done fraudulently or at the instigation of the 1st and 2nd Defendants.
80. To further prove the allegations of fraud, a lot of strength was placed on a Certificate of Official Search over the suit property dated 29th January, 1991 produced at page 49 of the Plaintiffs' List of Documents. The search indicates that the proprietor of the suit property was the Government of Kenya and that the same was reserved for Sumbeiywo Primary School. The Plaintiffs claim that the Commissioner of Lands thus acted fraudulently in transferring the land from the government to the 1st Defendant and his brother.
81. Since the land was initially registered in favour of the Government of Kenya and reserved for the school, once the school was closed and the buildings demolished, the Chief Land Registrar contacted the relevant ministry to give the way

forward as regards ownership of the land. The Ministry of Education registered that it had no objection to the land being released back to the previous owners, who in this case was the 1st and 2nd Defendants.

82. In this regard, there is a letter by the Ministry of Education dated 10th November, 1994 addressed to the Chief Land Registrar in response to another letter of 6th March, 1992. In this letter, the Ministry of Education informed the Chief Land Registrar that it had no objection to the land known as Plateau/Chepkongony Block 2(Sumbeiywo)/65 formerly used by Sumbeiywo Primary School being released back to the owners since the school had been closed.
83. The Chief Land Registrar then wrote to the District Land Registrar, Eldoret informing him of the letter of 10th November, 1994 above and directing him to issue title for the suit property to those entitled to it. The County Council of Wareng also wrote to the District Land Registrar stating that it had no objection to the registration of the suit land in the names of the 1st and 2nd Defendants instead of Sumbeiywo Primary School.
84. The Plaintiffs have ignored the fact that before the land was registered in the names of the 1st and 2nd Defendants, the Chief Land Registrar involved the Permanent Secretary, Ministry of Education and the Municipal Council of Wareng. It is only after getting the go ahead from the Ministry of Education and the Council that the land was registered in the names of the 1st and 2nd Defendants.
85. I am of the opinion that these letters offer sufficient explanation with regards to how the land moved from the Government of Kenya to the 1st and 2nd Defendants. The allegation that the 1st

and 2nd Defendants acquired registration as proprietors of the suit land fraudulently was therefore not proved. Being the duly and legally registered owners of the land, the 1st and 2nd Defendants had every right to have it subdivided as they did into plot nos. 72 and 73 so that each one of them could own their respective share of the land.

86. Consequently, the Plaintiffs prayer to this court to declare that the suit property was fraudulently transferred to plot numbers Plateau/Chepkongony Block 2(Sumbeiywo)/72 and 73 thus null and void fails.

(c) Whether the suit property was properly acquired by the Government of Kenya for establishment of Sumbeiywo Primary School;

87. As already found above, the 1st and 2nd Defendant were the first allottees of the suit land after the same was purchased from the white settler and subdivided to the members of Mosop & Soy Smallholders. It was private land purchased by the groups purely for the purpose of subdivision and distribution to its members.

88. Being private land, and having been allocated to the 1st and 2nd Defendants herein, the only way it could be converted for public use was through compulsory acquisition. This being prior to the 2010 Constitution and the Land Act, the applicable law that guided the process of compulsory acquisition of private land for public benefit at the time was the Land Acquisition Act (repealed), which came into effect on 23rd August, 1968.

89. Section 8 of the Land Acquisition Act (repealed) provided that where land was compulsorily acquired under the Act, full compensation was to be paid promptly to all persons interested

in the land. However, under Section 9, 10 and 11 of the repealed Act, the first step in land acquisition was the Commissioner for Lands to express his intention through a gazette notice to compulsorily acquire the property in question.

90. The Commissioner was also required to publish in the Gazette a Notice of Inquiry which was to be served on every person who appeared to him to be interested in the land. This inquiry was intended to determine the persons with a bona fide claim to the land and determine the value of the land, as well as the compensation payable to the interested parties. The Commissioner was then required to prepare a written award, and serve the interested parties with the same. After this preliminary stage, Section 17 of the aforesaid Act, the Commissioner was required to conduct a final survey to ascertain the exact particulars of the acquired land.
91. First and foremost, it is not clear which Government Agency the suit property was being acquired for since no gazette Notice was published expressing the intention to acquire the land. Secondly, even though the Plaintiffs claim that the land was set aside for the school known as Sumbeiywo Primary School, the District Education Office, Uasin Gishu District was not even aware there was a school known by the said name existed until the 1st and 2nd Defendant lodged a complaint regarding the loss of their land with the then Permanent Secretary, Ministry of Education.
92. It is clear that the provisions of the Land Acquisition Act (repealed) with request to compulsory acquisition were not complied with. To be specific, no Gazette Notice stating the intention to acquire the 1st and 2nd Defendants' land was

published, no inquiry was conducted as required under Section 9 of the Land Acquisition Act (repealed) as to the compensation payable. But most importantly, there is no evidence that compensation was given to the owners of the land as required under Sections 8 and 13 of the Land Acquisition Act (repealed).

93. In **Mutuma Angaine -vs- M'marete M'muronga (2011) KECA 411 (KLR)**, the Court of Appeal, while dealing with the issue of compliance with procedure during compulsory acquisition of private land, held that:-

“It is clear from the above Act, that the Government has the power to acquire land by compulsion for a public purpose or benefit. However, it is trite law that when a person’s property is forcefully acquired the Government must fully comply with the law, and follow the laid down procedure strictly and meticulously. No person’s property may be acquired compulsorily without due process. Section 6(2) of the Act aforesaid requires that certain critical steps be taken before a person is deprived of his or her property. That section requires that a notice of intention to acquire the land shall be published in the Gazette, and be served upon every person who appears to be interested in that land. This was not done, despite its mandatory requirement. There was no notice published in the Gazette in respect of plot 1836, and certainly no notice was served on the respondent. The provisions of the section 6 (2) envisage personal service on persons with an interest in the land intended to be compulsorily acquired... We can only go by the record,

and the record showed that no gazette notice was published with regard to plot 1836, which is the disputed plot...

The learned judge was also correct in concluding that the title to the suit land continued to remain in the respondent's name, and that he continued to remain in possession as the Government had not complied with section 19(3) of the Act."

94. Owing to the foregoing, the only finding that this court can make is that there was no valid acquisition of the suit property in 1983 when it was resolved that provisions had to be made for public utilities. As a result, the Plaintiffs cannot now claim that the 1st and 2nd Defendants and/or their families had encroached on the suit property.

(d) Whether there exists a school known as Sumbeiywo primary School?

95. The Plaintiffs have asked that this court revoke the 1st and 2nd Defendants' title and a new one be issued in the name of Sumbeiywo Primary School. It is therefore necessary that this court determines whether there exists a school known as Sumbeiywo Primary School in whose favour the suit property can revert to.

96. The parties herein agree that the 1st and 2nd Defendants were members of the entity that was known as Mosop & Soy Small Holders alongside the Plaintiffs. This entity purchased four blocks of land, one of them being land known as Sumbeiywo Farm LR No. 11127/1. There is no dispute that the 1st and 2nd Defendants paid KShs. 1,500/- each for purchased one share in

Sumbeiywo Farm. The members balloted and 1st & 2nd Defendant were allocated plot no. 201.

97. As is evident from the original area list, there was no provision made for public utilities such as schools, a cattle dip, dam etc. The Plaintiffs claim that they were advised by the then Area Chief of Plateau Location that for subdivision to be complete, they had to make provision for public utilities. The Plaintiffs purport that at a Chief's Baraza held on 20th April, 1983 all the members agreed to donate their land to make provision for public utilities. According to the Plaintiffs, the land that was earmarked for the school is what came to be registered as plot no. 65 (the suit property) in the name of the 1st and 2nd Defendants.
98. The dispute between the school and the 1st and 2nd Defendants herein started way back in the 1980s. From the Letter dated 8th August, 1988 produced by the Defendants at page 18 of their bundle, the Permanent Secretary, Ministry of Education wrote to the District Education Officer. He indicated that they had received a complaint from the owners of the land where the school stood asking them to close the school and threatening court action. The Provincial Education Officer also wrote to the District Education Officer vide letter dated 9th August, 1988 stating that he had received a similar complaint from the 1st and 2nd Defendants that the school had been illegally constructed on their land. He asked the District Education Officer to investigate and report on the issue.
99. The District Education Officer submitted a report dated 25th August 1988. He made the findings that Sumbeiywo Primary School was not discussed by the District Education Board (DEB).

He stated that they were still trying to get in touch with the area chief to establish by which authority the school was started. He however stated that he met the Head teacher and Chairman of Sumbeiywo, who confirmed to him that the land was set aside for the school and he verified from the survey map. He made the finding that the land belonged to the school.

100. In response, the Permanent Secretary, wrote back to the District Education Officer vide letter dated 7th September, 1988 noting that it was unusual for a school to be started without the knowledge of the DEB and government teachers to be posted to that school. The Permanent Secretary referred the matter to the DEB for its recommendations. Following lengthy deliberations and correspondence, the Ministry of Education recommended that the school would be closed in 1989 due to the prevailing land dispute, and also owing to the fact that the school did not have enough facilities.

101. Vide letter dated 20th April, 2023 and duly filed in court, the National Land Commission wrote to the parties herein indicating its intention of withdrawal. The National Land Commission cited a letter dated 17th July, 2017 from the Ministry of Education which stated that the land should be given back to its original owners. The National Land Commission further confirmed that from both the original and new area list, the 1st Defendant was allotted the suit land. The NLC also filed a Notice of Withdrawal of its suit against the Defendants as well as withdrawal of its Cross-claim dated 18th July, 2019 and stated that it no longer wished to participate in the proceedings.

102. This court has seen the referenced letter dated 17th July, 2017 from the Ministry of Education to the Attorney General. In the

said letter, it is indicated that there is no school on the ground after the school was closed in the year 1989 due to unavailability of land. The letter indeed notes that the dispute had long been adjudicated by officers from the Ministry of Education and other Government Agencies, thus the said Ministry did not wish to proceed with this matter.

103. The 1st Defendant also produced a letter dated 19th May 1989 by the then District Education Officer one P.K. Mandago addressed to the 1st Defendant titled "CLOSURE OF SUMBEIYWO PRIMARY SCHOOL". This letter documents that due to unavailability of land for the school, it had to be closed down and asked the 1st Defendant not to proceed with the case.

104. Moreover, aside from the closure of the school, the parties are in agreement that the structures for the school were demolished by the 1st and 2nd Defendants' families. In fact, PW4 testified that the demolition of the school was supervised by the District Education Officer, and that the Ministry of Education released the land to the owners. It is and remains an undisputed fact, the school previously known as Sumbeiywo primary School was closed with finality in the year 1989.

105. In addition, the Ministry of Education again wrote to the High Court on 24th March, 1998 when this matter was still pending therein as HCCC No. 48 of 1998. The Ministry informed the Court that Sumbeiywo Primary School was closed in 1989 due to unavailability of land. In the letter, the Ministry advised that if the community wished to revive the school, then it had to look for a title deed of minimum 5 Acres in the name of the school, and then apply to the District Education Board for opening it once it has put up the required structures.

106. The conditions for re-establishment of the school were again set out in the letter dated 13th March, 1989 from the Permanent Secretary, Ministry of Education to the District Commissioner, Uasin Gishu District. Key among them was the re-application to follow the DEB and DDC procedures prior to re-establishment of the closed school. The parents were also asked to put up better classrooms, and give alternative and acceptable land to the present owner of the school land.
107. Nothing was placed before this court to indicate that these conditions have been fulfilled. Therefore, for all intents and purposes, there is no school in existence going by the name of Sumbeiywo Primary School for which this court can give the suit property herein to be held on its behalf by the Ministry of Education, or any other Ministry for that matter.
108. There is no school currently registered under the Ministry of Education going by the name of Sumbeiywo Primary School. Since the school does not exist, then the Plaintiff's prayer asking this court to find Sumbeiywo Primary School as the rightful owner of the suit property and have the suit land revert to the school must also fail.

(e) Whether the Plaintiffs are entitled to the prayers sought in the Plaint;

109. Prayer (1) and (2) of the Plaint have been conclusively dealt with in the ensuing deliberations, where the court has found that the transfer to the 1st Defendant and his brother was not fraudulent. The court has also found that there is no school in existence known as Sumbeiywo Primary School to whom the land can revert back.

110. Aside from the declaration of fraud, the Plaintiff sought a Permanent injunction against the 1st and 2nd Defendants restraining them by themselves, agents and/or servants from occupying, alienating, selling, or in any way dealing with the suit land. On the grant of a permanent order of injunction, in the case of **Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR**, the High Court sitting on appeal held that:-

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.”

111. For the court to issue a permanent injunction, the rights between the parties must have been settled, and it must be shown that the Defendant has no claim to the suit property. Based on the findings herein above, I do not think that the Plaintiffs have succeeded in satisfying the conditions for granting a permanent injunction and the said prayer must thus fail.

112. The Plaintiffs also sought special damages in the sum of KShs. 233,400/- in respect of the demolished class rooms. In this regard, I will be guided by the decision made in the case of

Swalleh C. Kariuki & another vs Viloet Owiso Okuyu (2021) eKLR, where the court stated as follows:-

“In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

‘Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves’.

113. It follows therefore that the Plaintiffs were required to not only plead the special damages, but also prove the said damages specifically. Looking at the pleadings and evidence produced by the Plaintiffs, I see no basis for an award in the amount of special damages claimed. The Plaintiffs did not provide any receipts for the materials used in putting up the classrooms or anything else to show that they are entitled to the award. In any event, the school was brought down on order of the Ministry of education and the land given back to the 1st Defendant and his brother. They had every right to bring any offending structure thereon down.

114. In addition, the Plaintiffs sought an award in the manner of general damages and mesne profits. Once more, the Plaintiffs have failed to prove any entitlement to the suit property as to entitle them to a claim for general damages and/or mesne profits. Thus, the said award cannot issue.

(f) Who shall bear the costs of this suit?

115. On the issue of who shall bear the costs of this suit, Section 27 of the Civil Procedure Act provides for discretion as follows: -

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

116. The general rule on costs therefore is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act cited above. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.
117. This suit was commenced by the Plaintiffs herein way back in 1998. It went all the way to the Court of Appeal, and was referred back to this court to be heard afresh. Despite having been in court for almost 28 years now, the Plaintiffs have failed in proving their case as set out in the Further Amended Plaint.
118. Conversely, this means that the 1st Defendant has in fact successfully defended his rights and interests in the suit property. The 1st Defendant is therefore the successful party in this suit and is entitled to the costs. There being no valid and/or justifiable reason to deny the 1st Defendant his just entitlements, this court will exercise its jurisdiction and award him the costs of the suit.

Orders:-

119. In the end, the Plaintiffs failed to prove their case to the required standard. Consequently, I make the following orders:
- (a) The Plaintiffs' suit is dismissed.
 - (b) The 1st Defendant shall have the costs of this suit.
120. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **5TH** day of **FEBRUARY, 2026** vide Microsoft Teams.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of;

Mr. Ochieng for 1st Defendant

No appearance for Plaintiffs

No appearance for the 2nd -4th Defendants.

Court Assistant - Laban.

ORIGINAL