IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E070 OF 2023

BETWEEN

THE CATHOLIC DIOCESE

OF MOMBASA REGISTERED TRUSTEES.....APPELLANT

AND

AGAPITO PEREIRA, FATMA LOB, IGNATIUS PEREIRA *(suing as the*

registered trustees of

GOAN COMMUNITY, MOMBASA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(An Appeal against the Judgment/Order of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on the 2nd day of February 2022

in

ELC Suit No. 448 of 2002)

****

JUDGMENT OF THE COURT

The Respondents, ***Agapito Pereira, Fatma Lobo and Ignatius Pereira, suing as the registered trustees of the***

Goan Community, Mombasa, filed the suit against The Catholic Diocese of Mombasa Registered Trustees, the Appellant, seeking

vacant possession of the property known as Mombasa/Block XX/31, *(the subject property)* together with damages, costs, and other reliefs. The Respondents stated that they were the lawful trustees and beneficial owners of the subject property, which comprised land and buildings upon which a school had been constructed and operated.

By an agreement dated 1st January 1991, the Goan Community, Mombasa, handed over the subject property to The Catholic Diocese of Mombasa Registered Trustees for purposes of management and sponsorship of a primary and secondary school, known as the Sacred Heart School *(the School premises).* Under the terms of the agreement, the 1st Respondents retained permanent and exclusive use of the kindergarten classrooms and other specified portions of the subject property while the Appellant assumed responsibility for the management, maintenance, repair, insurance and general upkeep of the school premises during the subsistence of the agreement; that the agreement imposed both express and implied obligations upon the Appellant, including the duty to keep the property in good repair, to carry out regular maintenance, to repaint and

redecorate the premises as required, to insure the subject property against risks such as fire and earthquake, and to take reasonable care of the 1st Respondents' property. They further stated that the Appellant was under an

obligation to return the School premises in good condition upon termination of the agreement.

It was their case that the Appellant breached the terms of the agreement by failing to properly maintain and repair the School premises, by allowing the subject property to deteriorate significantly, and by failing to insure the School premises against foreseeable risks. As a consequence of these breaches, the subject property suffered extensive deterioration, resulting in substantial loss and damage.

As a consequence, by a letter dated 27th September 2002, the 1st Respondent lawfully terminated the agreement and required the Appellant to hand over vacant possession of the school premises by the end of November 2002. Despite the termination of the agreement, the Appellant allegedly failed, refused and neglected to vacate the premises, or to hand over possession, thereby necessitating the institution of the suit.

In the suit they claimed to have suffered loss and damage on account of moneys that would be required to be expended to restore the subject property to its original condition, and that the deterioration had substantially diminished the value of the subject

property; that the approximate value of the subject property was KShs. 200,000,000; and that they were exposed to the risk of

further loss arising from the Appellant's failure to properly maintain and insure the premises.

In the Further Amended Plaint dated 15th April 2019, the 1st Respondent sought judgment against the Appellant for vacant possession of the subject property, damages for breach of contract and loss arising from deterioration, costs of the suit, and such other or further relief as the court might deem fit to grant.

In response, the Appellant filed a Defence denying the claim in its entirety and put them to strict proof of the allegations contained in the Amended Plaint. The Appellant admitted the existence of the agreement dated 1st January 1991, but denied that it remained solely responsible for the management, control or condition of the subject property throughout the period; that, pursuant to Government policy and the applicable education laws, the management and running of the school had been taken over by the Government of Kenya through the Ministry of Education, thereby divesting the Appellant of effective control and management of the school.

The Appellant stated that, following the Government takeover, the management, supervision, staffing and operational

control of the school were vested in the Ministry of Education and its agents. Consequently, the Appellant denied liability for any deterioration, disrepair or loss allegedly suffered by the

subject property during the period when the school was under Government control. The Appellant further denied breaching any express or implied terms of the agreement and contended that it exercised reasonable care in the management of the premises during the period it was in control. The Appellant pleaded that deterioration of the subject property, if any, was not attributable to its acts or omissions.

With regard to the claim for damages, the Appellant stated that the Respondents failed to specifically plead or strictly prove the alleged loss and damage as required by law, and denied that the 1st Respondents were entitled to the sums claimed or to any damages whatsoever. The Appellant further denied refusing or failing to hand over vacant possession of the subject property and contended that it was not in a position to do so once control and management had been assumed by the Government and, for this reason, sought to have the suit dismissed.

During the hearing, ***Ignatius Pereira, PW1,*** testified that the dispute concerns the management and sponsorship of the School premises situated on the subject property and that, on 1st January 1991, an agreement was executed between the parties;

that the agreement expressly provided that the Respondents would retain management of the kindergarten while the Diocese would sponsor the school; that the 1st Respondent breached the agreement by failing to hand

over the kindergarten, by failing to carry out maintenance, and by allowing the premises on the subject property to deteriorate. He stated that they engaged Tysons Ltd to undertake a valuation, and that repairs now required amounted to Kshs. 16 million, as supported by a valuation report; that, by a letter dated 27th September 2002, they terminated the agreement and demanded vacant possession, which was not forthcoming as the Respondent had handed over the school premises to the 2nd Respondent without their knowledge or consent. He stated that they sought vacant possession and Kshs. 16 million for repairs. He stated that the school was completely run down and expressed surprise that it still held a licence to operate.

During Cross-examination, PW1 stated that Sacred Heart School is a public school, meaning that any child may attend, and that it was not restricted to the Goan Community. He confirmed that teachers were employed by the Teachers Service Commission (TSC). He referred to a letter dated 4th February 1991, stating that he did not author it, and was not conversant with its contents; that he did not know who employed teachers prior to 1991 as he was elected trustee in 2001 or 2002. He confirmed

that the head teacher was employed by TSC and handled day-to-day operations. He stated that there was no change in circumstances regarding teachers before and after the Catholic Diocese took over.

PW1 had no report showing the condition of the buildings before handover in 1991 and conceded that, without such a report, deterioration could not be measured with precision. He stated that academic performance was below expectation and attributed this to teachers, while acknowledging that the Catholic Diocese could not discipline TSC teachers. He confirmed that the suit was filed after his election as trustee, but denied misunderstanding the agreement. When cross-examined by counsel for the 2nd Respondent, PW1 stated that the 2nd Respondent was not a party to the 1991 agreement, and that they had no objection to who employed the teachers.

Richard Munyua Kiambi, PW2, testified as a registered and licensed valuer, holding a Bachelor of Arts in Land Economics (1991) and a member of the Institution of Surveyors of Kenya. He stated that he was instructed by the 1st Respondent to assess repairs to the buildings on the subject property. He conducted an inspection and prepared a report dated 4th April 2019, which he produced, and which showed that the buildings required repairs at an estimated cost of Kshs. 16,052,000. He also produced a detailed schedule of restoration works to be undertaken.

When cross examined, he stated that he carried out a site inspection; and that he did not establish whether the school was public or private, nor did he assess the age of the buildings as his mandate was confined to repairs only. He

testified that no structural defects were noted, and that the repairs applied irrespective of who built the structures or when they were constructed. He obtained inspection permission from the Goan Community and the head teacher, who represented the Ministry. He did not rely on prior reports, and that the quantification was based on his professional experience.

On behalf of the 1st Respondent, ***Father Benjamin Ndune, DW1,*** stated that he was a Catholic priest and Education Secretary of the Catholic Diocese of Mombasa. He adopted his witness statement dated 29th June 2020 as evidence. He stated that the Church entered the school in 1991 only as a sponsor; and that the school was already a public-school run by the Ministry of Education with TSC teachers; and that the Diocese understood its role under the 1991 agreement to be chaplaincy and spiritual matters only, and not financial management or infrastructure. He stated that the Diocese was not in a position to return management of the school because it never had it. During Cross-examination he stated that the Diocese seconded three members to the Board of Management, which comprised about thirteen members, and that the Goan Community had no representative

on the Board; and that all decisions, including repairs, must be approved by the Ministry; that he was not personally present in 1991 but relied on records. He confirmed that the Agreement was between the Goan Community and the Church only without Ministry

representation. He stated that ownership of public schools overrides private agreements, and that the Ministry owned the school. He stated that the Church never intended to allow deterioration of the subject property.

Newton Evans Okwatsa, DW2, the Sub-County Director of Education, Mombasa, testified as the 2nd Respondent's witness and stated that Sacred Heart School was a public primary and secondary school first registered in 1967 with management vested in the Board of Governors/Board of Management, and sponsorship by the Catholic Diocese. He stated that the secondary school was first registered as a public school in 1967 and that, according to the certificate of registration, the managers are the Board of Governors (BoG). He further testified that the latest registration of the secondary school is dated 2005, and that the certificate still indicates that the manager is the BoG; that the primary school section was registered on 4th December 2014, and that the managers are the Board of Management (BoM); that the sponsor of the secondary school is indicated as the Appellant, while the sponsor of the primary school is the County Education Board (CEB); and that the Catholic Diocese is part of the CEB as

members of the BoM.

He stated that the BoM consists of 17 members, including three members from the Catholic Diocese, whose role mainly relates to ethos, discipline, and spirituality. He further stated that, being a public school, the institution receives

its financial resources from Government capitation, which includes a vote for Repairs, Maintenance, and Improvement (RMI) from Government funds; that the BoM supervises the management of funds, and that this supervision includes procurement, public works, and assistance with bills of quantities. He explained that the BoM makes requests to the Government for funding depending on the needs of the school, including repairs and other infrastructural development. He went on to state that the teachers in the school are employed by the TSC and that, where there is a shortage of teachers, the BoM may employ and pay additional teachers commonly referred to as BoM teachers.

When cross-examined, he stated that the school has been a public school since 1967. He stated that he did not know the circumstances under which the Government came into the picture in 1967. He testified that teachers have been employed by the Government since that time and that the BoM (formerly BoG) acts on behalf of the Government. He asserted that the management of the school has been with the Government since 1967; that, according to the certificate of registration, the ECDE (nursery) and primary sections share a joint certificate; and that the

management of pre-primary education is vested in the County Government. According to him, he was not aware of any agreement between the Respondents and the Appellant regarding management of the school, and that the TSC does not pay teachers in private schools.

The trial Judge, upon considering the pleadings and the evidence, found that the 1st Respondent was the absolute registered proprietor of the subject property on which the Sacred Heart School comprising the nursery, primary, and secondary sections is situated. The court held that the title is a freehold title, free from encumbrances, and that neither the Appellant nor the Government had any registered proprietary interest in the land. The court emphasized that ownership of the land was not disputed and that, by virtue of ***Section 24*** of the ***Land Registration Act***, the Goan Community enjoyed full ownership rights together with all rights and privileges appurtenant thereto.

On the status of the school, the trial court undertook a detailed examination of the historical evolution of education law in Kenya, beginning with the Education Ordinance of 1952, the Education Act of 1968, and later the Basic Education Act of 2013. The court found that, although the Sacred Heart Schools had been referred to and registered at various times as “public schools,” this designation did not necessarily connote Government ownership; that, under the earlier legal regimes, schools could be classified as public, aided, assisted, or maintained schools even

though they were established and owned by private or voluntary bodies. It concluded that Sacred Heart School fell within the category of an aided or assisted school, meaning that, while it received Government assistance, including teachers and grants, it was not owned by the Government.

The court described it as a misnomer to equate the term “public school” with Government ownership and held that, notwithstanding Government involvement, the 1st Respondents remained the owner of the school by virtue of its ownership of the land.

With regard to the Agreement dated 1st January 1991, the trial court found that the agreement between the 1st Respondents and the Appellant was valid and binding. The court interpreted the agreement as one through which the Goan Community handed over management of the School premises, the management and sponsorship of the primary school, and sponsorship of the secondary school, to the Appellant. The court rejected the Appellant’s contention that its role was limited to chaplaincy and spiritual matters only. It held that the agreement vested substantive management responsibility in the Catholic Diocese while ownership remained with the 1st Respondents. The court further found that the arrangement created a relationship akin to a licence, which was subject to specific terms and capable of revocation upon breach.

The trial court found that the Appellant breached the

agreement in several material respects. It found that the Diocese denied the 1st Respondent access to the kindergarten, contrary to the express terms of the agreement, that it handed over management and control of the school to the Government without the consent or knowledge of the 1st Respondents, and that it failed to maintain the

School premises, allowing it to fall into a state of serious disrepair. The court found that no clause in the agreement permitted the Appellant to cede control or management of the school to the Ministry of Education, and that such conduct amounted to a fundamental breach of the agreement.

On termination, the trial court found that the 1st Respondent lawfully terminated the agreement through the letter dated 27th September 2002, which demanded that the Appellant hand over possession of the school and all assets by the end of November 2002; that, upon termination, and pursuant to Clause 8 of the agreement, the Appellant was obligated to relinquish the school premises, sponsorship, and movable assets to the 1st Respondents, which the Appellant had failed to do and was therefore in continued breach.

Regarding liability for repairs, the trial court found that the Appellant was responsible for the deterioration of the school buildings, and held that the claim for Kshs. 16,052,000 as the estimated cost of repairs was specifically pleaded and supported by expert evidence. It held that liability arose both from the express and implied terms of the agreement, and from the

general duty of care under the law of negligence. The court rejected the argument that the condition of the School premises at the time of handover had not been proved, holding that, in the absence of evidence to the contrary, it was to be presumed that the School

premises were handed over in a reasonable state of repair. The court further held that a licensee could not waste property and escape liability to the licensor.

In considering the appropriate relief, the trial court acknowledged that the school was operational and that students were in attendance and that, in order to avoid disruption of education, the court declined to order immediate vacant possession. Instead, it ordered that vacant possession be granted to the 1st Respondents within twelve months from the date of Judgment, during which period the parties were to engage in good faith to ensure a smooth transition. The court further ordered that, within the same twelve-month period, the Appellant undertakes the repairs outlined in the valuation report, failing which it would be liable to pay the sum of Kshs. 16,052,000 or such portion thereof as remained unspent at the time of handover.

On costs, the trial court held that responsibility lay with the Appellant, having been the party entrusted with management of the School premises and having unlawfully ceded control to the Government. The court therefore awarded costs of the suit

against the Appellant. No order as to costs was made against the Attorney General, the 2nd Respondent, as it was not a party to the 1991 agreement.

Aggrieved by the Judgment, the Appellant lodged an appeal to this Court on the grounds that: the learned trial Judge was in error in entering Judgment

for the 1st Respondents and granting it vacant possession of the School premises when the 1st Respondents' pleadings and evidence were at variance, and the determination of the court was against the weight of evidence on record; in finding and holding that the management of the School premises, which was the subject of the proceedings, was handed over by the 1st Respondents to the Appellant, whereas the evidence demonstrated that management of the school had already been handed over to the Ministry of Education long before the agreement dated 1st January 1991 was executed, and that such management never reverted to the 1st Respondents; in finding that the School premises had been wasted, deteriorated and damaged when no evidence was adduced regarding the state of the school as at 1st January 1991 when the agreement between the Appellant and the 1st Respondents was executed, and without establishing the extent of any deterioration from that date; in finding that the School premises had dilapidated so as to justify an order for repair or payment of Kshs. 16,052,000 as ordered by the court; and in awarding the 1st Respondents the sum of Kshs. 16,052,000 when the particulars of the claim were not specifically

pleaded and strictly proved as required by law.

The parties filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel ***Mr. Wafula*** appeared for the Appellant and learned counsel ***Mr. Furaha*** appeared for the 1st Respondent.

There was no appearance for the 2nd Respondent, though served, and who had filed written submissions.

In their written submissions, counsel for the Appellant submitted that the evidence on record demonstrated that the School premises had long been a public school managed by the Government through the Ministry of Education, with teachers deployed by the TSC, and that such management pre-dated the 1991 agreement, and that the school never reverted to the Appellant; that the 1st Respondents could not transfer management which it did not possess, invoking the principle of *nemo dat quod non habet*; that the trial court was wrong in holding that the Appellant handed over management of the school to the Government; and that the evidence of the County Director of Education showed that the Sacred Heart School was a public primary and secondary school registered as such in 1967, funded through Government capitation, and managed by statutory boards under the Ministry of Education.

On the alleged deterioration of the school buildings, counsel submitted that the burden of proof lay with the 1st Respondents, but that they had failed to establish the condition of the buildings

as at 1st January 1991, or to demonstrate the extent of any deterioration thereafter. Counsel relied on ***sections 107, 108*** and ***109*** of the ***Evidence Act,*** and on the decision in ***Jenniffer Nyambura Kamau vs Humphrey Mbaka [2013] KECA 423 KLR ;*** *and* ***Re B (Children) (FC) [2008] UKHL***

35 for the proposition that he who alleges must prove and that, where a fact is not proved, it must be treated as not having occurred. Counsel also faulted the trial court for presuming that the School premises were handed over in good repair and for inferring negligence in the absence of evidence.

With respect to the award of Kshs. 16,052,000, counsel submitted that the claim was in the nature of special damages and was neither specifically pleaded nor strictly proved. Reliance was placed on ***Sirce Limited vs Lake Turkana El Molo Lodges [2008] 2 EA 521;*** and ***National Social Security Fund Board of Trustees vs Sifa International Ltd [2016] eKLR,*** highlighting the principle that special damages must be specifically pleaded and strictly proved. Counsel further cited the cases of ***Ratcliffe vs Evans [1892] 2 QB 524 ;*** and ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR*** in support of the requirement for particularity in pleading special damages; and the Supreme Court's decision in the case of ***Raila Odinga & Another vs IEBC & 2 Others [2017] eKLR*** for the proposition that parties are bound by their pleadings, and that

evidence outside the pleadings cannot be considered. On costs, counsel submitted that the trial court wrongly condemned the Appellant to bear the costs of the suit.

In their written submissions, counsel for the 1st Respondents submitted that it was not in dispute that the subject property on which Sacred Heart School is situated belongs to the 1st Respondents and that, by operation of the common

law principle encapsulated in the *maxim quicquid plantatur solo, solo cedit,* ownership of the land necessarily carries ownership of all buildings and fixtures thereon. Reliance was placed on ***Mukuru Munge vs Gilead Mwanyasi [2006] eKLR;*** and ***Waribu Chongo vs Benson Maina Gathithi [2014] eKLR*** to support the

contention that whatever is permanently attached to land becomes part of the land and belongs to the registered proprietor; that as the owner of the subject property was entitled to enter into the agreement dated 1st January 1991 by which it handed over management and sponsorship of the School premises to the Appellant, subject to clearly defined terms; that the agreement was explicit that the management and sponsorship were transferred to the Appellant and that, should the Appellant opt to relinquish the Agreement, management would revert to the 1st Respondents together with the movable assets; and that the Appellant admitted the existence of the agreement and could not lawfully resile from its express terms by alleging that its role was merely that of a sponsor.

It was further submitted that the Appellant's attempt to

contradict the written agreement by oral testimony offended the parole evidence rule under ***Section 97(1***) of the ***Evidence Act***. Counsel relied on the cases of ***Housing Finance Company of Kenya Ltd vs Palm Homes Ltd & 2 Others [2002] 2 KLR;*** and ***Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd [2017] eKLR*** for the proposition that extrinsic evidence cannot be admitted to vary, add to, or

contradict the terms of a written contract; and that, having freely entered into the agreement, the Appellant was estopped from denying that it assumed management of the School premises.

On the contention that the Sacred Heart schools were public schools and therefore incapable of private management, counsel submitted that the trial court correctly explained the historical distinction between public, assisted, and maintained school; that classification as a public or assisted school did not vest ownership in the Government, and did not extinguish the proprietary rights of the Appellant. Counsel submitted that, even if the secondary school was later registered as a public school, such registration did not confer ownership upon the Government or that Government assistance or the posting of teachers by the TSC did not, of itself, negate private ownership or management rights.

With respect to the Appellant's argument that management had already been vested in the Government prior to 1991, counsel submitted that there was no evidence that the kindergarten and primary school were public schools at the time of the agreement. Counsel pointed out that the registration certificates relied upon by the Appellant were dated long after

1991 and did not support the contention that the Appellant lacked management authority at the material time.

Turning to the deterioration of the School premises, counsel submitted that, once management was handed over, the Appellant assumed full

responsibility for the School premises, and was under a duty not to permit waste; and that the Appellant could not evade liability by insisting on proof of the condition of the buildings as at 1991. Reliance was placed on the valuation report prepared by Tysons Limited, which concluded that maintenance and repair of the buildings had been neglected over a long period, leaving the property in a state of disrepair. Counsel submitted that the expert report and photographs constituted sufficient proof of deterioration.

On the award of Kshs. 16,052,000, counsel submitted that the amount was properly pleaded and proved. It was argued that the claim related to estimated repair costs, which are inherently prospective in nature and were best proved through expert assessment. Counsel relied on the cases of ***Nkuene Dairy Farmers Co-operative Society & Another vs Ngacha Ndeiya [2010] eKLR,*** as applied in ***Njoki vs Gitonga [2024] KEHC 2497 (KLR);*** and ***James Kariuki Kanyeki & Another vs Blue Water Properties Ltd [2021] eKLR*** for the proposition that, in material damage claims, a claimant need not prove that repair costs have

already been incurred, but only the extent of the damage and the cost of restoration. Counsel submitted that the valuation report quantified the loss with sufficient certainty and justified the award.

On costs, counsel submitted that the trial court properly exercised its discretion in awarding costs to the Respondent in terms of ***section 27*** of the ***Civil***

Procedure Act. Reliance was placed on ***Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006*** for the principle that an appellate court should not interfere with the exercise of discretion on costs, unless it was based on wrong principles. Counsel submitted that no basis had been laid to warrant interference with the trial court's order on costs

In its written submissions, the 2nd Respondent opposed the appeal and urged the Court to uphold the Judgment of the Environment and Land Court, submitting that the decision was well reasoned, sound, fair, and just. The 2nd Respondent set out the background of the dispute, noting that the suit before the court arose from a claim for breach of contract instituted by the 1st Respondents against the Appellant, founded on the agreement dated 1st January 1991. It was emphasized that the 2nd Respondent was not a party to that agreement; that the trial court correctly identified and determined the issues for determination, namely ownership of the land, the status of the Sacred Heart Schools, whether there was a breach of the agreement, and the appropriate remedies. On ownership, it was submitted that the

subject property was undisputedly owned by the Goan Community, and that ownership of the land carried with it proprietary rights over the developments thereon.

On the status and management of the School premises, and whether the schools were public schools owned and managed by the Government, it was

submitted that the trial court's reasoning that the term "public school" did not necessarily mean a Government-owned school, but could also refer to a privately-owned school receiving Government aid. The court's reliance on the Education Ordinance of 1952, the Education Act of 1968 (repealed), the Teachers Service Commission Act of 1967, and the Basic Education Act of 2013 was endorsed as correct in law. It was submitted that, under those legal regimes, a school could be described as public, assisted, or maintained without conferring ownership upon the Government.

The 2nd Respondent submitted that the trial court's historical exposition clarified that Government assistance, including posting of teachers by the TSC and the existence of Boards of Management, did not negate private ownership; that such Government involvement was a philanthropic or supportive role intended to ensure the viability of schools, rather than an assertion of proprietary rights.

The 2nd Respondent further supported the trial court's reliance on comparable authorities involving competing claims between private landowners and the Government over school

property; that in particular, reference was made to the ***Parklands Arya Girls High School case and Shree Visa Oshwal Community & Another vs Attorney General & 3 Others, (supra)*** in which it was held

that the Government, through the Ministry of Education, could not interfere

with or override private proprietary rights in land under the guise of public interest or educational policy; that the trial court correctly characterized the arrangement as a licence, granting the Appellant the right to use the land and manage the schools subject to the terms of the agreement; and that the finding that the Appellant breached the agreement was supported by the evidence and justified the remedies granted.

With respect to the award of damages for deterioration of the school buildings, the 2nd Respondent submitted that the claim for Kshs. 16,052,000 was properly pleaded as the estimated cost of repairs, and was supported by the valuation report produced in evidence, and the finding that the damages flowed from the Appellant's duty of care arising from having been entrusted with management of the subject property and failing to discharge that duty. The argument that the damages were not specifically pleaded or proved was rejected, with the 2nd Respondent endorsing the court's finding that the amount had been expressly pleaded and supported by expert evidence.

On costs, the 2nd Respondent submitted that the trial court properly exercised its discretion in awarding costs against the

Appellant since costs follow the event, and that the Appellant, having been found in breach and having occasioned the litigation, ought to bear the costs.

This being a first appeal, this Court is under a duty to re-evaluate, re- assess, and re-analyse the evidence on record and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. This principle is well settled and was restated in ***Selle vs Associated Motor Boat Co. Ltd [1968] EA 123*** and reiterated in ***Peters vs Sunday Post Ltd [1958] EA 424***. At the same time, an appellate court will not ordinarily interfere with findings of fact unless they are based on no evidence, a misapprehension of the evidence, or the trial court acted on wrong principles, as held in ***Mwangi vs Wambugu [1984] KLR 453***.

In the forestated regard, the issues falling for determination are: i)whether the learned trial Judge was in error in finding that the management of Sacred Heart School was handed over by the 1st Respondents to the Appellant under the Agreement dated 1st January 1991 notwithstanding the Appellant's contention that management of the school had already been vested in the Government prior to the execution of that agreement and never reverted to the 1st Respondents; ii) whether the Appellant handed

over control and management of the school to the Government, contrary to the Appellant’s position that the Government had always been in control of the school and that no such handover by the Appellant took place; iii) whether the School premises on the subject property was wasted, deteriorated, or dilapidated, in the absence of evidence

establishing the condition of the School premises as at 1st January 1991, and without proof of the extent of any deterioration attributable to the Appellant thereafter; iv) whether the 1st Respondent was entitled to the award of Kshs. 16,052,000 as the cost of repairs on the basis that the claim was neither specifically pleaded nor strictly proved as required by law; v) whether the 1st Respondent was entitled to vacant possession of the School premises; and vi) finally, whether the learned Judge properly exercised his discretion in condemning the Appellant to bear the costs of the suit.

Beginning with the issue as to whether the management of School premises was handed over by the 1st Respondents to the Appellant under the agreement dated 1st January 1991, it is common ground that the Goan Community is the registered proprietor of the subject property, upon which the Sacred Heart School is situated. By operation of law, ownership of land carries with its ownership of all developments thereon unless lawfully severed. The principle of ownership of whatever is affixed to the land was expounded by this Court in the case of ***Waribu Chongo vs Benson Maina Gathithi [2014] KECA 769 (KLR)*** when it

stated thus:

> ***“It is trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the latin maxim quicquid plantatur solo, solo cedit. The owner of the land becomes the owner of the soil and all objects permanently affixed***

or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed."

See also ***PJS vs MHAD; AMH (Interested Party) [2022] KECA 641 (KLR)***

where this Court held that the owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto, bearing in mind the purpose of the attachment.

The pertinent provisions of the agreement reads as follows:

"Whereas the Goan Community are registered owners of the Sacred Heart School property situated on Plot Number 31 Section XXII Mombasa, Archbishop Makarios Road and are desirous of handing over the management of the school property, the management and sponsorship of the Primary School and the sponsorship of the Secondary School to the Diocese.

And whereas the Diocese has agreed to take over the management of the said School property, the management and sponsorship of the Primary School and the sponsorship of the Secondary School.

Now this agreement witnesseth as follows:

1. The Goan Community shall prepare the Primary School accounts and have the same audited before the handing over date.

2. The Primary School Bank Account including Deposit Accounts and cash at hand shall be handed over to the Diocese on the handing over date.

3. The Goan Community shall pay all the outstanding debts of the Primary School incurred by them before the handing over date.

4. The moveable assets of the school as contained in the annexed schedule shall be handed over to the Diocese on the material date.

5. The responsibility of the Goan Community shall cease as from the date of handing over and the Diocese shall assume full responsibility as from that date.

6. The Goan Community shall retain permanent and exclusive use of the Kindergarten classrooms and other outbuildings that do not at present form part of either the Primary or Secondary Schools. The Goan Community shall allow the Diocese to use the Kindergarten classrooms during the morning school session for a period of three years from 1st January, 1991.

7. The Goan Community shall be given the use of the School hall and the quadrangle situated between the Primary and Secondary Schools for the duration of the agreement.

8. In the event of the Diocese opting to relinquish the management of the School property and sponsorships, the same shall revert to the Goan Community together with the moveable assets."

It is a settled principle of law that where parties have

reduced their agreement into writing, extrinsic evidence cannot be admitted to vary, add to, or contradict the written terms, in the absence of recognized exceptions.

In ***Odgers: Construction of Deeds and Statutes (5th ed.) at page 106,*** the learned author emphasizes the long-established principle governing the interpretation of written instruments in the following terms:

> ***"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."***

The rationale underlying this rule is that, where contracting parties have deliberately reduced their agreement into a single and final written instrument, that document is taken to represent the complete and exclusive record of their bargain. Consequently, extrinsic evidence of prior negotiations, discussions, or arrangements is inadmissible for the purpose of construing, contradicting, or varying the terms of the written contract.

Put differently, once parties have consciously chosen to embody their agreement in writing, evidence of matters antecedent to that writing cannot be relied upon to undermine or rewrite the final contract. The court's task is therefore confined to interpreting the contract as written, and not to speculate on what the parties may have said or intended outside the four corners of the document.

In the case of ***Damondar Jihabhai & Co. Ltd vs Eustace***

***Sisal Estates Ltd* [1967] EA 153**, it was held that:

> ***"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above – Globe Motors Inc & others vs TRW Lucas Electric Steering Ltd & Others (supra) – Lord Justice Beatson stated as follows:***

> ***'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'"***

In the case of ***Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd [2017] eKLR***, this Court (Ouko, JA. (*as he then was),* Kiage and Murgor, JJ.A.) reaffirmed the objective approach to contractual interpretation and stated as follows:

> ***"Courts adopt the objective theory of contract interpretation and profess to have an overriding view, sometimes called the four corners of the instrument rule, which insists that a document's meaning should be derived from the document itself, without reference to anything outside the document, extrinsic evidence excluded."***

The Court emphasized that this principle is not merely a rule of interpretation but a rule of law, to the effect that the meaning of a written contract must, in the first instance, be ascertained from the document itself.

The Court, however, went on to clarify that the parol

evidence rule and the exclusion of prior negotiations are not absolute and are subject to well- recognized exceptions. In that regard, the Court stated:

> ***"The rule of exclusion of negotiations prior to entry of a contract, as well as the parol evidence rule, are subject to a number of***

exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract where it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement."

In support of that position, the Court cited ***Gillepsie Bros. & Co. vs Cheney,***

Eggar & Co. ***[1896] 2 QB 59*** where Lord Russell C.J. stated:

"***Although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."***

Applying the above stated principles to the present appeal,

the agreement between the 1st Respondents and the Appellant was a formal, written, and comprehensive instrument. Its existence, execution, and validity were expressly admitted by the Appellant. Crucially, the Appellant did not plead or prove that the agreement was ambiguous, incomplete, partly oral, or subject to any vitiating factors, such as fraud, mistake, misrepresentation, or illegality. In the absence of

such pleadings or proof, the court was bound to interpret the agreement within its four corners.

See also ***Mwabili vs Nayab Motors Limited & another [2025] KEHC 11393 (KLR)***

Secondly, the language of the agreement was clear and unambiguous. It expressly provided for the handover of management and sponsorship of the School premises to the Appellant, while reserving specific proprietary and user rights to the 1st Respondents, including exclusive use of the kindergarten facilities. There was nothing in the text of the agreement limiting the Appellant's role to chaplaincy or spiritual oversight only. In those circumstances, the trial court rightly declined to admit or rely upon oral testimony and historical assertions intended to contradict or dilute the express contractual obligations assumed by the Appellant.

Thirdly, the Appellant's contention that management had already been vested in the Government prior to 1991 amounted, in substance, to an attempt to rely on antecedent facts and arrangements to defeat the clear terms of the written contract, which approach is precisely what the parol evidence rule forbids.

Extrinsic evidence may only be admitted to aid interpretation where the contractual language is ambiguous, and not to contradict a document whose meaning is plain and unambiguous. The agreement clearly set out the parties' intent and purpose, which was to hand over management of the School premises

to the Appellant. Nothing in the agreement stated that the Government was at that time vested with management. If this was the case, nothing would have been easier than for the 1st Respondents to have stated as much. The learned trial Judge was therefore correct in rejecting evidence aimed at rewriting the agreement through reference to prior Government involvement in the school's administration.

Finally, by voluntarily entering into the agreement and operating under it for several years, the Appellant affirmed its terms and assumed the attendant management obligations. It could not later be heard to assert, through oral evidence or post hoc explanations, that it never intended to undertake those responsibilities.

So, did the fact that the school was a public school change the ownership status? It is not disputed that School premises was at various times referred to as a public school, and that it receives Government assistance, including teachers deployed by the TSC and capitation funding. It is also not disputed that the school operates through statutory Boards of Governors or Boards of Management established under education legislation. The dispute

lies in the legal consequences of those facts.

The learned trial Judge undertook a detailed and correct analysis of the historical and statutory framework governing the education system in Kenya,

including the Education Ordinance of 1952, the Education Act (repealed), and the Basic Education Act, 2013. The analysis demonstrates that the term “public school” has not, either historically or in current law, been synonymous with Government ownership of land or school property. Under earlier education regimes, schools were classified as public, aided, assisted, or maintained schools, many of which were established, owned, and developed by private or religious bodies but received Government support in the form of grants, teachers, or supervision. Government involvement was intended to ensure educational standards and access, not to divest private proprietors of their proprietary rights.

Even under the current Basic Education Act, the presence of a Board of Management, Government capitation, or TSC teachers does not, of itself, vest ownership of land or buildings in the State. The Act expressly recognises sponsors and proprietors, including religious and community bodies alongside Government oversight. Management structures under the Act are regulatory and supervisory; they do not extinguish proprietary interests.

In the present case, the evidence established beyond

dispute that the Respondent is the registered proprietor of the subject property. No evidence was produced to show compulsory acquisition, surrender, or statutory vesting of that land in the Government. In law, therefore, the classification of the school as “public” did not displace the Respondent’s ownership of the land or its authority

to enter into agreements concerning its use and management. See ***Shree Visa***

Oshwal Community & Another vs The Attorney General & 3 Others (supra).

The Appellant's reliance on the evidence of the sub-County Director of Education to demonstrate that the Government was managing the School premises does not advance its case. If anything, the evidence confirmed Government involvement in staffing, funding, and regulation, but did not establish Government ownership of the land or an exclusive right of management overriding the existing private proprietary arrangements. Indeed, the witness conceded that he was unaware of the agreement between the parties, and that such agreements fall outside the registration certificates issued by the Ministry.

Government participation in education, however extensive, does not, of itself, convert privately owned land into public property or nullify contractual arrangements lawfully entered into by the registered proprietor. It is clear beyond peradventure that the Sacred Heart School, though operating as a public or assisted school for educational purposes, at all times remained situated on

privately owned land, and was capable of being managed and sponsored pursuant to the agreement dated 1st January 1991.

The general principle to be observed by an appellate court in deciding whether to disturb the quantum of damages were set out in the case of ***Kemfro***

Africa Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and Olive Lubia

(1982-88) 1 KAR 727 and restated by this Court in the case of ***Arrow Car Ltd vs***

Elijah Shamalla Bimomo & 2 Others [2004] eKLR that:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

In the same vein, in the case of ***Butt vs Khan [1978] KECA 24 (KLR),*** the

Court held as follows: -

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This, with respect, is what I think happened in this case. The***

learned judge attached undue importance to the likelihood of epilepsy developing in the future”.

As to whether deterioration on the subject property was proved, we take to mind the decision in the case of ***Gibbs vs Cruikshank [1873] LR 8 CP 454*** the court held that:

> ***"A licensee or person in possession of another's property must not commit waste or permit the property to fall into disrepair through neglect."***

Halsbury's Laws of England, 4th Ed., Vol. 27 states that a licensee who has control of premises owes a duty to exercise reasonable care and is liable for damage occasioned by misuse or neglect.

The general principle governing assessment of general damages of this nature was outlined by Lord Justice Donaldson in the case of ***Dodd Properties (Kent) Limited and another vs Canterbury City Council and others [1980] 1 All ER 928*** in the following words:

> ***"The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the***

cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations."

The Appellant contends that the learned trial Judge wrongly found that the School premises had deteriorated on the basis that no evidence was adduced to establish the condition of the premises as at 1st January 1991 when the agreement was executed. It was submitted that, in the absence of a baseline condition report, any finding of deterioration was speculative and contrary to the rules on burden of proof.

It goes without saying that, once the management of the School premises was contractually handed over to the Appellant, it assumed a continuing duty both under the express and implied terms of the agreement and under the general law to take reasonable care of the premises and not to permit waste. This duty was prospective and ongoing; it did not depend on proof that the School premises were in a pristine or specific condition at the date of handover. What mattered was whether, during the period of the Appellant's management, the property was maintained to a reasonable standard consistent with its use as a school.

PW1 testified that the school buildings were in a run-down state, and that maintenance had been neglected over a prolonged period. He stated that the condition of the premises had

deteriorated to such an extent that substantial repairs were required, prompting the Respondents to engage Tysons Limited to carry out a professional assessment. His testimony was not shaken in cross-

examination on the existence of deterioration and damage; rather, the cross- examination focused on whether the Diocese had control over teachers and day- to-day operations, not on the physical condition of the buildings.

Crucially, PW2, a registered and licensed valuer, conducted a site inspection and prepared a detailed valuation and condition report dated 4th April 2019. His evidence was that the buildings exhibited clear signs of deferred maintenance, including worn finishes, dilapidated fittings, and structural elements requiring repair. He provided a detailed and particularized report that itemized the works required and quantified the total cost of restoration at Kshs. 16,052,000, noting that there were no structural defects, but that the state of the buildings was inconsistent with regular maintenance over time. That evidence was professional, detailed, and grounded on physical inspection. For instance, the Report specified the main repairs as:

> ***"Roof leakages and associated effects on ceilings and paint work***
>
> ***Broken doors and windows;***
>
> ***Cracks on walls, columns,***
>
> ***and beams; Unfunctional***

toilets and no water supply; General paintwork unattended for long; Worn out floor screed.”

It is clear that such repairs were of a general nature for which the Appellant as a manager was obligated to undertake, particularly considering that the School premises was under its control and management.

The Appellant did not challenge PW2's qualifications, methodology or credibility. More significantly, the Appellant did not produce any counter- valuation, maintenance records, inspection reports or documentary evidence demonstrating that it had undertaken regular repairs, repainting, or refurbishment during the period it was contractually responsible for management. Nor did it adduce evidence showing that the state of disrepair pre- existed the agreement, or that deterioration occurred due to factors beyond its control.

This Court in the case of ***Nkuene Dairy Farmers Co-op Society & Another vs Ngacha Ndeiya (supra)*** observed:

> "***In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage***

complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. In Ratcliffe v. Evans [1892]2QB 524 Bowen L.J. said:

> ***'The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendantry.'"***

The court will treat an expert report as part of the totality of the evidence and must interrogate its soundness before acting upon it.

This Court in the case of ***Shah & Another v Shah & Others [2003] 1 EA 290***

held that:

> ***"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case, and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so… Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."***

In those circumstances, the learned trial Judge was entitled to draw an adverse inference from the Appellant’s failure to rebut the expert evidence placed before the court.

That said, the law does not require a licensor to prove the exact historical state of premises in order to succeed in a claim for waste or negligent

management. In the absence of evidence to the contrary, a court is entitled to presume that property handed over for institutional use was in a reasonably serviceable condition, and that prolonged neglect resulting in visible dilapidation is attributable to the party charged with its maintenance.

To our mind, the learned trial Judge did not base his finding on assumption or conjecture. Rather, he relied on uncontroverted expert evidence, photographic and descriptive assessment of the premises, and the Appellant's failure to demonstrate compliance with its contractual obligations. In our view, faced with the facts and evidence on the state of the school premises, we are satisfied that the learned Judge adopted the right approach in concluding that, by the time the proceedings were instituted, the school premises were dilapidated and in a state of disrepair.

As to whether the 1st Respondents was entitled to the award of Kshs. 16,052,000, the record plainly shows that Kshs. 16,052,000 was expressly pleaded in the amended plaint as the estimated cost of repairs required to restore the suit property. The 1st Respondents set out, with sufficient particularity, the nature of the deterioration complained of and pleaded the precise

monetary sum claimed as the cost of reinstatement. The requirement that special damages be specifically pleaded was therefore satisfied.

Secondly, on proof, the claim was supported by expert evidence. PW2, a registered and licensed valuer, conducted a physical inspection of the premises and prepared a detailed report itemizing the remedial works required, thereby quantifying the cost of each and every item of repair thereof at a total of Kshs. 16,052,000. His qualifications were not challenged. His methodology was not impeached, and no contrary expert evidence was tendered by the Appellant. The trial court correctly appreciated the nature of the claim as one for estimated repair costs, as opposed to reimbursement of expenditure already incurred. In such cases, the law does not require proof of actual payment, but proof of the extent of damage and the reasonable cost of restoration. This principle was affirmed in ***Nkuene Dairy Farmers Co-operative Society & Another vs Ngacha Ndeiya (supra).***

The award of costs is a matter within the discretion of the trial court to be exercised judiciously and in accordance with settled principles. Under ***Section 27*** of ***the Civil Procedure Act,*** costs ordinarily follow the event unless the court, for good reason, orders otherwise.

This Court in the case of ***Farah Awad Gullet vs CMC Motors Group Limited*** ***[2018] KECA 158 (KLR)*** had this to say:

> ***"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual***

caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of ***Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR,*** stated:

"[18] It emerges that the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent-to the actual process of litigation.'"

In the present case, the learned Judge gave clear and cogent

reasons for awarding costs against the Appellant. The court found that the Appellant had been entrusted with management of the suit property, had breached the agreement by unlawfully ceding control to the Government, and had failed to maintain the School premises, thereby necessitating the litigation. The suit succeeded against the Appellant. Notably, no order for costs was made against the Attorney General, who was not a party to the 1991 agreement. The learned

Judge therefore exercised his discretion on costs based on the correct principles, and after taking into account all relevant considerations, with the result that this ground has no merit.

In sum, this appeal is without merit and is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Malindi this 20th day of February, 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 the true copy of the original

signed

DEPUTY REGISTRAR