



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT THIKA**  
**ELC NO. 263 OF 2017**  
**[FORMERLY ELC NO 118 OF 2007 - NBI]**

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**JOAB KAMAU NJOROGE** - **PLAINTIFF**

**Vs**

**ARCDIOCESE OF NAIROBI KENYA**

**REGISTERED TRUSTEES** - **DEFENDANT**

**JUDGMENT**

**The Pleadings**

1. Vide an amended plaint dated the 6/3/2102 and 5/11/2018, the plaintiff filed suit against the defendant and sought the following orders;
  - a. An order for the removal of the defendant's temporary structure from the Plaintiff's parcel of land LR No 22404 [suit land] in Thindigua area, Kiambu District.
  - b. An order of permanent injunction restraining the defendants, by themselves, their servants and/or agents, from entering, remaining thereon, or in any other manner interfering with the plaintiffs' quiet possession and enjoyment of the parcel of land LR No 22404 aforesaid.
  - c. General damages for trespass
  - d. Costs of the suit and interest on c and d above at court rates from the date of the judgement till payment in full.
2. The Plaintiff stated that he is the registered owner of the suit land, and that the defendant has, without any colour of right, trespassed onto the suit land and constructed a structure using corrugated iron

sheets. In addition, they have placed more building material on the property with the aim of commencing a permanent building.

3. The defendant denied the Plaintiff's claim in its amended defence and counterclaim dated 24/10/1028. It contended that, contrary to the Plaintiff's claim, the suit land has at all material times been a public utility plot set aside for use by the residents of Thindigua Estate as a community centre, and the structures thereon were constructed through the fundraising efforts of the Estate's residents for their use well before the Plaintiff's impugned acquisition of the suit land.
4. In addition, the defendant contends that it is the lawful owner of the suit land, having been allocated as such by the Kiambu County Council for purposes of developing a community centre.
5. That to the contrary, it is the Plaintiff who has trespassed onto the land without lawful cause.
6. In addition, it was averred that the title held by the Plaintiff was obtained illegally, and particulars of fraud were pleaded and particularised under para 10B of the Counterclaim, to the effect that the Plaintiff colluded with officials of the Land Registry to acquire a title to public land reserved for a community centre.
7. Reasons wherefore the Defendant sought the orders as follows;
  - a. A declaration that the defendant is the legal owner of the suit land and subsequent orders for registration of the same in its name.
  - b. Revocation and cancellation of the title to the land in the name of Joab Kamau Njoroge
  - c. An order directing the Chief Land Registrar to rectify the green card and issue the defendant with a title of the suit land.
  - d. A permanent injunction restraining the plaintiff, jointly and severally, by himself, his servants, employers and/or agents, from registering any dealings, dealing in, disposing of, transferring and/or interfering with the defendant's peaceful use, enjoyment, occupation and/or dealing in the suit land or any part of it, in any manner detrimental to the defendant.

8. In its response to the defence and counterclaim, the Plaintiff maintained that neither the Kiambu County Council nor the County has ever been the legal owner of the suit land and, consequently, lacked the capacity to allocate the land as alleged. The Council has, under no circumstances, ever allocated the suit land to the Plaintiff in any event. The Plaintiff denied all the particulars of fraud levelled against it and put the Defendant on strict proof thereof.
9. Joab Kamau Njoroge testified as PW1. He relied on his witness statement dated 12/11/2018 in evidence in chief. He produced documents in support of his case, marked as PEX No 1-4
10. In his evidence in chief, he stated that he purchased the suit land from Lucy Wangu Kihanya, Samuel Kamau Ngugi, Abu Omari Mungai and Charles Attaya in 2005 for the sum of Kshs 3.0 Million. He reiterated that the acquisition was lawful and denied any collusion with the officials of the Lands Registry.
11. In cross-examination, he stated that he was one of the shareholders of Thindigua Co Limited [the Company], having joined in 1972, and was therefore well versed with the Company's affairs. He further stated that the original land was owned by the Company and later subdivided by Surveyor James Kamwere. Shown the deed plan, he confirmed that the suit land was formerly LR No 76/32/7 and that he did not have the original deed plan for the suit land.
12. With reference to the occupation of the suit land, he confirmed that the Defendant is in occupation and that the structure on the land is used as a school. He added that he is not aware that the suit land was public land.
13. That said, he added that, as a shareholder, he was allocated a plot by the company, where he still resides today, and that he was aware of the subdivision of the larger land into smaller plots for its members, and that some of the land was surrendered for public purposes. He stated that he does not know how L R No 76/32/7 changed to the suit land and that he neither possessed the part development plan [PDP], allotment letter, nor the change of user from public to private use. He carried out due diligence through a

land search and found that the vendors were the legitimate owners of the land.

14. DW1 James Kamwere testified that he is a licensed surveyor since 1972 under registration certificate No 61741. He relied on his witness statement dated 9/7/2019 and produced documents marked as PEX No 1-17
15. That on or about February 1979, the company instructed him to carry out a subdivision of its property, LR 76/32, situate in Kiambu County. He carried out the subdivision in two phases: the first subdivision covered land under cultivation, and the second covered land under the coffee plantation. The 1st scheme was ultimately approved by the Commissioner of Lands, and survey work was carried out and completed, and deed plans were issued.
16. The 2nd phase comprised residential plots as well as public purpose plots. The Commissioner of Lands, vide the letter dated 26/11/1991, approved the subdivision and change of user, subject to special conditions, one of which required the surrender of public purpose plots to the Government free of charge. The final approval was issued on 27/5/1994, after which he submitted the deed plans to the Director of Survey for authentication and approval.
17. He stated that the community centre plot was allocated L R No 76/32/7 for surrender purposes, and its deed plan was No 113706, which he submitted to the Director of Survey alongside the other surrendered plots for his signature. After that, he submitted the deed plans to the Company to enable the Directors to process the surrender registration at the Commissioner of Lands office. He emphasised that the surrendered land retained its public purposes character and could not be changed to other purposes. He added that this land was not Government land either, hence it was not available for allocation, change of user, and/or alienation to individuals.
18. Concerning the land in question, he indicated that LR No. 22404 was superimposed upon LR No. 76/32/7, which he characterized as an irregularity. He stated that a new survey plan should have been

prepared and accompanied by a partial development plan illustrating the change of use, duly approved by the Commissioner of Lands, prior to the issuance of an allotment letter. He further stated that a new grant cannot be issued without a letter of allotment, and concluded that the entire process of obtaining LR No. 22404 was irregular. Consequently, the title is considered to be tainted with illegality.

19. In cross-examination, he stated that he obtained a stamped copy of the survey plan, accompanied by a receipt. He added that the title contains an educational user, which is a public user, but the land is now illegally in private ownership.
20. Samuel M Njuguna testified as DW2 and introduced himself as a shareholder and director of the Company since the 1970s. He relied on his statement dated 12/11/2018 in evidence in chief. He produced documents marked as PEX Nos 18-22 in support of the defence and counterclaim.
21. He stated that the Plaintiff, too, has been a shareholder since the 1970s or early 1980s, like him. That the defendant was entrusted with LR No 76/32/7 in the early 1990s to develop a community hall for the benefit of the public.
22. That one of the conditions for the approval of the subdivision of the land by the Commissioner of Lands was set out in his letter dated 15/5/1975, which required the surrender of a number of plots for public purposes, [to serve the needs of the members of Thindigua Company] and LR 76/32/7 was set aside for a community centre.
23. In 1998, he and other directors initiated legal action against the company's current management, led by Mr Francis Gikonyo, which had refused to relinquish the deed plans for the specified public utility plots, claiming they were lost or misplaced. The court subsequently ordered that new deed plans be prepared. As they were pursuing the deed plans, they discovered that the old deed plans had been used in 1996 to issue title deeds illegally. This shows that the directors intended to mislead the members in 1998, and yet they had

used the said deed plans to commit illegalities and divert public land to private hands.

24. On 29/5/1995, an application was made by PK Tanui and others for the allocation of plots Nos 76/32/3, 76/73/6 and 76/73/7, alleging that the land was vacant Government land and yet it belonged to the company. LR No 22404 was issued to the original allottees, namely Lucy Wangu Kihanya, Samuel Kamau Ngugi, Abu Omari Mungai and Charles Attaya, who were employees of the Ministry of Lands. A single allotment letter dated 29/5/1996 was used to allocate three plots to a group of people, one of them being PK Tanui and others, and the properties sought for allocation were listed as being in Nairobi rather than Kiambu. This was to conceal the true identity and the location of the properties to achieve illegalities.
25. He stated further that the suitland was handed over to the defendant in the 1990s and is used as a community centre.
26. In cross-examination, he stated that the land was allocated to the defendant by the company's shareholders. Public utility plots, including those for roads and trade centres, were surrendered to the Commissioner of Lands, but the Commissioner of Lands later returned them to the company to allow the company to develop them as public utility plots. However, the company did not develop them; instead, it allocated the land to the defendant. He failed to produce any documentation in support of his testimony. He added that no plots had been surrendered to the Kiambu County Council and that, in fact, the ones deemed surrendered were fake. He further stated that, in any event, the council had no land to issue to the defendant, as the land had been alienated to third parties, including the Plaintiff, as early as 1996. The land was not government land, and the council had no authority to allocate it to anybody, let alone the defendant.
27. Later on 14/5/2022, by consent Dw2 was recalled to produce two letters dated 26/11/1991 and 27/5/1994.
28. DW3 - Francis Kaboche Migwi relied on his witness statement dated 12/11/2018 in evidence in chief. He stated that he is a resident

of Thindigua, Kiambu County. The Thindigua Coffee Estate, owned LR 76/32 and measuring about 600 acres, was owned by white settlers prior to independence. To enable them to purchase the land, the squatters who lived and worked on the farm incorporated themselves into Thindigua Company Limited and bought the land in 1972.

29. That in 1972 he became a shareholder and purchased 2 shares. Between the end of the 1970s and the early 1980s, the Plaintiff also purchased shares and became a shareholder of the Company, and he too attended meetings to discuss the subdivision of the land. The 1st subdivision took place in 1978 and was carried out by James Kamwere, a surveyor. At one of the annual general meetings, the surveyor informed the members of the conditions for subdivisions, which included the creation of roads to serve the plots and the surrender of all public utility plots to the government free of charge.
30. That vide an application dated 12/4/1978, the company sought and obtained approval from the Commissioner of Lands to subdivide the land. The ministry gave its approval vide the letter dated 15/5/1978, but subject to the surrender of several plots to the custody of the Kiambu Town Council as public utility and for roads. These plots were marked in the survey plan, being LR No 76/73/3, 6, 7, 8, 9, 10, 11, 135, 136 and 714, for use as a dairy produce collection point, health centre, community centre, nursery school, primary school, the 2nd nursery school, cemetery, open-air market, police post and ordinary plot, respectively.
31. That in the late 1990s the company requested the Commissioner of Lands to return the surrendered public utility plots to the company for development for public utility purposes to prevent the plots from being grabbed. The Commissioner agreed, and the plots were returned but vested in the Kiambu Town Council, which, vide the minutes of 24/10/1996, resolved to assign some of the plots to mainstream churches. One of them, LR No 76/73/7, was assigned to the Catholic Church to develop a community hall.

32. He added that since then, the defendant has been in possession of the suit land. In 1996, the new directors of the company demanded that the previous chairmen, namely Francis Gikonyo and his team, hand over the deed plans to them. However, Francis Gikonyo swore an affidavit dated 1/10/1996, claiming the deed plans were lost. It turned out that the said Chairman, in 1995 or early 1996, had colluded with some officials at the Ministry of Lands and surrendered the deed plans, which were then used to fraudulently allocate the plots to third parties under the Registration of Titles Act, an action aimed at portraying the land as government land under first registration, even though the land was a subdivision of a larger plot. The suit land was therefore illegally converted to LR No 22404 and allotted to the employees of the Ministry of Lands namely Lucy Wangu Kihanya, Samuel Kamau Ngugi, Abu Omari Mungai and Charles Attaya, who transferred the land to the Plaintiff, a shareholder of the company, who was well aware of the affairs of the company as he attended meetings.
33. During cross-examination, he explained to the court that he has known the Plaintiff since the 1970s, when they were buying land from the company and attending shareholder meetings. He also stated that he was a director of the company. He confirmed the letters dated 15/5/1978, regarding plot surrender, and another dated 21/6/1982, on vesting the land to Kiambu Town Council for the benefit of the members of the company, as well as the minutes of the Town Council considering the allocation of the land to the Defendant.
34. DW4 Peter Irungu Kabiru testified and relied on his witness statement dated 12/11/2018 in evidence in chief. He stated that he is a resident and shareholder of Thindigua Company in Kiambu. He became a shareholder in 1990, having acquired a share from an original member of the company, and was allocated plot No 76/32/575.
35. He also stated that he is a member of the local Catholic Church, St Gregory the Great Catholic Church, an outstation of the larger St Peter and Paul Catholic Parish in Kiambu. He became the chairman

of the development committee in 2005. He found the church and the community using the suit land as a community centre. There is a *mabati* structure on the plot. The plot is secured with barbed wire, and trees are planted along the perimeter fence. The larger compound is used by the residents for various sports, wedding receptions, community fundraising and meetings, among other public activities.

36. He stated that he petitioned several government offices for a resolution of the dispute with the plaintiff before the suit was filed in court in vain.

37. In cross-examination, he stated that the suit land belongs to the church in trust for the community. He stated that, based on the minutes of the Kiambu Town Council, he believes the land was allocated to the defendant.

#### **The written submissions**

38. The court has read and considered the written submissions filed by the parties in this suit and will refer to them in this judgment.

#### **Analysis and determination**

39. Having considered the pleadings, the evidence adduced at the hearing, and the written submissions, the key issues falling for determination are;

- a. Whether the suit land was surrendered by the Company to the Commissioner of Lands and what were the terms of the surrender.
- b. Whether the plaintiff acquired any lawful interest in suit land
- c. Whether the defendant was allocated land by the County Council of Kiambu
- d. What orders should the court issue in the circumstances
- e. Who meets the cost of the suit.

**Whether the suit land was surrendered by the Company to the Commissioner of Lands and what were the terms of the surrender.**

40. It is common ground that the suit land traces its roots to land previously owned by white settlers, measuring around 600 acres, and that it was owned by Thindigua Coffee Estates. In the 1970s, former coffee estate workers formed Thindigua Company Limited and bought the estate. Following the acquisition, the company pursued the subdivision of the land to settle its members.

41. Regulation 11 of the Development and Use of Land (planning) Regulations 1961 under the Land Planning Act, Chapter 303 Laws of Kenya (now repealed) provided as follows:

(1). Every person requiring consent for development shall make application to the interim planning authority for the area in which the land concerned is situated or where no such authority exists for the area, to the Central Authority in such form and such manner as may be prescribed and shall include such plans and particulars as are necessary to indicate the intention of the applicant.

(2) In particular such application shall show the use and density proposed and the land which the applicant intends to surrender for the purposes of -

(a) principal and secondary means of access to any subdivisions within the area included in the application and to adjoining land, and

(b) public purposes consequent upon the proposed development.

(3) For the purpose of this regulation "public purpose" means any non-profit-making purpose which may be declared by the Minister to be a public purpose and includes -

(a) educational, medical and religious purposes;

(b) public open spaces and car parks;

(c) Government and local government purposes."

42. Regulation 16 of the Regulations provided as follows:

(1)(1) Conditions imposed in granting consent to a planning application may require the doing of things, or may require that things shall not be done in relation to land or buildings

or any part thereof, or may be of such other character as the Central Authority or interim planning authority, as the case may be, may think proper, and the Central Authority or the interim planning authority, as the case may be, may require the applicant to enter into an undertaking in such form as may be prescribed, to observe the conditions imposed and may require the applicant (except in the case of unalienated Government land) to furnish security, whether by bond or otherwise, in such sum as the Central Authority or the interim planning authority, as the case may be, may think fit, for the due observance of the conditions.

(2) Where in the opinion of the Central Authority or the interim planning authority, as the case may be, insufficient land is surrendered in the application for the purposes specified under regulation 11 (2) of these Regulations or such land is, for any reason, unsatisfactory, the authority may disapprove the application or may inform the applicant that the application will be approved if additional land or satisfactory land, as the case may be, is surrendered:

Provided that -

(i) the authority shall not request the surrender of additional land for public purposes if, having regard to the nature and amount of the development proposed in the application, the land surrendered for such purposes represents an appropriate contribution of the total land required for public purposes to serve the area as a whole;

(ii) the authority shall not disapprove an application under this paragraph where the owner surrenders an area of land for public purposes equal to 20 per cent or more of the area of land included in the application;

(iii) land surrendered for the public purposes specified under regulation 11 (2) of these Regulations shall be freely surrendered to the Government and subject to the approval of the Minister the land surrendered shall be made available

for public purposes related to the area generally, as and when required;

43. Under regulation 11(3) aforesaid Development and Use of Land (planning) Regulations of 1961 (hereinafter referred to only as “the Regulations”), “public purposes” is defined as “any non-profit making purpose” and includes educational, medical and religious purposes; public open spaces and car parks; and Government and local government purposes.
44. Proviso (iii) to Regulation 16(2) of the Regulations made it mandatory for land surrendered for public purposes to be surrendered to the Government free of charge and subject to the approval of the Minister the land could be made available for public purposes related to the area where it was situated.
45. It is commonly acknowledged that upon acquisition of the land the company commissioned DW1 to carry out the subdivision of the land for purposes of allocating to its members. DW1 led the evidence and confirmed that he prepared the subdivision plans, obtained the approvals, and finally prepared the deed plans for the subdivisions, handing them over to the Company.
46. James Kamwere, the surveyor who conducted the survey, took the court through the process of obtaining the subdivision approvals and led unchallenged evidence that one of the conditions for subdivision was the surrender of portions of the land for the road and public utilities to the Government free of charge. DW3 informed the court that he and the Plaintiff were present at one of the Annual General meetings when the surveyor briefed the members, and that the members approved the subdivision alongside the conditions. DW3 produced letters dated 15/5/91 and 21/6/1982, in which the Commissioner of Lands stated the terms of the surrender. The lands were to be surrendered to the Kiambu Town Council free of charge to hold for public use. The letter dated 26/11/1991 produced by DW2 stated that all public purposes plots were to be surrendered to the Government free of charge.

47. In addition, DW2 also produced the letter dated 27/5/1994 addressed to Thindigua Company by the Commissioner of Lands giving the final approval.

48. This was confirmed by the said council vide the letter dated 30/12/1996, indicating the various public utility purposes that the lands were surrendered for, and one of them being LR 76/32/7, being for a community centre.

49. The Plaintiff led evidence that he had been a shareholder of the Company since the 1970s and was aware of and familiar with the Company's affairs, including the subdivisions of the land. PW1 admitted as much when he stated that;

“ I am aware that some portions of the land were surrendered to the Government for public use.”

50. Arising from the above, the court concludes that the land was surrendered to the Government to hold it in trust for the members of Thindigua Company Limited for public purposes. That being the case, the surrendered lands did not form part of Government land. This land was contributed by the members of the company to be set aside for their common use and placed in the hands of the Government to hold under the common law doctrine of public trust. It was therefore to be held under special fiduciary arrangements.

51. In the new constitutional architecture, public land is defined in Art 62 of the Constitution as ;

“Public land. 62. (1) Public land is— (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; (c) land transferred to the State by way of sale, reversion or surrender; (d) land in respect of which no individual or community ownership can be established by any legal process; (e) land in respect of which no heir can be identified by any legal process; (f) all minerals and mineral oils as defined by law; (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government

game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; (h) all roads and thoroughfares provided for by an Act of Parliament; (i) all rivers, lakes and other water bodies as defined by an Act of Parliament; Constitution of Kenya, 2010 (j) the territorial sea, the exclusive economic zone and the sea bed; (k) the continental shelf; (l) all land between the high and low water marks; (m) any land not classified as private or community land under this Constitution; and (n) any other land declared to be public land by an Act of Parliament— (i) in force at the effective date; or (ii) enacted after the effective date. (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under— (a) clause (1) (a), (c), (d) or (e); and (b) clause (1) (b), other than land held, used or occupied by a national State organ. (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use”

52. It is further decreed that land held for public purposes may vest in the county Government to be held in trust for the people resident in the county, and shall be administered by the National Land Commission in certain instances provided for in the supreme law.
53. Under Art 60 of the said Constitution, land should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, in accordance with the principles set out therein. I have already held that the land was owned by the members of the Company who contributed for purposes of public utility for their enjoyment and use. This action accorded with the principles of land management set out in the Constitution.
54. The court finds that the suit land was surrendered to the Government to hold in trust for the members of the Company.

## **Whether the plaintiff acquired any lawful interest in suit land**

55. The principles underpinning the standard of proof in civil cases is on a balance of probability. It is now settled that he who alleges must prove. Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya provide as follows: -

“107. Whoever desires any Court to give judgment as to any legal right or liability dependent on facts which he asserts must prove that those facts exist.”

109. 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 proof of the fact shall lie on any particular person.”

56. The burden, therefore, lies with the Plaintiff in this case to prove ownership of the land. The Defendant, on the other hand, contends that the Plaintiff acquired the land through fraud, namely by colluding with officials of the Lands Office to illegally acquire land earmarked for public use as a community centre.

57. In the case of *Munyu Maina vs. Hiram Gathiha Maina* (2013)eKLR pronounced itself as thus;

“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 challenged 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

58. The court is being called upon to determine which of the Plaintiff and the Defendant is the rightful owner of the land. It is therefore incumbent on both the Plaintiff and the Defendant to prove their claims to the suit land.

59. It is the Plaintiff's case that he acquired land through purchase from the previous owners of the title. He annexed a sale agreement

dated 30/11/2005, a transfer dated 19/12/2005, and a title registered in his name on 29/12/2005.

60. DW1 led evidence that the survey plan for LR 22404 was superimposed on LR No 76/73/7 with a view to illegally alienating the land surrendered by the company. The court notes that the deed plan annexed to the title bears the original No 76/73/7, which was the land surrendered by the company to the Commissioner of Lands. To that extent, therefore, the court determines that the land purchased by the Plaintiff is the same land that had been surrendered to the Government to hold in trust for the members of the company for their common amenities. In particular, the public user was a community centre.
61. Evidence placed before the court by the Defendant shows that P K Tanui and others applied for the allocation of NBI LR NO 76/73/3, LR NO 76/73/6 and LR NO 76/73/7 on 29/5/1995. The lands were described as residential and stated to be situated in Nairobi. The plans filed by DW1 before the court show that the plots comprised the company's properties surrendered for common utilities and that they are situated in Kiambu. The applicants' act of situating the land in Nairobi was part of a fraudulent scheme to alienate public utility lands held in trust for the company's members in a disguised manner.
62. The Plaintiff led evidence that the Vendors who sold the land to him acquired a first title under the Registration of Lands Act and therefore the title was indefeasible. I note the title is a grant meaning that the root of the title is traceable to an allocation of the land by the Commissioner of Lands.
63. Under the old regime of land law and in particular Section 3 of the GLA the President of the Republic Kenya had power to inter alia:-
- a. "(a)\* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;
64. The Act specifically delineated what land would be disposed of by way of a grant. It had to be unalienated Government land.

65. I have already determined that the suit land was part of the land contributed by the shareholders of the Company and surrendered to the Commissioner to hold under the doctrine of public trust for the purposes of common utilities for their peaceful use and enjoyment. The land was held in trust for the benefit of the company's members. The land having not been unalienated government land, therefore, the Commissioner of Lands had no power whatsoever to allocate the land to the persons named in the title.
66. DW3 presented evidence indicating that the original allottees were employees of the Ministry of Lands. Only they would have possessed the knowledge that this land had been surrendered to the Commissioner of Lands and could have exploited it. Through deception, they facilitated the alienation of the land to themselves. The court observes that these four individuals were not parties to the suit. If the allegations are substantiated, this conduct parallels an abuse of office by persons entrusted with deed plans for public benefit. Such actions would constitute illegal conversion of land into private ownership.
67. DW1 presented undisputed evidence indicating that the property's use was falsely represented as residential, as part of a corrupt scheme to unlawfully dislodge the title from the company. It is noteworthy that the Plaintiff failed to submit any evidence to the court supporting a change of use from a community centre to residential. Furthermore, it is observed that the title indicates the land is intended for educational purposes. The manner in which the land's use transitioned from residential to educational remains unexplained, particularly in the absence of any approval for a change of user under the Physical Planning Act, at the time.
68. The Supreme Court of Kenya had the opportunity to analyse the procedure of allocation, survey and issuance of title arising from an allotment by the Commissioner in the case of Dina Management and stated as follows;

“ In the case of Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows: “...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

69. As part of demonstrating a clean root of title, it was expected that the plaintiff would have demonstrated that the right or interest granted to the vendors, the basis of his title, was valid; accompanied by a letter of allotment and a PDP; acceptance letter; payment of stamp duty premium.

70. It is the defendant's case that the Plaintiff acquired the title through fraud. The Black's Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his

right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another

71. In the case of R.G. Patel v. Lalji Makanji(1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

72. Similarly, in the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

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

73. DW2, DW3 and DW4 were all in agreement that the Plaintiff was a shareholder of the company and attended meetings in which the subdivision of the land was approved. I have already held elsewhere in this judgement that the Plaintiff was aware

of the circumstances of the land but went ahead and knowingly acquired the same fraudulently.

74. On the issue of the indefeasibility of title, the court is not persuaded that the Plaintiff demonstrated that he acquired a clean title and that the acquisition complied with the law.

75. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

76. The right to property is safeguarded under the provisions of Article 40 of the Constitution, which states, inter alia, that Parliament shall not enact any legislation that permits the state or any individual to arbitrarily deprive a person of property of any kind, interest, or right over any property. However, this protection does not extend to property determined to have been unlawfully acquired. Reference is made to the Provisions of Article 40(6) of the Constitution which states as follows;

“The rights under this Article do not extend to any property that has been unlawfully acquired.”

77. Section 26 of the Land Registration Act which mirrors to a large extent the provisions of Section 143 of the now repealed Registration of Land Act [RLA] provides as follows;

“(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”.

78. I have found that the original allottees / vendors acquired no title/interest in the suit land and therefore no valid title/interest was passed to the Plaintiff. Resultantly he acquired nothing. I have said enough to show that the Plaintiff did not acquire a valid title in the land. I determine the issue in the negative.

**Whether the defendant was allocated land by the County Council of Kiambu**

79. The defendant has contended that it was allocated the suit land by the KIAMBU County Council. In 1997, the local member for Technology Ward in Kiambu County, in writing, requested that the Town Planning Committee consider allocating the suit land earmarked for the community centre to the defendant.

80. The matter was discussed in the committee in its meeting held on 24/10/1996 where it was resolved that

“ That a letter be written to the Catholic Church Thindigua to explain how they were going to utilise the plot if allocated to construct a community centre and how they were going to involve the public in developing and using it later”

81. It is not clear whether the letter was written to the defendant and what the answer was save to state that no evidence was placed before the court to support any allocation of land to the Defendant.

82. It is important to note that the defendant is a private entity, and it is therefore unclear how land belonging to the company's members could be allocated to it. In any event, the land did not belong to the County or Council of Kiambu and therefore had no capacity to

allocate the land set aside for public amenities to the defendant. This must have been the basis for the Town Planning Committee's apprehension. There was no guarantee that, once the defendant was allocated the land, it would not lose its public utility and become private property belonging to the defendant. In any event, there is a difference between the Catholic Church, which is a place of worship for those who profess the Catholic faith and teachings, and the defendant, which is for all practical purposes a private entity.

83. On this issue, I determine that the defendant failed to lay cogent evidence that the land was allocated to it. The defendant has not proved its counterclaim, and the same for is dismissal.

**What orders should the court issue in the circumstances**

84. Having determined that the suit land comprises land that was surrendered for public purposes for the residents of the Thindigua area in Kiambu, neither the Plaintiff nor the defendant has proven any valid claims to the land.

85. The title held by the Plaintiff is therefore revoked pursuant to the provisions of section 80 of the Land Registration Act, as it was acquired unlawfully and illegally, with the Plaintiff being aware and a party to the illegal acquisition. The suit land is consequently reverted to the members of the company for use as a public utility and community centre. Unchallenged evidence presented by the defendant indicated that the community structures were constructed with funds raised by the community. Therefore, it would be illegal to alienate land that the community has contributed to itself for their collective enjoyment and benefit to a third party without their approval.

**Final orders for disposal**

86. In the end, the following orders are mete and just;

- a. The Plaintiff's case is unmerited. It is dismissed
- b. The defendant's claims in the counterclaim are unmerited. It is dismissed

- c. It is hereby declared that the title in the name of the Plaintiff was obtained through fraud and illegality and therefore it is declared illegal, null, and void.
- d. Consequently, the title IR No 71847 comprised in L R No 22404 measuring 0.5950 ha situate in Kiambu Municipality in Kiambu County be and is hereby cancelled and revoked.
- e. It is hereby declared that LR No 22404, formerly LR No 76/73/7, be and is hereby declared a public utility land/community centre for the benefit and use of the members of the Thindigua Company Limited.
- f. I order that the Chief Land Register do hereby register LR No 76/73/7 in the name of the Kiambu County Government as a public utility land/Community Centre to be held in trust for the members and residents of the Thindigua area in Kiambu County.
- g. The Director of Survey is hereby ordered to reinstate the registration of Deed Plan No 113706 or such other number for Land Reference No 76/73/7 for the suit land.
- h. It is hereby ordered that the deed Plan No 207788 dated 21/8/1996 for LR No 22404 be and is hereby cancelled and revoked.
- i. Since both parties have lost their claims, I order each party to bear their own costs

87. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MARCH 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**  
**JUDGE**

**Delivered Online in the Presence of:**

1. Mr Kangata present for the Plaintiff
2. Ms Small HB for Mr Wanyonyi for the Defendant
3. CA- Ms. Yvette Njoroge

ORIGINAL FILE COPY