

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. 339 OF 2014

DESTERIUS SHITSAMA MULAMA

(Suing as the legal representative of the late

LAWRENCE MULAMA ITOLONDO).....
PLAINTIFF

VERSUS

THE CHAIRPERSON AND THE SECRETARY,

BOARD OF MANAGEMENT AMALEMBA PRIMARY

SCHOOL (Both being sued on behalf of the School

Committee, Amalemba Primary School).....1ST
DEFENDANT

BENSON K. MBAISI T/A LUNAO

ENTERPRISES AND

BUILDING CONTRACTORS.....2ND
DEFENDANT

THE HONORABLE ATTORNEY GENERAL

(Being sued on behalf of the Principal

Secretary, Ministry of Housing).....3RD
DEFENDANT

JUDGMENT

Introduction

1. Lawrence Mulama Itolondo (now deceased), instituted this suit vide an amended plaint dated 29th May 2019. He pleaded that he was the registered proprietor of a leasehold interest comprised in L.R. No. KAKAMEGA/TOWN BLOCK IV/467 (suit property), for a term of ninety-nine (99) years from the year 1992. That on or about 25th August 2010, the 1st and 3rd defendants, without any colour of right and without his consent, instructed the 2nd defendant herein to trespass onto the said parcel of land and commence construction of a perimeter wall around the entire property.
2. The plaintiff contended that the said construction works were being undertaken by the 2nd defendant on behalf of the 1st defendant, who claimed that the suit property formed part of an unregistered parcel of land used as the compound of Amalemba Primary School. That the defendants' actions amounted to trespass since no consent had been sought or obtained from him as the registered proprietor of the suit property to justify their entry onto the land and the construction of the perimeter wall

thereon. It was his position that the defendants had no lawful claim or entitlement to the suit property.

3. Consequently, the plaintiff sought the following orders against the defendants:

- a. An order of permanent injunction restraining them, their agents, servants or anybody claiming through them from trespassing, encroaching, continuing to construct a perimeter wall or dealing in any way whatsoever with L.R. KAKAMEGA/TOWN BLOCK IV/467.**
- b. Demolition of a perimeter wall constructed around the parcel of land by the 2nd defendant on behalf of the 1st defendant.**
- c. A declaration that L.R. KAKAMEGA/TOWN BLOCK IV/467 belongs to the plaintiff.**
- d. An order of eviction evicting the 1st defendant by themselves, agents, servants or anybody claiming through them from L.R NO. Kakamega/Town /Block IV/467.**
- e. Costs of the suit and interest at court rates.**
- f. Any other relief this court deems fit and just to grant.**

4. In response to the plaint, the 1st defendant filed an amended statement of defence dated 11th November 2020 wherein it stated that it has been in open, peaceful and continuous occupation of the school land, including L.R. No. KAKAMEGA/TOWN BLOCK IV/467 since 1989, to the exclusion of the plaintiff, who it contended has never utilized the same. It further stated that the school land is extensively developed and that the developments complained of were undertaken by the Government through the Ministry of Housing under a Slum Upgrading Project.
5. Further that the perimeter wall around the suit property was constructed by the Ministry of Housing and that a storeyed building comprising classrooms, administrative offices and sanitation facilities was also constructed under the said project at a cost of Kshs. 34,540,935/-, funded by an international donor, and which has benefitted over one thousand pupils.
6. The 3rd defendant also filed a statement of defence dated 4th March 2022 and stated that the suit land, Kakamega/Town Block IV/467, was originally alienated government land that had never been surrendered to the government for purposes

of allocation to the plaintiff or any other person. Further, that the suit filed by the plaintiff, was premature, incompetent, and brought without statutory notice under the Government Proceedings Act, which requires 30 days' notice before instituting a suit.

7. Lawrence Mulama Itolondo, the original plaintiff herein passed on before the suit was heard and was substituted by Desterius Shitsama Mulama the legal representative of his estate.
8. The suit proceeded to hearing by way of *viva voce* evidence. The plaintiff and the defendants each called one witness in support of their respective cases.

Plaintiffs' evidence.

9. PW1 was Desterius Shitsama Mulama, suing on behalf of Lawrence Mulama, his deceased father who was the initial plaintiff. He adopted his witness statement dated 10th June 2024 as his evidence in chief and produced documents contained in the list of documents dated 25th October 2021, initially filed in court by the deceased. His evidence was that the suit property, L.R. Kakamega Municipality Block

IV/467, was lawfully allocated and registered in his late father's name on 7th May 1993, and Certificate of Lease issued.

10. That at the time of acquisition, the plot had old buildings which his father demolished, leaving two structures for rental purposes in preparation for construction of a petrol station. That after obtaining the lease, his father had entered into a long-term arrangement with AGIP Kenya Ltd for the construction and operation of the said petrol station. That the suit property borders Amalemba Primary School.

11. The witness further informed court that on 25th August 2010, Amalemba Primary School, through its agents, commenced construction of a perimeter wall around the school, which encroached onto his late father's land, including the portion bordering the Kakamega-Kisumu road. That this prompted his father to lodge a formal complaint with the Municipal Council of Kakamega, which responded vide a letter dated 7th September 2010.

12. He produced application letter dated 20th July 1992; allotment letter; payment receipt; lease instrument;

certificate of lease; official search; Lease agreement with Agip Kenya; letter of complaint by Amalemba Primary School; Minutes of meeting by the District Commissioner; letter by the Clerk to the County Council of Kakamega; letter by commissioner of lands; complaint letter by the plaintiff to Municipal Council of Kakamega; Minutes; letter by clerk to Council; several correspondence and map.

13. On cross-examination, PW1 admitted that his father acquired the property in 1993, while the school was established earlier in 1989. He acknowledged a letter dated 29th July 1993 containing a complaint that his father had demolished classrooms and sealed off part of the school land. While he maintained his father fenced the land in 1993 and remained in possession until 2010, he stated that his father applied for the allocation in 1992 while serving as the Chairman of the Kakamega County Council.

14. He further admitted that the Letter of Allotment dated 29th September 1992 required payment within 30 days, yet the receipt produced was dated November 1992. He confirmed that he did not have a resolution by the County Council of Kakamega allowing the Commissioner of lands to

allocate the plaintiff the suit property. That the plaintiff was not allocated the suit property through public auction. This marked the close of the plaintiff's case.

Defence evidence

15. DW1, Grace Barasa, the Head Teacher and Secretary to the Board of Management of Amalemba Primary School, testified for the 1st defendant. She adopted her statement dated 11th July 2018 as her evidence in chief and produced documents filed therewith. It was her testimony that Amalemba Primary School was established in 1989 and has since maintained open, peaceful, and continuous occupation of the school land, including the parcel known as Kakamega/Town Block IV/467, entirely excluding the Plaintiff, who has never utilized it.

16. It was her evidence that the suit land was illegally registered to Lawrence Mulama Itolondo on 19th December 1995, while the school was already in occupation. That the school land had undergone extensive development under a government slum upgrading project by the Ministry of Housing, including construction of a perimeter wall,

classrooms, administrative offices, and sanitation facilities, funded by an international donor at a cost of Kshs. 34,540,935/-, benefiting over 1,000 pupils. That the 2nd defendant acted only as a contractor under Ministry of Housing instruction. That the 1st defendant was wrongly sued herein since the school had no role in the government project.

17. She produced certificate of practical completion from the Municipal Council of Kakamega to the Ministry of Housing; letter from the Permanent secretary Ministry of Housing to the 2nd defendant; letter by the 2nd defendant to the permanent secretary ministry of housing; contract document in respect of Slum upgrading Programme; tender document; performance bond; letter by the school to the Division officer of; two letters by the District Commissioner to the Clerk to County Council of Kakamega; letter by the District officer to the District Commissioner and letter from the School to the Provincial Commissioner.

18. On cross-examination, DW1 stated that when she joined the school in 2018, she found the legal dispute already active in the school records. She asserted that the school

records do not recognize the plaintiff's father as ever having been the owner of the suit property, which she claimed was originally land belonging to the Municipal Council before being granted to the school. She noted that the plaintiff's claim of a separate plot for a petrol station was inconsistent with the physical reality on the ground, as there is no boundary separating the suit property from the rest of the school compound.

19. She maintained that the slum upgrade development on the suit property began in 2010. That the school had no ownership documents but were in occupation of the suit property. That the School did not construct the perimeter wall. That the perimeter wall was constructed by the Ministry of Housing. That marked the close of the defence case.

20. Parties were directed to file written submissions in support of their respective cases. On record are submissions dated 25th September 2025 filed by the plaintiff and submissions dated 24th October 2025 filed by the 3rd defendant; both of which this court has carefully considered.

Plaintiff's submissions.

21. Counsel for the plaintiff isolated and submitted on five key issues for determination. On whether the plaintiff is the lawful registered proprietor of the suit land with indefeasible title, counsel submitted that the plaintiff held a valid Certificate of Lease issued on 7th May 1993 under the repealed Registered Land Act for a term of ninety-nine years commencing on 1st October 1992 in respect of the suit land. Counsel argued that the certificate of title constituted conclusive evidence of proprietorship pursuant to **Section 26 of the Land Registration Act** and that the same had not been challenged on any of the statutory grounds such as fraud, misrepresentation, illegality or acquisition through a corrupt scheme. It was further submitted that the plaintiff also produced supporting documents including the application for allocation dated 20th July 1992, the letter of allotment dated 24th September 1992, payment receipts dated 25th November 1992 and an official search dated 30th July 2014 confirming that the suit property was registered in the plaintiff's name without encumbrances.

22. On whether the defendants' actions amounted to trespass and unlawful encroachment, counsel submitted that the 1st defendant, through the 2nd defendant, entered the suit property around 25th August 2010 and commenced construction of a perimeter wall without the plaintiff's consent or any lawful authority. Counsel argued that such actions constituted trespass under common law and the **Section 3 of the Trespass Act (Cap 2014)** and that documentary evidence including correspondence with the Municipal Council of Kakamega and minutes of relevant meetings demonstrated that the development complained of was illegal.

23. On whether the allocation of the suit land to the plaintiff was lawful, counsel submitted that at the material time the land formed part of Trust land vested in the then Kakamega County Council under the **Trust Land Act (Cap 288)**. Counsel argued that the commissioner of lands had the authority, with the concurrence of the local authority, to allocate such land for private purposes.

24. It was submitted for the plaintiff that the plaintiff's application for allocation, subsequent letter of allotment and

payment of the requisite fees demonstrated compliance with the applicable legal framework. Counsel further contended that the allocation to the plaintiff predated the school's complaints and that a separate parcel of land was later reserved for the school as confirmed in correspondence from the commissioner of lands dated 13th August 1996.

25. Counsel contended for the plaintiff that the process of allocation of the suit property to the plaintiff complied with **section 7 of the Trust Land Act**. Reliance was placed on the case of **Jesse Mugo Mbuti v Munya Osman & Another Nairobi ELC CASE NO E004 OF 2022**.

26. On the sustainability of the 1st defendant's claim to the suit property, counsel submitted that the school's claim was based merely on occupation since 1989 and that occupation alone could not defeat the rights of a registered proprietor under **Section 25 of the Land Registration Act**. Counsel further argued that the documents relied upon by the defendants acknowledged that the school did not hold a title to the suit property and that the government had subsequently reserved a separate parcel of land for the school which was distinct from the plaintiff's property.

27. Lastly, on whether the plaintiff was entitled to the reliefs sought, counsel submitted positively, stating that the evidence placed before the court established the plaintiff's lawful ownership of the suit property and the defendants' unlawful interference therewith.

3rd defendant's submissions.

28. Counsel for the 3rd defendant submitted that the suit land known as KAKAMEGA/TOWN BLOCK IV/467 was Trust land vested in the then Kakamega County Council under the provisions of the Trust Land Act. Counsel argued that the documentary evidence produced by the plaintiff, including the letter of allotment and lease, demonstrated that the land was originally under the jurisdiction of the Municipal Council and therefore subject to the legal procedures governing alienation of Trust land.

29. On the legality of the plaintiff's title, counsel submitted that the process leading to the issuance of the title was irregular and did not comply with the legal procedure for alienation of public land. It was argued that the plaintiff failed to demonstrate that the Municipal Council had passed

a resolution or issued any formal communication advising the commissioner of lands that the suit land was available for allocation.

30. Counsel further contended that the letter of allotment produced by the plaintiff was not supported by a Part Development Plan and that there was no evidence of gazettelement or public auction as required under the applicable legal framework. Reliance was placed on the case of **Ali Mihamed Dagane (Granted Power of Attorney by Abdulahi Muhumed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v Hakar Abshir & 3 Others [2021] e KLR.**

31. Counsel argued that the plaintiff had not complied with the conditions contained in the letter of allotment, particularly the requirement that acceptance and payment be made within thirty days, noting that the receipt produced by the plaintiff showed payment outside the stipulated period. It was therefore argued that the allotment lapsed and the subsequent title issued to the plaintiff was irregular.

32. On whether the plaintiff holds a valid title, counsel relied on **Section 26(1) of the Land Registration Act** and cited **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** to submit that although a certificate of title is *prima facie* evidence of ownership, it can be challenged where it is shown to have been acquired illegally, unprocedurally or through a corrupt scheme. Counsel therefore urged the court to find that the plaintiff's title was irregularly obtained and incapable of conferring any lawful proprietary interest.

Analysis and determination.

33. The court has carefully considered the pleadings, evidence and rival submissions. Three issues arise for the court's determination, namely;

a) Whether the plaintiff's acquisition of the suit property was unlawful.

b) Whether the defendants have trespassed on the suit property; and

c) Whether the plaintiff deserves the orders sought.

34. It is not in dispute that the suit property is registered in the name of the plaintiff Lawrence Mulama Itolondo. The official search certificate issued to the plaintiff dated 30th July 2014 shows that the plaintiff was registered as proprietor of the suit property on 7th May 1993.

35. Article 40 (6) of the Constitution of Kenya protects the right to own and acquire property in respect only to property that is lawfully acquired.

36. Section 26 of the Land Registration Act provide for indefeasibility of title as follows;

“Certificate of title to be held as conclusive evidence of proprietorship

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

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

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

37. Therefore, registration vests in a proprietor of land, indefeasible and absolute ownership rights, unless there is proof that the acquisition of title was by fraud, misrepresentation, want of procedure, illegality or corruption.

38. In the case of **Dina Management Ltd v County Government of Mombasa & 5 Others [2023] e KLR** the Supreme Court of Kenya held that for a title to be held to be valid, it ought to arise from a process that is lawful and procedural and a title obtained unlawfully or unprocedurally is invalid, even if the registered proprietor obtained it in good faith.

39. Similarly, in **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

40. In the instant case, the defendants challenged the process of acquisition of title by the plaintiff, arguing that lawful process was not followed. Before registration of the plaintiff’s interest in the suit property as lessee in 1993, the same was held by the County Council of Kakamega. Therefore, at the point of acquisition by the plaintiff, the suit property was Trust land held by the County Council of Kakamega in Trust for the community. Hence, for the said allocation to vest lawful ownership in the plaintiff, it ought to have complied with the law in force in 1993 which was provided for in the repealed Constitution of Kenya and the repealed Trust Land Act Cap 288 Laws of Kenya.

41. The law on allocation of Trust land was stated in sections 115 and 117 of the repealed Constitution of Kenya.

42. Section 115 (1) and (2) of the repealed Constitution vested Trust land in County Councils and provided as follows;

(1) “All Trust land shall vest in the County Council within whose area of jurisdiction it is situated.

Provided that there shall not vest in any county council by virtue of this section-

(i) any body of water that immediately before 12th December 1964 was vested in any person or authority in right of the Government of Kenya; or

(j) any mineral oils.

(2) Each County Council shall hold the Trust land vested in it for the benefit of persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.

Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this section so far as it is repugnant to any written law.”

43. Section 117 (1) of the repealed Constitution provided for setting apart of Trust land by County Councils as follows;

- (1) “Subject to this section, an Act of parliament may empower a County Council to set apart an area of Trust land vested in that County Council for the use and occupation; -**
- (a) By a public body or authority for public purpose or**
- (b) For the purpose of prospecting for or extraction of minerals or mineral oils; or**
- (c) By any person or persons for a purpose which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that County Council, either by the reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof.**

And the Act of parliament may prescribe the manner in which and conditions subject to which such setting apart shall be effected.

(2) where a County Council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

(3) Where a County Council has set apart an area of land in pursuance of this section, it may subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.”

44. The process of setting apart Trust land was provided for in section 13 of the repealed Trust Land Act as follows;

“13. Setting apart by Council

(1) In pursuance of section 117(1) of the Constitution, a Council may set apart an area of Trust land vested in it for use and occupation—

(a) by any public body or authority for public purposes; or

(b) for the purpose of the extraction of minerals or mineral oils; or

(c) by any person or persons for purposes which in the opinion of the Council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the Council, either by reason of the use to which the area set apart is to be put or by reason of the [Rev. 2012]

(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

(a) the Council shall notify the chairman of the relative Divisional Land Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the Council of the day and time of the meeting;

(b) the Council shall bring the proposal to set apart the land to the notice of the people

of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Land Board at which the proposal is to be considered;

(c) the Divisional Land Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the Council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) the recommendation of the Divisional Land Board shall be considered by the Council, and the proposal to set apart the land shall not be taken to have been approved by the Council except by a resolution passed by a majority of all the members of the Council:

Provided that where the setting apart is not recommended by the Divisional Land Board concerned, the resolution shall require to be passed by three-quarters of all the members of the Council.

(3) Where the Council approves a proposal to set apart land in accordance with subsection (2)(d) of this section, the

Council shall cause a notice of the setting apart to be published in the Gazette.”

45. Therefore, before Trust land was set apart for use by an individual like in the instant matter, the procedure required that the County Council notifies the chairman of the Divisional Land Board of the proposal to set apart the land; the chairman was to fix a date within three months for consideration of the proposal; the proposal to set apart land had to be brought to the notice of the community and the date of such consideration by the board be notified to the people of the relevant area; the Divisional Land board was obligated to hear representations from the people present and memoranda presented, then make recommendations which are considered by Council, and the proposal to set apart Trust land could only be approved by a majority of the full Council.

46. The above procedure was restated in the case of **Bahola Mkalindi v Michael Seth Kaseme and 2 Others Malindi ELC Case No. 168 of 2012**, where the court emphasized that the law regulating dealings in Trust land was different

from the legal regime regulating Government land particularly under the repealed Constitution.

47. In the case of **Gitson Energy Limited v Francis**

Chachu Ganya & 6 Others [2017] eKLR the Court of

Appeal held, inter alia, that:

“The elaborate procedure set out at section 13 of the Trust Land Act for setting apart land required a Council to notify the relevant Divisional Land Board of the proposal to set apart land. That chairman was required to fix a day, not less than one and not more than three months from the date of notification when the Board would meet to consider the proposal and he was also to notify the Council of the day and time of the meeting. Then would follow an important exercise on public participation - it was the duty of the Council to notify the public of the day and time of the Divisional Land Board meeting at which the proposal to set apart land would be considered. The local residents had a right to attend that meeting and fully participate in it, and the Board was required to record in writing the representations of all persons concerned who were present at the meeting and thereafter forward its recommendations together with a

record of the representations made in the meeting.”

48. Section 53 of the repealed Trust Land Act granted the Commissioner of Lands the power to administer Trust land and stated as follows;

“53. Commissioner of Lands to administer Trust land

The Commissioner of Lands shall administer the Trust land of each Council as agent for the Council, and for that purpose may—

- (d) exercise on behalf of the Council, personally or by a public officer, any of the powers conferred by this Act on the Council, other than that conferred by section 13(2)(d) of this Act; and**
- (e) execute on behalf of the Council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient:**

Provided that—

- (i) the Commissioner of Lands shall act in compliance with such general or special directions as the Council may give him; and**

(ii) the Minister may, by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular Council, where the Minister is satisfied that the Council has made satisfactory arrangements to administer its Trust land itself."

49. Therefore, before Trust land was administered by the Commissioner of lands or was allocated to an individual by the Commissioner of lands on behalf of the County Council, the procedure specified under section 13 of the Trust Land Act ought first to have been complied with by the County Council. The process of allocation would then be done by the Commissioner of lands in accordance with the law on allocation of public land. In **Nelson Kazungu Chai & 9 Others v Pwani University [2014] e KLR** the Court stated the procedure for allocation of unalienated land 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 unalienated 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 restated in the case of African Line Transport Co. Ltd v Attorney General, Mombasa HCC 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....”

50. In **African Line Transport Company Limited v The Honourable Attorney General Mombasa HCC NO. 276 OF 2003 [2007] e KLR**, the court held that planning comes first then surveying and the letter of allotment ought to be accompanied by a PDP with a definite number which is taken to the department of survey for surveying. Then it is taken to the Director of surveys for authentication and approval before a reference number is issued.

51. In the instant case, there is no evidence that the procedure under section 13 of the Trust Land Act was complied with. There was no evidence that the suit property was set apart for allocation to an individual. There was also no evidence of public participation in the allocation of the suit property to the plaintiff or any evidence that the plaintiff obtained the suit property in an open and transparent manner as required under the Trust Land Act. Besides, no evidence was tendered to show that the Council notified the Chairperson of the Divisional Land Board of the proposal to set apart the suit property, or that the Divisional Land Board considered any such proposal from the Council. Further no evidence was tendered to show that the people

of Kakamega municipality were made aware of any proposal to set apart the suit property for purposes of allocating it to the plaintiff or that the Divisional Land Board recommended to the Council for setting apart the suit property. There was no evidence of a notice in the Gazette for setting apart the suit property.

52. In addition, there is neither evidence of a resolution of the members of the County Council of Kakamega approving a recommendation by the Divisional Land Board to set apart the suit property nor that the Council approved the allocation of the suit property to the plaintiff by the Commissioner of Lands. Besides, no PDP was attached to the allotment letter and no evidence of authenticated and approved survey plans by the Director of surveys was availed.

53. Therefore, it is clear that the allocation of the suit property to the plaintiff was unprocedural and unlawful. Allocation of Trust land could not be based merely on the fact that the allottee had no plot within Kakamega town as alleged by the plaintiff.

54. The County Council having allowed the use of the suit property for purposes of a public school which served the community meant that the suit property was in use by the community and was not available for allocation, hence the allocation of the same to the plaintiff was unlawful.

55. On whether there was trespass by the 1st defendant, Trespass is defined as the unlawful and unauthorized entry into another's property. For trespass to be demonstrated, the person alleging trespass must demonstrate lawful ownership of the property alleged to have been trespassed upon.

56. In the instant matter, as this court has found that the suit property was not lawfully acquired or owned by the plaintiff, it is clear that the 1st defendant did not need the plaintiff's permission to use the suit property and hence no trespass was proved against the 1st defendant. The evidence on record showed that the plaintiff obtained title of the suit property when the 1st defendant was already in occupation. Therefore, no trespass was proved. The plaintiff having failed to demonstrate lawful acquisition, is not entitled to orders sought in the amended plaint.

57. Ultimately, I find and hold that the plaintiff has failed to prove his claim on the required standard. I therefore dismiss the plaintiff's suit with costs to the 1st and 3rd defendants.

58. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 18TH DAY OF MARCH 2026**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Getanda for the plaintiff

Mr. Juma for the 3rd defendant

No appearance for the 1st and 2nd defendants

Court Assistant: Delphine