



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CASE NO. 535 OF 2000**

**CROSS CURRENT INDIGENOUS NETWORK .....PLAINTIFF**

**VERSUS**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> DEFENDANT**

**AFRICAN INLAND CHURCH (KENYA) .....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**1. Introduction and the Pleadings:**

The plaintiff, Cross Current Indigenous Network (CCIN), a Non Government Organization (NGO) registered in Kenya under Section 10 of the **Non-Governmental Organization Co-ordination Act** initiated the present suit vide a plaint dated 4<sup>th</sup> April 2000 filed in court on 5<sup>th</sup> April 2000 which was subsequently amended on 28<sup>th</sup> April 2000. The plaintiff vide the amended plaint claims that it was vide a letter dated 15<sup>th</sup> May 1992 allotted by the 1<sup>st</sup> defendant unsurveyed **Plot No. C Hill Area** measuring 0.18 of a hectare (though letter indicates 0.81Ha) which it accepted and paid the requisite fees. The plaintiff avers that the 1<sup>st</sup> defendant on or about the 15<sup>th</sup> February 1998 unlawfully and fraudulently processed and issued a certificate of title over the suit plot which had following survey become **LR No. 209/11635 (IR 75930)** to the 2<sup>nd</sup> defendant when the allotment of the land to the plaintiff was still subsisting and had not been revoked and/or cancelled.

2. The plaintiff sought judgment against the defendants jointly and severally for:

- a) A declaration that the plaintiff is and continues to be the lawful allottee of Plot LR No. 209/11635 initially Plot No. C Hill Area and that the subsequent registration of the registered owner is null and void.**
- b) A permanent injunction restraining the 2<sup>nd</sup> defendant either by itself, its servants, agents or any of them whatsoever from interfering with, selling, disposing of, transferring and/or in any way dealing with all that piece of land known as LR No. 209/11635.**
- c) A permanent injunction restraining the 2<sup>nd</sup> defendant either by itself, its servants, agents or anyone of them howsoever from interfering with the plaintiff's quiet possession of the said plot.**
- d) An order compelling the 1<sup>st</sup> defendant to register the plaintiff as the owner as lessee of the property LR No. 209/11635.**
- e) Costs of the suit.**

3. The 1<sup>st</sup> defendant, the Commissioner of Lands filed a statement of defence dated 19<sup>th</sup> May 2005 and denied having issued title to Plot No. **209/11635** to the 2<sup>nd</sup> defendant fraudulently. The 1<sup>st</sup> defendant averred that the plaintiff's suit was defective and did not disclose any cause of action against it and prayed for the dismissal of the suit with costs.

4. The 2<sup>nd</sup> defendant, the Africa Inland Church (AIC) filed its defence and counterclaim dated 20<sup>th</sup> April 2000 which was subsequently amended on 17<sup>th</sup> May 2000. The 2<sup>nd</sup> defendant averred that it was the registered proprietor of the leasehold interest in **LR No. 209/11635** Nairobi. The 2<sup>nd</sup> defendant denied that the plaintiff had carried out any developments on the suit property asserting that any developments effected thereon were donor funded and were for the sole purpose of the propagation of the Gospel. The 2<sup>nd</sup> defendant averred that as the registered owner of the suit property its title was indefeasible. The 2<sup>nd</sup> defendant denied that the title was issued to it fraudulently and specifically denied the particulars of fraud set out in paragraph 10 of the plaintiff's plaint.

5. By way of counterclaim the 2<sup>nd</sup> defendant claimed the plaintiff is in possession and occupation of the suit property without its consent and that the possession constitutes trespass. It seeks judgment against the plaintiff in the counterclaim for:-

a) **Possession;**

b) **Damages for trespass;**

c) **Costs;**

d) **Interest on (b) and (c) above at commercial rates.**

6. The trial of this suit has been protracted with interlocutory applications taking up a considerable amount of time. Honourable Justice Ojwang (as he then was) took the evidence of PW1, PW2 and PW3 between 2005 and 2009 although PW2 and PW3 were recalled for cross examination by the counsel for the 2<sup>nd</sup> defendant before me on 26<sup>th</sup> July 2013. The plaintiff's last witness, Sammy Aoko Amolo (PW4) testified before me on 12<sup>th</sup> November 2013. The 1<sup>st</sup> defendant called one witness Gordon Ochieng (DW1) and the 2<sup>nd</sup> defendant also called one witness, Rev. Bishop Silas Yego (DW2) in support of their respective defences. The trial closed on 30<sup>th</sup> October 2015 whereupon the parties were directed to file their final closing submissions. After the parties filed their submissions, the court file was forwarded to me at my current court station, Kisii Environment and Land Court from Environment and Land Court Milimani - Nairobi in September 2017 for purposes of preparing the judgment. It has taken me a considerable period of time to prepare this judgment and I sincerely regret the delay.

#### **7. Evidence by the Parties;**

At the centre of this suit is the ownership of land **parcel LR No. 209/11635** situate within the Upper Hill Area of Nairobi. On the property there are developments in the nature of buildings that are being utilized and/or were intended to be utilized for religious purposes. The plaintiff, a NGO claims to be the rightful owner and hinges its claim on a letter of allotment dated 11<sup>th</sup> May 1992 issued by the Commissioner of Lands in respect of unsurveyed Plot C Hill Area to Cross Current Indigenous Network (PEx4). The 2<sup>nd</sup> defendant for its part claims the property was properly allocated to them after the letter of allotment dated 11<sup>th</sup> May 1992 was withdrawn and/or cancelled by the Commissioner of Lands. The 2<sup>nd</sup> defendant further asserts that they hold the registered title to the suit property and that their right to the property is absolute and indefeasible.

8. PW1, Pastor Boaz Okul Omondi gave lengthy evidence which in the main dealt with the background relating to the relationship he had with Rev. Dr. Richard Bennett and his wife Dorothy Bennett who were foreign based evangelists and/or missionaries who from 1980 were visiting the country regularly on evangelism missions. In the course of PW1's interactions with Dr. Richard Bennett and his wife the idea of starting a bible printing centre in Nairobi was mooted and the Bennetts' offered to use their linkages in the United States of America (USA) notably through Cross Currents International Ministries (CCIM) which were operational in the USA, Canada and the United Kingdom which he could utilize to mobilize funding for such a project. It was on the basis of that PW1 testified that Dr. Richard Bennett recommended that they could establish a local NGO through which the funds raised could be channeled for the agreed purpose. PW1 testified that as there was a governmental freeze relating to registration of NGO's during the period and they were trying to identify a suitable place to set up the Bible Printing Centre they opted to incorporate a not for profit company to pursue their objective and that is how the company "**Cross Current Indigenous Network Ltd**" a company limited by shares got to be registered on 3<sup>rd</sup> December 1991 ("**PEx1**").

9. PW1 in his evidence testified that he was a trained accountant and that in 1972 he was employed by Kesho Publications at Kijabe which was owned by African Inland Church (AIC), the 2<sup>nd</sup> defendant in the instant suit. He further stated that he studied theology and was ordained as a pastor of the AIC but was not employed as a pastor and only served as a freelance preacher and that he preached in different AIC churches. The witness stated as there was no Bible Printing Press in Africa, the cost of Bibles tended to be too expensive because they had to be imported from abroad and the shipment made them expensive. He testified that he shared his concerns with friends and in particular with Dr. and Mrs. Richard Bennett and one Dr. Pawell who was the President of the Bible Society of Kenya who was from America. He stated that they were all excited and thrilled with the idea of establishing a Bible Printing Press locally and following a meeting in 1986 with Dr. Pawell the witness stated he was able to get a scholarship to the USA where he was able to visit various bible publishing companies. He stated though Rev. Bishop Birech, Presiding Bishop AIC was initially reluctant to allow him to go, he permitted him to go on the scholarship and after 7 months he returned and he was appointed the Managing Director of Kesho Publications.

10. After PW1's return to the country he stated, he briefed Dr. Bennett and it is then it was decided to register a local non-profit organization and as there was a moratorium regarding registration of NGO's from the government, "**Cross Current Indigenous Network Ltd**" was registered as a company as per the certificate of incorporation dated 3<sup>rd</sup> December 1991. The witness stated it is this company which was converted into a NGO through registration as such on 25<sup>th</sup> September 1997 as per "**PEx.2**". PW1 stated that he was not a signatory to the original Memorandum of the Articles of Association for the company but was nominated as a director of the company on 6<sup>th</sup> May 1992 and remained a director up to the time of filing the suit (see minutes of formative meeting dated 6<sup>th</sup> May 1992 ("**PEx.3**").

11. The plaintiff (PW1) stated that they applied to be allocated a plot by the government to carry out their project of printing and the distribution of Bibles vide an application dated 2<sup>nd</sup> April 1990 and that they got an allotment letter dated 15<sup>th</sup> May 1992 allocating them "**unsurveyed Plot No. C Hill Area**" measuring 0.81hectares or thereabouts. The letter of allotment ref. **62432/IV/187** was produced as "**PEx.4**". The plaintiff (PW1) stated that they accepted the offer vide a letter dated 18<sup>th</sup> May 1992 and that they paid the requisite allocation fees of kshs. 2,958/= and were issued with an appropriate receipt by the Commissioner of Lands. The plot was subsequently surveyed and a beacon certificate issued. The property was given **LR No. 209/11635** and the plaintiff states they took possession and fenced the property using barbed wire in January 1993. PW1 stated that the plaintiff applied for water and sewerage connections and that he was the one who made the application. Subsequently, he stated they commissioned a planner to prepare building plans for the property which were submitted to the City Council and were approved. PW1 stated that after they obtained approval of the building plans from the City Council, they commenced construction and they completed Phase I which comprised of offices, chapel, library, dining hall and accommodation rooms

which cost approximately kshs.50Million in early 1994. The witness stated the facilities were being used by diverse organizations to train pastors, for meetings and prayers and distributing bibles. He stated that amongst their clients were the AIC, Baptist Church, Pentecostal churches, Anglican Church, Chrisco Church etc and that all the clients including the AIC were paying for the use of the facilities.

12. The witness stated that the bulk of the money for the construction came from donors and that Dr. Bennett was instrumental in mobilizing donations from abroad notably from the Cross Currents International Ministries in United Kingdom (UK), USA and Canada. PW1 further stated that the AIC did not make any contribution towards the construction and only came into the picture in April 2000 when PW1 said they received a letter dated 30<sup>th</sup> March 2000 from the then Assistant Bishop Rev. Silas Yego now the Presiding Bishop AIC church notifying them that the AIC would henceforth take over the management of Cross Current. The witness stated that the letter was delivered by a contingent of police officers in 8 police vehicles. The police informed the witness that the property was in the name of Africa Inland Church (AIC) and they wanted him to immediately vacate. This development apparently prompted PW1 to contact his lawyer who upon undertaking the appropriate due diligence search at the lands office instituted the present proceedings.

13. PW1 testified that the search at the lands office revealed that the AIC had allegedly been allocated unsurveyed Plot **LR No. 11635** vide an allotment letter dated 29<sup>th</sup> October 1997 signed by one F. G Karuri for the Commissioner of Lands. The AIC accepted the offer vide their letter of 29<sup>th</sup> October 1997 and paid the requisite allocation fees (documents listed in plaintiff's bundle as Nos 20(i)-(iii) and included in the bundle). The witness pointed to what he said were discrepancies with the letter of allotment made to AIC stating that the letter was not signed but stamped, the plot was captioned unsurveyed yet it had a LR number. Letter indicated that it cancelled letter ref. **62432/10/187** of 15<sup>th</sup> May 1992 whereas the letter that allocated the plot to the plaintiff was **ref. 62432/IV/187** dated 15<sup>th</sup> May 1992.

14. The witness stated in his evidence that the AIC used fraudulent means to acquire title to the suit property as they knew the property belonged to the plaintiff since they had been holding meetings there and were paying for the facilities as evidenced by payment receipts which were issued to them by the plaintiff. He stated the AIC knew the property had been developed by the plaintiff. The witness denied that the plaintiff, Cross Current Indigenous Network, was a department of AIC and stated that they had no reason to acquire title to land that properly belonged to the plaintiff. The witness stated that the plaintiff was seeking for cancellation of the title issued to the 1<sup>st</sup> defendant in respect of **LR No. 209/11635** and an order of injunction against the defendants restraining the defendants from in any manner interfering with the property.

15. In cross examination, PW1 reiterated that he had known Dr. Bennett together with his wife from 1980 and for 12 years they had been friends and worked together to realize the dream of having a Bible Printing Centre established in Kenya. PW1 outlined the work done by Dr. Bennett and his wife and he affirmed that the Bennetts' were instrumental in assisting them to start the Bible Printing Centre. He agreed that Dr. Bennett raised the money for construction of the centre from donors from abroad although there were also local donors who contributed towards the project. The witness denied he was ever removed from being a director of the plaintiff. He stated he did not accept the sum of kshs.110,000/= on account of his terminal dues but rather utilized the same to carry out activities of the plaintiff.

16. In further cross examination, PW1 stated that Dr. Richard Bennett and William Bommet were the initial directors of Cross Current Indigenous Network Ltd registered on 3<sup>rd</sup> December 1991 and that he (PW1) was invited by Dr. Bennett to become a director as per the Minutes of 6<sup>th</sup> May 1992. PW1 further admitted receiving the letter dated 12<sup>th</sup> February 1997 from Dr. Bennett annexed at page 33 of the 2<sup>nd</sup> defendant's bundle of documents. In the letter Dr. Bennett was expressing his disappointment in the manner PW1 had conducted himself and was serving notification that he (PW1) and his wife and other local persons associated with Cross Currents Indigenous Network Ltd had been removed from the management and operations of Cross Currents Indigenous Network Ltd (CCIN) and that new management had been nominated. PW1 stated that Dr. Bennett had no power to remove him and/or the other directors from being directors of CCIN Ltd. PW1 stated that he duly answered Dr. Bennett's said letter through his lawyers. The witness further stated that they did not abide by the directions of Dr. Bennett as set out in the letter of 12<sup>th</sup> February 1997 but rather continued to run and manage the Bible centre. He said following closure of the bank accounts at Barclays Bank of Kenya Ltd by Dr. Bennett they opened new bank accounts for the company and continued operations. New board members, Daniel Waithaka Mwangi and Timothy Mpaayei were appointed in April 1997 and they consequently became directors of the NGO together with PW1 when the NGO was registered and issued a certificate of registration on 25<sup>th</sup> September 1997. It was the position of PW1 that once the NGO was registered the company which hitherto had been operating ceased operations which were henceforth taken over by the NGO. The witness stated that there was no formal winding up of the company and that no annual returns for the company were being filed with the Registrar of Companies.

17. The witness (PW1) agreed that all the money used to construct the Bible centre came from donors and that the money was channelled through the company CCIN Ltd. PW1 further in cross examination stated that the initial letter of allotment given in 1992 was to the company which later transformed to a NGO. He maintained the letter of allotment issued to AIC in 1997 was not genuine and did not cancel the allotment letter to the company. He said the 1997 allotment for **LR No. 11635** did not refer to the plaintiff's land in Nairobi but to land in Kakamega and that the reference of the earlier allotment letter which was cancelled vide the allotment letter of 1997 was not the one allocated to the plaintiff as the quoted reference number was different from that of the plaintiff's letter. The witness (PW1) admitted he was called for a meeting at AIC Headquarters in June, 1998 where he was questioned regarding matters relating to the land where the plaintiff had carried out the project. The witness further stated that the plaintiff had not obtained title to the suit property by 1998 when the 2<sup>nd</sup> defendant was issued a title to the same land but was insistent that the title by the 2<sup>nd</sup> defendant was fraudulently acquired. The witness stated they had been pursuing the issuance of title but never got issued with one by the 1<sup>st</sup> defendant.

18. The plaintiff called three other witnesses, one, Henry Nteere Mbutura (PW2), Timothy Taki Mpaayei (PW3) and Stanely Aoko Amolo (PW4). PW2 was an Architectural Assistant and it was his evidence that he was engaged in preparing the initial working drawings for the construction on the plot. The witness affirmed that he met Dr. Bennett and his wife together with PW1 who jointly requested him to assist them to obtain approval of the building plans with the city council. He further stated in getting the building plans to be approved, he worked together with a German Volunteer Professional Engineer Architect, a Mr. Gomer who was sourced by Dr. Bennett. The Germany brought some documents and drawings which were modified before being submitted for approval by the City Council. The witness stated that PW1 was their local contact and it was from him they would seek and obtain guidance. He further stated that though the property did not have a title the fact that there was an allotment letter and it was recently surveyed made it possible to seek and obtain approval from the council. The witness evidence was that he was engaged as a technical assistant to oversee the procurement of the necessary approvals and to supervise

the construction on site. He affirmed that he was infact working under Mr. Gomer, the German professional. The witness confirmed that the project was being financed by missionaries from abroad. He stated that PW1 was their local director while Dr. Bennett was the link for the foreign missionaries.

19. PW3 stated he was an Architect and that he was engaged by the plaintiff to perform architectural work in 1994/1995. The plaintiff was then constructing on a plot within Upper Hill Area of Nairobi and there were incomplete buildings that he was tasked to supervise to completion. He stated the plaintiff had approved building plans but had no title to the property save for an allotment letter and beacon certificate denoting the plot had been surveyed. The witness stated that he met the board members of Cross Current Indigenous Network Ltd, namely Daniel Waithaka, Pastor Boaz Omondi (PW1) and Dr. Richard Bennett and they are the ones who gave him the job. The witness explained that he completed the buildings in phase I of the project in 1995. He stated that he was appointed a director of Cross Current Indigenous Network Ltd in 1997, two years after completing the construction and that henceforth he was participating in the board meetings. He stated that Dr. Bennett withdrew from the board of the company which left himself, Boaz Omondi (PW1) and Waithaka as directors. He explained the AIC were using the facilities at the centre and were paying for them and was thus surprised when the AIC later started staking claim of ownership in regard to the property. He stated that all the documents showed that the plaintiff was the owner of the property, only that they had not acquired title to the property. He maintained that the allotment to the AIC and the consequent processing of title could only have been fraudulent. He maintained the plaintiff was the rightful owner of the suit property and not AIC who were issued the title. The witness stated that he was one of the founding officials of the NGO which was registered on 25<sup>th</sup> September 1997. He said he became a director of Cross Currents Indigenous Network Ltd on 18<sup>th</sup> April 1997.

20. PW4 Sammy Aoko Amolo testified that he was employed by the plaintiff in May/June 1997 and that he was running the day to day operations of the Bible centre. He stated he would issue receipts for services rendered by the centre which included use of the centre's facilities for meetings. He stated AIC was a regular user of the facilities and were issued with receipts for payment for services every time they used the centre. He referred to receipts issued to AIC on 16<sup>th</sup> December 1997, 23<sup>rd</sup> January 1998, 25<sup>th</sup> February 1998 and 5<sup>th</sup> March 1998 for various services rendered to them by the plaintiff. The witness stated that AIC was being treated just like any other customers at the centre and that it was only in the year 2000 that they started claiming ownership of the land and buildings on the suit land.

21. DW1, one, Gordon Ochieng, a Principal Land Administration officer with the Ministry of lands testified on behalf of the 1<sup>st</sup> defendant. It was his evidence that indeed the plaintiff on 15<sup>th</sup> May 1992 was allocated the disputed parcel of land **LR No. 209/11635**. He stated that the dispute arose because of a letter written by the AIC dated 16<sup>th</sup> September 1997 (Doc. 4 in the 1<sup>st</sup> defendant's list and bundle of documents) requesting change of name of allottee from Cross Currents Indigenous Network to Africa Inland Church Kenya Trustee Board. The said letter was in the following terms:-

**The Commissioner of Lands,**

**Re: Change of Name of a Plot Allotment from Cross Current Indigenous Network to Africa Inland Church Kenya Trustee Board.**

**Receive warm Christian greetings from us.**

**This letter is to thank you very much for having considered our request for the allotment of a plot to Cross Current Indigenous Network within Madaraka area, Nairobi.**

**However, we wish to inform you that, technically, Cross Current Indigenous Network is a department of the Africa Inland Church Kenya and, for that reason, we are now requesting you to change the allottee's name of the above plot from Cross Current Indigenous Network to Africa Inland Church Kenya Trustee Board which is the custodian of the AIC properties and issue the title deed in the same name.**

**Thank you in advance for giving this matter you urgent attention.**

**Yours faithfully,**

**Rev. Francis P. Ngila**

**Chairman**

**Nairobi Regional Church Council**

22. The witness stated the Ministry acted on this letter and issued a new letter of allotment to AIC church dated 28<sup>th</sup> October 1997. He stated the earlier letter of allotment issued to Cross Current Indigenous Network dated 15<sup>th</sup> May 1992 was withdrawn/cancelled upon the issuance of the new allotment letter to AIC as no lease/title had been issued against the earlier letter of allotment. The witness testified that the new lease was issued to AIC on the understanding that Cross Current Indigenous Network was a department and/or subsidiary of AIC as indicated in the letter of 16<sup>th</sup> September 1997. The Ministry subsequently processed and issued title to the 2<sup>nd</sup> defendant. The witness further explained that the Ministry did not seek evidence to confirm the relationship between the plaintiff and the 2<sup>nd</sup> defendant before effecting the change requested by the 2<sup>nd</sup> defendant respecting the letter of allotment. The witness affirmed that the same deed plan for the plot that had been allocated to the plaintiff is the one that was utilized to process the title in favour of AIC church. He stated that as the allotment was made for charitable purposes, the Ministry did not find it necessary to seek further evidence as to the relationship of Cross Current Indigenous Network and the church when they received a request for change of allottees name as it was consistent with the plot being utilized for charitable purposes.

23. The witness further acknowledged Cross Current Indigenous Network from the documents shown to him existed both as an incorporated company and as an NGO registered on 3<sup>rd</sup> December 1991 and 25<sup>th</sup> September 1997 respectively. He denied there was any fraud on the part of the 1<sup>st</sup> defendant when it allotted the AIC the plot as there was notification that the earlier letter of allotment had been cancelled. The Ministry according to the witness took it that the plaintiff (1<sup>st</sup> allottee) and the church were one and the same party and hence there was no necessity for giving the plaintiff a formal notification of the cancellation of the letter of offer.

24. The 2<sup>nd</sup> defendant testified through Rev. Bishop Silas Yego (DW2), the Presiding Bishop AIC church. He stated that he was appointed assistant Bishop in 1996 before being appointed Presiding Bishop of the AIC church in 2001. The bishop stated that he got to know Dr. Richard Bennett in 1991/1992 when the former Presiding Bishop Birech informed him that Dr. Bennett wished to be assisted to start a Bible Printing Press in Nairobi and was looking for a suitable location. The Bishop stated that the former Presiding Bishop Birech, using his connection to the retired President facilitated the allocation of the suit property to Cross Current Indigenous Network where Dr. Bennett and William Bommet, a resident of Nakuru and a brother in law to the retired President were the Directors. The Memorandum and Articles of Association of Cross Current Indigenous Network Ltd shows Dr. Richard Bennett and William Bommet were the initial subscribers to the memorandum.

25. According to the witness, the AIC church saw the opportunity presented by Dr. Bennett as one that would finally enable the church to have the Bibles printed locally and thus reduce the cost of the same and that it was because of that the AIC through the Presiding Bishop offered their support to Dr. Bennett to have a plot allotted for the project. The witness stated further that after the allocation of the plot, the company allotted the plot did not commence printing of Bibles but they put up some buildings on the allocated property.

26. The witness further stated the plaintiff were not issued a title in their name and since they did not carry out the project of printing bibles as they had indicated they would do, the AIC on 16<sup>th</sup> September 1997 wrote to the Commissioner of Lands to change the name of the allottee from the plaintiff's name to AIC church. The bishop in this regard in his evidence stated as follows:-

**“The letter to the Commissioner of Lands indicated Cross Current was a department within AIC. When Cross Currents came to AIC they indicated they wanted to print Bibles and that was to be a first of a kind. AIC accepted to partner with Rev. Bennett and hence AIC was to be their umbrella in Kenya. That is how Cross Currents became a department of AIC.**

**AIC were the ones who requested for the allocation and as Cross Current did not do what they had stated they would do we requested for the property to be reverted to AIC.**

**We were allocated the plot on 28<sup>th</sup> October 1997.”**

The AIC accepted the offer and paid the requisite dues and a title was processed in favour of the church and registered on 18<sup>th</sup> February 1998.

27. The Bishop stated that the plaintiff was not registered as a NGO in 1992 when it was purportedly allocated the suit plot and explained that the plaintiff was registered as a NGO in 1997. The Bishop further explained that Dr. Richard Bennett and his wife who were foreign missionaries affiliated to Cross Currents International Ministries – USA were the ones who introduced Cross Currents Indigenous Network in Kenya to further the objectives of the parent Cross Currents International Ministries – USA in Kenya. He further explained Dr. Bennett and his wife were singularly responsible for sourcing the funds for the construction of the buildings on the suit property. He referred to the application for the registration of the plaintiff as a NGO made by pastor Boaz Omondi (PW1), Daniel Mwangi and Timothy Mpaayei (PW3) in 1996 at paragraphs 5, 6 and 7 which showed that Cross Currents International Ministries - USA was intrinsically involved in the work of Cross Currents Indigenous Network under paragraph 5(a), 6 and 7 of the application for registration as a NGO the applicants stated:-

**5(a) Possible source of funds:-**

**Cross Currents International Ministries – USA**

**6. Other countries of operation (where applicable) – new in Kenya and have regional offices in other countries e.g USA, Canada.**

**7. Names of other organizations affiliated or connected to in terms of collaboration in funding, operations, etc – As of now Cross Currents International Ministries – USA**

28. The Bishop in the premises contended that the construction of the Bible centre was fully funded through Dr. Richard Bennett who was the link between the local operations of Cross Currents Indigenous Network and Cross Currents International Ministries – USA who were mobilizing the funds to support the local operations. It was his further contention that Pastor Boaz Okul, Daniel Waithaka and Timothy Mpaayei in applying to register the NGO in their names to the exclusion of Dr. Richard Bennett who was the main benefactor to the Bible Centre project was intended to appropriate the Bible Centre and the suit property for their selfish ends. In his witness statement at paragraph 17 the Bishop states:-

**17. I am aware that the said Boaz Omondi, acting in concert with Timothy Mpaayei in an attempt to convert the assets of Cross Current Indigenous Network Limited's assets aforesaid, registered a Non-Governmental Organization going by the same name in 1997. The registration of the said Non-Governmental Organization was aimed at transferring the assets of the Cross Current Indigenous Network Limited's property to the Non-Governmental Organization.**

The witness testified that Boaz Okul Omondi (PW1) was a Pastor of AIC and that he had worked with AIC for 23 years at Kijabe Kesho

Publications and at Nairobi Kesho Publications at Gill House from where he resigned in 1994 to join Cross Current Indigenous Network. The witness further testified that Boaz Okul was the national treasurer of AIC from 1992 up to 1997 in an acting capacity before he left to try his hand in politics.

29. Bishop Yego stated in his evidence that Pastor Boaz Omondi (PW1) was working for Dr. Bennett at Cross Current Indigenous Network Limited (Bible centre) and his services were terminated on 12<sup>th</sup> February 1997 and his terminal dues amounting to kshs. 110,000/= were paid to him. He further stated that Pastor Omondi and Timothy Mpaayei refused to vacate and/or handover the management of the Bible Centre to Trans World Radio to whom Cross Currents International Ministries through Dr. Bennett had donated the Bible Centre and instead began commercializing activities at the centre for their own benefit. It was the Bishop's evidence that Trans World Radio was run by the AIC and it was therefore up to Trans World Radio and the AIC to agree on how the property was to be handled as per the letter dated 18<sup>th</sup> November 1999 from Trans World Radio to AIC (page 46 of the 2<sup>nd</sup> defendant's bundle of documents). The letter in part stated:-

**“As agreed during our meeting, we would like to formally ask your office to act as caretakers of the CCIM property in Upper Hill Nairobi. You have all our support to do whatever is necessary to remove the two individuals Pastor Boaz Omondi and Mr. Timothy Mpaayei Currently using the property and to manage it until such a time that both TWR AND AIC shall agree on a plan of action for the said property.”**

30. Earlier Dr. and Mrs. Richard Bennett writing on behalf of Cross Currents International Ministries communicated to the Chairman and Board of Trans World Radio, Kenya the resolution donating the Kenyan assets to them. The letter signed on 28<sup>th</sup> August 1997 by Rev. Dr. Richard Bennett President CCIM and Mrs. Dorothy Bennett – Vice President and International Administrator CCIM (annexed at page 45 – 2<sup>nd</sup> defendants documents bundle) in part read:-

**“You are hereby informed of the following resolution of the Board of Cross Currents International Ministries USA (who in conjunction with Cross Currents International Ministries in Canada and the UK are the sole funding source of the Bible Centre in Nairobi) which resolution was unanimously passed by the USA Board on 6<sup>th</sup> December 1996 and subsequently ratified in Canada and the UK.”**

**“To donate to Trans World Radio, Kenya all the assets presently in the custody of Cross Currents Indigenous Ltd to Trans World Radio, Kenya with the understanding that no such asset will benefit or be given to any individual, but will in entirety be stewarded by Trans World Radio, Kenya exclusively for the propagation of the Gospel and the instruction of believers in the word of God.”**

**“It should also be noted by the Board of Trans World Radio that the large sums of money already invested in East Africa are the result of the Bennett's life-time Ministry.”**

**I am therefore requesting that the above resolution of CCIM Board meeting of December 6<sup>th</sup> 1996 be adhered to forthwith.”**

31. In cross examination the witness maintained that the plaintiff was not registered NGO when the allotment letter for the suit property was made in 1992. He stated that Dr. Bennett was the person behind the Bible Centre project while Dr. Boaz Omondi was invited by Dr. Bennett to oversee the implementation of the project. Dr. Bennett was a visiting foreign missionary and was absent from Kenya for long periods. The witness stated that Boaz Omondi was appointed as a director of Cross Current Indigenous Network Ltd following the resignation of William Bommet as a director and shareholder. He further stated AIC did not make any formal request to Cross Current Indigenous Network Limited for change of the allotment of the suit plot to AIC. He denied AIC acted in any fraudulent manner in having the title to the plot processed in its name stating that when the property was donated to Trans World Radio the latter did not have any problem with the AIC being registered as the owners of the property as long as they were allowed to use the same.

### 32. Submissions, Analysis and Determinations:

The parties filed their final closing submissions as directed by the court. The plaintiff's submissions were filed on 7<sup>th</sup> June 2016, the 1<sup>st</sup> defendant's submissions on 18<sup>th</sup> January 2017 while the 2<sup>nd</sup> defendant's submissions had been filed earlier on 5<sup>th</sup> September 2016. After reviewing the pleadings, the evidence and the submissions by the parties the issues for determination in this suit can be summed up as follows:-

**(i) Whether the plaintiff, cross Current Indigenous Network (NGO) had the locus standi to file the instant suit.**

**(ii) Whether the letter of allotment for Plot C (now LR No. 209/11635 - Nairobi) to Cross Current Indigenous Network dated 15<sup>th</sup> May 1992 was cancelled by the letter dated 28<sup>th</sup> October 1997 by the Commissioner of Lands allotting the same property to African Inland Church.**

**(iii) Whether an allotment letter can override and/or supercede a certificate of title where one has been issued in respect to the same property.**

**(iv) Whether the registration of the 2<sup>nd</sup> defendant as the owner of the suit property was fraudulent and hence null and void and the same ought to be cancelled.**

**(v) Who should bear the costs of the suit?**

33. **Cross Current Indigenous Network Ltd (as a company) and Cross Current Indigenous Network (as a NGO)**

The parties took considerable amount of time in the course of the trial in drawing a distinction between the two and/or showing the interconnection or relationship between the two. The plaintiff, through the evidence of Pastor Boaz Omondi (PW1) was of the view that Cross Current Indigenous Network Ltd, the company was basically transformed into Cross Current Indigenous Network the NGO and hence it was one and the same organization. The defendants' position was that the company and the NGO were separate and distinct legal entities and that one could not be interchanged for the other. There is no dispute and the evidence is clear that Cross Current Indigenous Network Limited was registered on 3<sup>rd</sup> December 1991 as per the certificate of incorporation "PEX.1" while Cross Currents Indigenous Network as a NGO was registered on 25<sup>th</sup> September 1997 as per the certificate of registration "PEX2". The subscribers to the company as per the Memorandum and Articles of Association were Richard Abrahams Bennett with 1 share and William Kiprom Bomett with 2 shares. The Memorandum and Articles of Association is annexed in the 2<sup>nd</sup> defendant's bundle of documents at pages 115-334. The Memorandum of Association of the company does not indicate there was any intention to convert the company to a NGO at any future date. The main objectives of the company are summed up in objects "a" to "d" of the Memorandum as hereunder:-

**(a) To import, print, publish, distribute in Kenya and elsewhere any periodicals, leaflets, bibles and other books for the advancement of the Christian faith.**

**(b) To promote, assist in promoting, manage or otherwise participate in any scheme or arrangement calculated or designed to spread the Christian faith in Kenya.**

**(c) To carry out, promote, manage or otherwise participate in charitable projects for improvement of the quality of life amount the communities being served.**

**(d) To organize meetings, seminars or otherwise participate in any scheme or arrangement calculated or designed to spread the knowledge of the Christian faith in Kenya.**

34. The application documents for the registration of Cross Currents Indigenous Network and its constitution are annexed to the 2<sup>nd</sup> defendant's bundle of documents at pages 64 to 86. The persons who applied for the registration of the NGO (at page 86) were Pastor Boaz Okul Omondi, Daniel Waitthaka Mwangi and Timothy Taki Mpaayei. Pastor Boaz Okul Omondi (PW1) in his testimony was emphatic that the company was converted to become the NGO arguing that as a director of the company he had authority to effect the changes. The 2<sup>nd</sup> defendant submitted that there was no evidence that Pastor Boaz Okul Omondi ever became a director of the company as no change of directorship of the company was ever effected by the Registrar of Companies and there was no evidence either by way of notification of change of directors and/or filing of annual returns tendered to show who the directors of the company were. The 2<sup>nd</sup> defendant argued that Pastor Boaz Omondi was but an employee of the company who was conferred with agency status to carry out the local operations of the company. The 2<sup>nd</sup> defendant contended further that Pastor Omondi's employment was effectively terminated by Dr. Richard Bennett vide the letter dated 12<sup>th</sup> February 1997 and that he was paid his terminal dues and effectively his status as the local agent of the company ceased and he and his wife were removed as signatories of the company's bank accounts with Barclays Bank of Kenya Ltd.

35. Pastor Boaz Omondi (PW1) contended that he was invited to join Cross Currents Indigenous Network by Dr. Richard Bennett as is attested by the Formative Documents made pursuant to a meeting held on 5<sup>th</sup> May 1992 between Dr. Richard Bennett, William Bommet and himself annexed to the plaintiff's bundle of documents and that henceforth he was a director and shareholder of the company. The 2 shares previously held by Mr. William Bommet, he averred were transferred to him. The 2<sup>nd</sup> defendant argues that PW1's appointment as a director and the transfer of the shares were never formalized by the appropriate filings at the Registrar of Companies and therefore never took effect. The plaintiff submits the "Foundation Documents" affirm that the company was a "NOT FOR PROFIT" organization and assert that the intention was always to register a NGO save that the government had at the time frozen registration of NGO's. Thus the plaintiff submits when it became possible to register an NGO, the plaintiff was registered as a NGO and as a consequence the assets that had been acquired by the founders of Cross Currents Indigenous Network Ltd were to be turned over to the NGO. By inference according to PW1, when the NGO was registered somehow the company ceased to exist and the assets that it had, automatically became the assets of the NGO. The plaintiff did not explain how such a feat could be achieved.

36. The Memorandum and Articles of Association of Cross Currents Indigenous Network Limited make no mention of any intention to convert to an NGO and likewise the constitution of Cross Current Indigenous Network (NGO) do not express in the objects that the NGO was to take over the operations, functions and/or assets and liabilities of Cross Currents Network Limited. The registration documents of the NGO do not show any nexus between Cross Current Indigenous Network Limited and Cross Currents Indigenous Network, the NGO. The two entities in my view are distinct and are therefore separate juristic persons under the law with the ability to sue and be sued on their own. For the two entities to have been interrelated, there needed to have been a clear and definite intention and clear documentation to that effect.

37. The contentious letter of allotment dated 15<sup>th</sup> May 1992 could only have been made and was made to Cross Currents Indigenous Network Limited registered on 3<sup>rd</sup> December 1991. Boaz Omondi (PW1) was formally invited to join the Board of Directors of Cross Currents Indigenous Network Ltd on 5<sup>th</sup> May 1992 as per the formation documents and therefore when he wrote the letter accepting the allotment he did so on behalf of the company. Cross Current Indigenous Network NGO was registered on 25<sup>th</sup> September, 1997 and was therefore not in existence when the allotment was made to the company. After the acceptance of the allotment and payment of the requisite allotment charges a contract came into existence between Cross Current Indigenous Network Ltd and the Commissioner of Lands. The plaintiff NGO was not a party to this agreement and could not therefore have accrued any rights or obligations under this contract. There was simply no privity of contract. Halsbury's Law of England 3<sup>rd</sup> Edition, Volume 8 paragraph 110 states as follows in regard to privity of contract:-

**"As a general rule a contract affects only the parties to it, and cannot be enforced against who is not a party, even if the contract is made for his benefit and purports to give him the right to use or to make him liable upon it. The fact that a**

**person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”**

38. In the present suit, I do not think the plaintiff has adduced any credible evidence to prove that the assets of the company were to become the assets of the NGO once it was registered. No sufficient nexus has been established to show that the company and the NGO had intended to become one. To the contrary, there is evidence to show that Dr. Richard Bennett who for all intents and purposes was the force behind Cross Currents Indigenous Network Ltd, having been the major mobiliser of the funds that were donated towards the construction of the Bible Centre on the suit property was opposed to the registration of the NGO. Dr. Bennett vide a resolution dated 2<sup>nd</sup> January 1997 passed by Cross Currents International Ministries and transmitted to the NGO Coordination Bureau annexed at page 98 of the 2<sup>nd</sup> defendant’s bundle of documents the request for registration of a NGO was revoked. In part the resolution read as follows:-

**(i) That if an NGO for this Board has already been granted, it should forthwith be revoked.**

**(ii) That if an application for an NGO is still under consideration, such application shall forthwith be cancelled.**

39. On 3<sup>rd</sup> February 1997 the legal officer for NGOs Co-ordination Bureau wrote acknowledging the Minutes and resolution from Cross Currents International Ministries (page 97 of the 2<sup>nd</sup> defendant’s bundle) stating thus:-

**“...the application had not reached its finalization and hence was still under process. However, our board takes note of your letter to withdraw the application and hence the same is withdrawn forthwith and any process procedure stopped on the same.**

.....”.

Nonetheless the NGO Co-ordination Bureau went ahead and registered the NGO. However, the evidence is clear that the registration of the NGO as an affiliate of Cross Current International Ministries as indicated in the application for registration was objected to.

40. The 2<sup>nd</sup> defendant in support of its submission that there was no basis to hold that the NGO took over the assets of the company after it was registered referred the court to Halsbury’s Laws of England 4<sup>th</sup> Edition Vol.7 paragraphs 727 and 728 cited with approval by the Court of Appeal in the case of **Ndimia Tea Factory Company Ltd –vs- KTDA Ltd [2008] eKLR** in similar circumstances as in the present suit:-

#### **727. Extent of Company’s Liability**

**A company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before incorporation. After incorporation it cannot ratify or adopt any such contract because in such cases there is no agency and the contract is that of the parties making it. The adoption and confirmation by a director’s resolution of a contract made before incorporation of the company by persons purported to act on its behalf does not create any obligation on it towards him [see FJ Neale (Glasgow) Ltd –vs- Vickery (1973) SLT (SL. ct) 88 where it was held that a new company formed with the same name as the old company and taking over assets and goodwill was not liable on the old company’s contract] [see also RE Northumberland Avenue Hotel Co. (1886) 33 ch. D 16, CA and North Sydney Investment and Tramway Co. –vs- Higgins (1899) AC 263 at 721, PC. 728. Adoption of Pre-Incorporation Contracts:**

**In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement (see Melhado –vs- Porto Alegre Rly Co. (1874) LR9CP.503).**

41. On the basis of the evidence, the allotment letter of 15<sup>th</sup> May 1992 was not to the plaintiff since the plaintiff was not registered by then. The plaintiff was registered on 25<sup>th</sup> September 1997 and it has not been proved by evidence that it was entitled to take over the assets of Cross Currents indigenous Network Ltd and/or to assume the benefit conferred by the letter of allotment dated 15<sup>th</sup> May 1992. The fact that PW1 and PW3 got involved in the operations and activities of Cross Currents Indigenous Network Ltd notably in the construction works of the Bible centre and thereafter the running of the day to day activities of the company and thereafter they became the initial promoters of the plaintiff NGO, in my view cannot be said to provide the nexus between the company and the **“new born”** NGO. The registration of the NGO may have perhaps been driven by the desire to wrestle the suit property from Cross Currents Indigenous Network Ltd in which Dr. Richard Bennett appeared to have a firm grip by reason of having majorly contributed towards the construction of the Bible centre. Dr. Richard Bennett and his wife having been foreign missionaries, whose visits to the county were reducing the company remained exposed as a **“soft target”** that could be raided. Before the NGO was registered Dr. Bennett made it clear through communication how he desired the assets of the company to be managed as evidenced by his letter dated 28<sup>th</sup> August 1997 to the Chairman Board of Trans World Radio, Kenya annexed at page 45 of the 2<sup>nd</sup> defendant’s bundle of documents. Vide the letter he communicated Cross Currents International Ministries resolution of 6<sup>th</sup> December 1996 where it was resolved **“to donate to Trans World Radio, Kenya all the assets presently in the custody of Cross Currents Indigenous Network Ltd ... with the understanding that no such asset will benefit or be given to any individual...”**.

#### **42. Did the plaintiff NGO have locus standi to institute this suit?**

Having found and concluded that Cross Currents Indigenous Network Ltd had a distinct legal capacity apart from Cross Currents Indigenous Network NGO and that no nexus between the two had been established, the issue as to whether the plaintiff had *locus standi* to bring the present suit arises. The plaintiff by the plaint pleads as follows:-

(a) That the plaintiff is a Non-Governmental Organization registered under Section 10 of the Non-Governmental Organization Co-ordination Act.

(b) That the 1<sup>st</sup> defendant by a letter dated 15<sup>th</sup> May 1992 allotted the plaintiff unsurveyed Plot C Hill Area measuring 0.18Hectares.

(c) That the plaintiff accepted the allotment and paid the requisite fees.

(d) That the plaintiff proceeded to develop the plot.

(e) That the 1<sup>st</sup> defendant on or about 15<sup>th</sup> February 1998 purported to issue title over the issue plot now known as LR No. 209/11635 to the 2<sup>nd</sup> defendant herein.

43. The plaintiff further pleads that the registration and subsequent issue of title to the 2<sup>nd</sup> defendant was unlawful and fraudulent as the plaintiff was the original allottee of the said property and the allotment had not been revoked as at the time of filing suit. The plaintiff pleads particulars of fraud thus:-

(i) Registering Plot No. C Hill Area in the name of the 2<sup>nd</sup> defendant when the plaintiff was clearly the original allottee of the said plot.

(ii) Issuing title to Plot No. LR 209/11635 to the 2<sup>nd</sup> defendant inspite of the plaintiff's status with relation to the said land.

(iii) Issuing title to the suit property to the 2<sup>nd</sup> defendant who had neither applied for it nor paid any premiums.

(iv) Issuing title to the 2<sup>nd</sup> defendant only after the plaintiff had developed the suit plot and commenced operations.

(v) Failing to revoke the plaintiff's allotment before allotting the land to the 2<sup>nd</sup> defendant.

(vi) Failing to notify the plaintiff of the intended revocation of the allotment.

(vii) The 2<sup>nd</sup> defendant surreptitiously got itself registered as owner of the suit plot when it knew the plaintiff was the owner of the property.

44. I have made reference to the plaintiff's pleadings in extenso to contextualize them against the evidence adduced by the parties. The evidence that is not in dispute is that the plaintiff as a NGO was registered on 25<sup>th</sup> September 1997. **How then could it have been allocated the suit property on 15<sup>th</sup> May, 1992 as pleaded?** The plaintiff had not been registered and had not come into existence and it could not therefore have been allocated the property as claimed. The evidence is that Cross Currents Indigenous Network Ltd was registered on 3<sup>rd</sup> December 1991 and it is the one to whom the allotment was made and it accepted the allotment and made the requisite payments. The developments on the plot which the evidence by PW1 and PW3 confirms were completed by 1995 were carried out by the company and not the NGO and the funding for the developments were mainly through donor funding obtained by Dr. Richard Bennett through the auspices of Cross Currents International Ministries in USA, Canada and the United Kingdom. By the time the plaintiff was registered on 25<sup>th</sup> September 1997 the developments had been completed and the buildings were in use. The party in my view who had capacity to institute any suit relating to land parcel LR No. 209/11635 was Cross Currents Indigenous Network Ltd and not the plaintiff NGO. The plaintiff NGO had no legal interest in the suit property and it is my finding and holding that the plaintiff NGO lacked any *locus standi* to bring the instant suit where the subject matter is the ownership of the parcel of land allotted to Cross Currents Indigenous Network Ltd vide the letter of allotment dated 15<sup>th</sup> May 1992 now registered as LR No. 209/11635 in favour of the 2<sup>nd</sup> defendant.

45. On the issue whether the letter of allotment dated 15<sup>th</sup> May 1992 was cancelled by the letter dated 28<sup>th</sup> October 1997 by the Commissioner of Lands allotting the same property to Africa Inland Church, my view is that following the request made by the Africa Inland Church vide their letter of 16<sup>th</sup> September 1997 for change of name of the plot allottee from Cross Current Indigenous Network to Africa Inland Church which request the Ministry of Lands accepted, the effect of issuing a fresh letter of allotment in the name of Africa Inland Church was to cancel the earlier letter of allotment to Cross Currents Indigenous Network. This said letter at page 2 (reverse side) carries an endorsement – **“This letter cancels my letter of allotment ref 62432/10/187 of 15<sup>th</sup> May 1992”**. The letter of allotment dated 28<sup>th</sup> October 1997 to Africa Inland Church was **“Ref: UNS: PLOT NO C NOW LR 11635 – NAIROBI”** and stated that the plot the subject of the offer was the one attached plan No. 62432/IV/186A measuring approximately 0.81Hectares. The letter of allotment dated 15<sup>th</sup> May 1992 to Cross Currents Indigenous Network was **“Ref: UN-SURVEYED PLOT NO. C HILL AREA”** and was in respect of the plot whose plan was attached as No. 62432/IV/186A measuring approximately 0.81Hectares.

46. I make these references to dispel the notion that the letter of allotment made to the Africa Inland Church may have related to a different plot other than the one allotted to Cross Currents Indigenous Network since during the trial there were suggestions that the plots referred to were different. A letter done on the same date 28<sup>th</sup> October 1997 by the Commissioner of Lands to the Director of Surveys fortifies this position. (Letter at page 54 of the 2<sup>nd</sup> defendant's bundle of documents). The letter is ref: **“UNS. PLOT NO. C NOW LR 11635 – NAIROBI”** and read as follows:

**“I refer to my letter of allotment ref. 62432/10/187 of 15<sup>th</sup> May 1992 addressed to Cross Currents Indigenous Network P.O Box 53488 Nairobi with a copy to you in the above connexion and would inform you that the offer contained therein has been**

**formally withdrawn.”**

I am in the premises satisfied that the letter of allotment made to Cross Currents Indigenous Network was withdrawn and/or cancelled by the 1<sup>st</sup> defendant. The letter of allotment not having been made to the plaintiff NGO, it is my view that they cannot properly raise issue in the manner the allotment may have been withdrawn and/or cancelled. They lack the *locus standi* to do so.

47. Having held that the plaintiff lacked the *locus standi* to bring the present suit in so far as it was challenging the cancellation of the allotment of the suit property to Cross Current Indigenous Network and the re-allotment of the same to the 2<sup>nd</sup> defendant, it follows I have to find they have not proved their claims against the defendants. If there were any claims respecting the cancellation of the letter of allotment dated 15<sup>th</sup> May 1992, it is only the allottee and/or any successor of Cross Currents Indigenous Network Ltd who could validly make the claims. As discussed and demonstrated above in this judgment the plaintiff was not the successor of Cross Current Indigenous Network Ltd. Indeed, throughout during the course of the trial, the current status of the company was never revealed. There is no evidence that the company has been dissolved and/or deregistered. The incorporation documents of the company show that Dr. Richard Abrahams Bennett and William Bommet were the initial subscribers and directors. There was no evidence to show that, that position was ever changed by the Registrar of Companies.

48. The fact remains that the allotment made to the company was cancelled and/or revoked by the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was issued with a fresh allotment for the same property and a title was processed and issued in favour of the 2<sup>nd</sup> defendant and registered. The company did not challenge the cancellation of the letter of allotment and issue of the title in the 2<sup>nd</sup> defendant's name. There is no basis upon which I can find the cancellation of the letter of allotment to Cross Current Indigenous Network Ltd to have been fraudulently procured by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant acted on the letter dated 16<sup>th</sup> September 1997 requesting for a change of the name of the allottee in good faith. The suit property was allocated for charitable purposes and the request by the 2<sup>nd</sup> defendant was consistent with the property continuing to be held for charitable purposes.

49. The 2<sup>nd</sup> defendant following the allotment had a title processed in its favour and is now the registered proprietor. Upon registration of the 2<sup>nd</sup> defendant as the proprietor of the suit land, its title became absolute and indefeasible and could only be challenged on the grounds of fraud or misrepresentation as provided under Section 23(1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) which provided as follows:-

Section 23 (1):-

**“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title to the proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”**

50. I have held that the allotment to the 2<sup>nd</sup> defendant has not been challenged by the party who would have been entitled to do so and I therefore cannot fault the allotment to the 2<sup>nd</sup> defendant. Equally, I cannot on the basis of the evidence on record fault the issuance of a certificate of title in respect of the suit property to the 2<sup>nd</sup> defendant. It is only the company, Cross Currents Indigenous Network Ltd who would have had the locus to challenge the title and they have not. I hold that the 2<sup>nd</sup> defendant upon registration as the owner and upon being issued with a title to the suit property, acquired an absolute and indefeasible title that could only be challenged on the ground of fraud or misrepresentation. The plaintiff having failed to demonstrate the interest it had in the suit property cannot challenge the title held by the 2<sup>nd</sup> defendant. The allegations of fraud alleged by the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants could only have been raised by the company which was the original allottee of the suit property. The company as evidenced by the various correspondences from Dr. Richard Bennett, who by all accounts was the force behind Cross Currents Indigenous Network Ltd, appeared to sanction the allotment of the suit property to the 2<sup>nd</sup> defendant through whom the continuation of the work started by the company was assured. The company at any rate did not challenge the re-allotment and issue of a title to the 2<sup>nd</sup> defendant in respect of the suit property. I find the fraud allegations by the plaintiff to be unproved as the plaintiff lacked the capacity to make them in the first place.

51. **Decision:**

In the result, I find and hold that the plaintiff has failed to prove its claim against the defendants on a balance of probabilities. I find the 2<sup>nd</sup> defendant's counterclaim against the plaintiff as relates to recovery of possession established and proven. However, even though the 2<sup>nd</sup> defendant in the counterclaim pleaded for damages for trespass, no basis was provided or laid both during the trial and in the submissions to enable the court to make an assessment for damages. The submissions were totally silent in this regard. In the premises, I find no basis upon which I can award damages to the 2<sup>nd</sup> defendant and I decline to make an award for damages for trespass.

52. I accordingly find no merit in the plaintiff's suit against the defendants and the same is hereby ordered dismissed with costs to the defendants. Further, I enter judgment in favour of the 2<sup>nd</sup> defendant on the counterclaim and order and direct that the plaintiff vacates **LR No. 209/11635** and delivers vacant possession thereof to the 2<sup>nd</sup> defendant within 30 days from the date of service of the decree herein upon them. The costs of the counterclaim are awarded to the 2<sup>nd</sup> defendant as against the plaintiff.

53. Orders accordingly.

**JUDGMENT DATED and SIGNED at KISII this 4<sup>TH</sup> day of APRIL 2018.**

**J. M MUTUNGI**

**JUDGE**

**JUDGMENT DELIVERED** at **NAIROBI** this **19<sup>TH</sup>** day of **APRIL 2018**.

**S. OKONGO**

**JUDGE**

**In the presence of:**

Ms. Easi holding brief for Wasuna for the plaintiff

Ms. Leila Ahmed holding brief for Masika for the 1<sup>st</sup> defendant

Ms. Ndundu for the 2<sup>nd</sup> defendant

Mr. Waweru Court Assistant

**S. OKONGO**

**JUDGE**