REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.70 OF 2009

NELSON KAZUNGU CHAI.....1ST PLAINTIFF

LAWRENCE KAZANI GOHU.....2ND PLAINTIFF

WYCLIFFE TEMBO MWANGOME.....3RD PLAINTIFF

SAID HASSAN HEMED.....4TH PLAINTIFF

IBRAHIM ABDI.....5TH PLAINTIFF

FESTUS MWARERE LENGA.....6TH PLAINTIFF

KENGA KILUMO CHARI.....7TH PLAINTIFF

LEONNOX MKUTANO NGALA.....8TH PLAINTIFF

SHADRACK NDHULI….....9TH PLAINTIFF

PRUDENCE MAPENZI MWANGORI.....10TH PLAINTIFF

=VERSUS=

PWANI UNIVERSITY.....DEFENDANT

J U D G M E N T

Introduction:

1. On 22nd July 2009, the Plaintiffs, on behalf of themselves and 298 others, commenced this suit by way of a Plaint.

2. The Plaintiffs have averred in the Plaint that in or around 1995, they settled on a portion of land known as L.R. NO.5046/1 and part of L.R. NO. 5024/1 Kilifi (the suit property) and subdivided the said portions lawfully and with the knowledge of the Defendant and the Government.

3. The Plaintiffs have averred that they were allocated the suit property by the Government with the consent, approval and knowledge of the Ministry of Agriculture, Kilifi Institute of Agriculture, the Provincial Administration, the then Ministry of Local Government and the then Kilifi Town Council.

4. According to the Plaint, the Plaintiffs carried out improvements and developments of great value awaiting the issuance of Certificates of Title and that they have not interfered with the other parts of L.R. Nos 5046/1, 5046/2, 5046/5, 5024/1 and 5024/2.

5. In the Plaint, the Plaintiffs are praying for an order of permanent injunction restraining the Defendants from fencing, occupying, taking possession or interfering with their use, possession and occupation of the suit property.

6. The Plaintiffs are also praying for a declaration that parts of land known as L.R. Nos 5046/1 and 5024/1 occupied by them belong to them

and for general damages for trespass and wrongful interference by the Defendant.

7. In the Defence, the Defendant has averred that it has never consented to the illegal occupation of its land by strangers; that by a presidential order of 21st February 2002, the Government banned allocation of all Government and Trust land including land reserved for public purpose and that if there are any developments on the suit property, then the same are illegal.

8. It is the Defendant's averment that any purported occupation of its land by the Plaintiffs is fraudulent.

9. In the counterclaim, the Defendant has prayed for the eviction of the Plaintiffs and for a permanent mandatory injunction restraining the Plaintiffs from being in occupation of the suit property.

The Plaintiffs' case:

10. The 1st Plaintiff, PW1, informed the court the Defendant is claiming for land measuring 623 acres. On their part, that they are claiming three parcels of land which they have already occupied. It was the evidence of PW1 that the Defendant was not in existence in 1995 when they were allocated the suit property.

11. It was the evidence of PW1 that through the then Ministry of Local Government, the then Ministry of Lands and the then Kilifi Town Council, the Germany Technical Corporation (GTZ), which is a non-governmental organisation, was requested to fund the upgrading of parts of Kilifi town in what was known as the Mtaani Kisumu Ndogo upgrading scheme. The upgrading scheme of Mtaani and Kisumu Ndogo informal settlements was used as a pilot project for the purpose of informing the Town Council on how to upgrade the other slums within the town.

12. According to PW1, the project commenced in 1990 by the mapping and surveying of the area that was to be upgraded.

13. The people living in the area that was to be upgraded (the beneficiaries) were identified. The infrastructure that was to be put in place like water, roads, waste collection points and toilets amongst others were also identified during the process of mapping and surveying of Mtaani and Kisumu Ndogo informal settlements.

14. PW1 informed the court that after the survey and planning of the area that was to be upgraded, GTZ demanded that a Residence Committee to represent the beneficiaries in the area should be formed. The committee that was formed came to be known as the Mtaani Kisumu Ndogo Residence Committee (the Committee). The other committees that were formed were the “Task Force Committee” and the “Project Promotion Committee”.

15. PW1 was elected by the residents of Mtaani and Kisumu Ndogo as the chairman of the Residence Committee on 14th August 1992. The chairman of the “Task Force Committee” was the then Town Clerk, who is also among the 308 Plaintiffs, while the chairman of the “Project Promotion Committee” was the then Deputy Commissioner of Lands.

16. It was the evidence of PW1 that the mandate of the Residence Committee was to identity the genuine squatters in Mtaani and Kisumu Ndogo while the Task Force Committee was to deal with the technical issues of the project. On the other hand, the Project Promotion Committee was to deal with the issue of the allocation of the land within the upgraded scheme.

17. According to PW1, the cadastral survey for the two areas that were to be upgraded commenced in 1993 whereupon it was discovered that there were a myriad of problems which included some of the beneficiaries being on areas reserved for roads while others were congested on one plot which was not supposed to be the case. Other residents of the two areas were found to be staying on what had been set aside during the surveying process for public utilities like open spaces, churches, nursery schools, mosques, among others.

18. The squatters who were found to be staying on the areas earmarked for the public utilities during the mapping and surveying process had to be moved. The squatters who had constructed houses to completion were the ones who were given priority during the allocation process in the upgraded areas. PW 1 informed the court that there was resistance from those who were asked to move out. There was violence and in the process some houses were burnt down.

19. It was the evidence of PW1 that the then Coast Provincial Commissioner instructed the Kilifi District Commissioner and the Town Clerk to look for alternative land for people who had been displaced from Mtaani and Kisumu Ndogo informal settlement schemes during the upgrading process. According to PW 1, the alternative land was found, otherwise known as the Kibaoni extension, which is the suit property.

20. PW1 stated that people were told to pay for the alternative land for the purpose of surveying because GTZ had ran out of funds and was not to be involved in resettling people on the alternative land that had been identified. Each squatter was required to pay Kshs.15,000 to the Resident's Committee, which they did and receipts were issued to them.

21. It was the evidence of PW1 that it was the Residence Committee and the Town Council of Kilifi that was required to apportion the suit property to the squatters who had been displaced from Mtaani and Kisumu Ndogo.

22. As the chairman of the Residents Committee, it was the evidence of PW1 that he applied on behalf of the Plaintiffs, to be allocated land by way of a letter addressed to the District Commissioner, through the Town Clerk. It was the evidence of PW1 that he also met the Principal of the then Kilifi Institute of Agriculture who showed him the land that he was to apply for.

23. According to PW1, he was informed that the alternative land that he was to apply for on behalf of himself and the other people that had been displaced did not belong to then Kilifi Institute of Agriculture, the Defendant's predecessor, because that land had been allocated to Kibaoni Primary School, Kibaoni School for the deaf and Kilifi Township Secondary School and that the remaining parcel of land was available for allocation to people.

24. It was the evidence of PW1 that he was shown an area of 100 acres which had been set aside for the three institutions, a part of which he was to apply for on behalf of the squatters that had been displaced from Mtaani Kisumu Ndogo.

25. It was the evidence of PW 1 that out of the 100 acres that he was shown, a substantive part of it had already been donated to schools and that they were to apply for the remaining portion of land, which was approximately 50 acres.

26. After making his application to the Kilifi District Commissioner, PW1 informed the court that the District Commissioner sent a letter to the Ministry of Agriculture requesting for the land that he had been shown. It was the evidence of PW1 that indeed the Ministry of Agriculture gave its approval for the allocation of its land to the squatters as requested.

27. The evidence of PW1 was that the Plaintiffs, who are over 300, were allowed to occupy the suit property by the then Minister of Land, Darius Mbela with the approval of the Kilifi Institute of Agriculture, the Ministry of Lands and the Provincial Administration. It was his evidence that they are only claiming for 50 acres, which is 1/10th of what the Defendant is claiming to be its land.

28. A survey report was produced in evidence showing the way the Plaintiffs apportioned the suit property amongst themselves and the developments that they have made on the land. The witness also produced in evidence a bundle of correspondences in respect of the suit property which I shall refer to at a later stage.

29. It was the evidence of PW1 that a Part Development Plan (PDP) for the 50 acres that was allocated to the Plaintiffs was prepared and sent to Ministry of Lands for approval. However, when the PDP was returned to them, it was discovered that someone had allocated to himself 20 acres. After the discovery of the grabbing of 20 acres out of the 30 acres that they had applied for, it was the evidence of PW1 that the Town Council of Kilifi held a meeting and resolved that the Ministry of Lands should nullify the allocation of the 20 acres to the "grabber" and issue fresh letters of allotment to the genuine squatters.

30. PW1 produced in evidence the PDP that was later on prepared and sent to the Ministry of Lands and the list of the people who are supposed to benefit from the allocation of the suit property, amongst other documents. It was the evidence of PW 1 that the suit property was surveyed and about 308 people (the Plaintiffs) were allocated the land in dispute and have since taken possession.

31. PW1 reiterated the fact that the Principal of Kilifi Institute of Agriculture had confirmed in writing that initially, the Institute's land measured 623 acres. However, after donating 100 acres to the existing primary school, the school for the deaf and the secondary school, the Institute remained with 476.05 acres. It was the evidence of PW1 that the Plaintiffs are claiming part of the 100 acres and not the 476.05 acres owned by the Institute which was later on taken over by the Defendant.

32. According to PW1, when he visited the Ministry of Lands, he saw a letter by the Ministry approving the allocation of the land to them. PW1 informed the court that the allocation of the suit property to the squatters was later on muddled up by some politicians who attempted to grab 20 acres of the property.

33. PW1 stated that after the approval of the allocation of the land to the squatters, the letters of allotment were prepared and signed although they were never issued due the grabbing of the 20 acres.

34. It was the evidence of PW1 that the Plaintiffs had settled in Mtaani Kisumu Ndogo since 1975 and that the Plaintiffs used to work for the then Kenya Cashewnut Factory and that they were resettled on the suit property in 1995 after the upgrading of Mtaani Kisumu Ndogo area, Kilifi.

35. It was the evidence of PW1 that the Defendant was allocated the whole land vide a letter of allotment dated 10th April 2006 due to pressure from people in Nairobi who had no idea as to what was happening on the ground.

36. In cross-examination, PW1 stated that the report by Mr. Okoth, the valuer, does not tally with the situation on the ground. It was his evidence that there are about 100 plots on the ground.

37. It was the evidence of PW1 that he did not have the records to show when the schools occupying the 100 acres were established or the exact acreage that was set aside for those institutions. However, it was his evidence that the Plaintiffs were shown the land that was vacant and not what is occupied by those institutions.

38. PW1 stated that the suit property is Government land having been compulsorily acquired by the Government. It was his evidence that the land being occupied by the Plaintiffs is approximately 45.50 acres and that they only have two letters of allotment in favour of two Plaintiffs.

39. It was his evidence that as per the proposed PDP, each squatter was to be allocated half an acre of land in the suit property.

40. As they were pursuing the letters of allotment for the 308 squatters, it was the evidence of PW1 that the Defendant interfered with that process and that only 47 squatters had already obtained their letters of allotment.

41. Although the Plaintiffs moved to the suit property in 1995, it was the evidence of PW1 that the letter seeking approval for the allocation

of land was done on 9th May 1997 as a formality because the Institution had already allowed them to occupy the land; that by the time the PC made his speech on 27th September 1995, they had not occupied the suit property and that the land belonged to the Government.

42. The then Town Clerk of Kilifi Town Council, PW2, informed the court that he worked at the Council as a Town Clerk between 1988 until 1998.

43. It was the evidence of PW2 that the Mtaani Kisumu Ndogo upgrading project started in 1992. The project was meant to improve the lives of the many people who had settled in the Mtaani and Kisumu Ndogo area and had put up houses in an unplanned manner. The Council was assisted in the implementation of the project by the Ministry of Local Government and GTZ.

44. According to PW 2, the two areas were to be re planned and each structure was to be on one plot. After re-planning, it was found that some of the people who were residing in the two estates had missed out on plots and they refused to move out. The Residents Committee was therefore mandated to find an alternative plot for the squatters who could not fit in the planned area.

45. Due to the chaos that ensued, it was the evidence of PW2 that the Residents Committee with the District Commissioner identified the suit property which is Government land. It was the evidence of PW2 that PW1 had a meeting with the Principal of Kilifi Institute of Agriculture who gave his approval.

46. According to PW2, PW1 did an application through the Council to the Ministry of Agriculture who agreed to release the land to the squatters. According to PW2, it is the District Commissioner who advised the squatters to move to the suit property after the plans to resettle them on the land were approved and that the Plaintiffs moved on the land in 1995.

47. In cross-examination, PW2 stated that when PW1 authored the letter requesting to be allocated the suit property on 2nd April 1996, he was just formalising the process of the allocation. PW2 admitted that he also did a letter dated 9th May 1997 requesting for land for the extension of upgrading Mtaani Kisumu Ndogo project.

48. According to PW2, the genuine squatters who missed out on land in Mtaani Kisumu Ndogo upgrading project were 100. However, the number went up to 300 people.

49. PW2 admitted that his name is on the list of the people who were to be allocated land in the suit property. It was his evidence that he was affected by the upgrading project in Mtaani/Kisumu Ndogo.

50. PW3 is a land surveyor. It was the evidence of PW3 that he went on the suit property on instructions of the Plaintiffs' advocate and prepared a grounds report which he produced in court.

51. It was the evidence of PW3 that he identified the extent of the boundary of the land in dispute and that the land had been subdivided into smaller portions.

52. According to PW3, the main parcel of land was about 100 acres and had institutions. The Plaintiffs, according to PW3, were occupying a portion of the 100 acres parcel of land. PW3 took the court through the report and pointed out the developments that the Plaintiffs have made on the suit property.

53. Other than the report detailing the structures on the suit property, PW3 also produced in evidence a locational plan showing the disputed land and how it was subdivided.

54. In cross-examination, PW3 stated that the suit property is Government land that was compulsorily acquired from Coastal Development Group. However, PW3 stated that he was not aware the purpose for which the Government acquired the land.

55. It was the evidence of PW3 that he did not indicate all the structures that are on the suit land in his report and that he picked 300 plots after establishing the boundaries. It was his evidence that the 300 plots had already been surveyed and they had beacons.

56. According to PW3, for one to acquire Government land, a PDP must be prepared and letters of allotment issued in accordance with the PDP. A surveyor then prepares the survey plan whereafter a certificate of lease is issued to the allotee. It was the evidence of PW3 that the displaced residents of Mtaani Kisumu Ndogo followed the correct procedure to have the suit property allocated to them.

57. PW3 stated that he obtained the maps for L.R.No.5024/1 and L.R.No.5046/1 from the Director of Surveys and established the boundaries of the disputed land. However, it was the evidence of PW 3 that the surveyor who had been retained by the Plaintiffs to carry out the survey work on the disputed land had not submitted his work to the Director of Surveys by the time he (PW 3) prepared his report.

58. PW4, a valuer, informed the court that he valued parcel of land number 5024/1 and 5046/1 and prepared a report. It was the evidence of PW4 that he identified the structures that were on the suit property and gave the value of each structure. The report by PW4 was produced as PEXB3.

The Defence case:

59. The former Principal of Kilifi Institute of Agriculture, DW1, informed the court that he was in charge of the Institute between 1989 until 1999 and that the Defendant is the successor of the Institute.

60. DW1 stated that the Institute acquired the land in question in 1981. Part of the Institute's land, according to DW 1, was compulsorily acquired by the Government for experimental development and allocated to the Institute while the other part of the land was purchased by the Government from Coastal Development Limited and allocated to the Institute for the same purpose.

61. According to DW1, the Institute's land was in five portions and it measured 622 acres. At the time of the acquisition of the land by the Institute, there were already three institutions that were existing on the land, which were Kibarani Primary School, Kibarani School for the deaf and Kilifi Township Secondary School. The three institutions occupied 30 acres.

62. It was the evidence of DW 1 that in 1989, there was a directive from the Ministry of Agriculture to the effect that the Institute should formally allocate the three schools 30 acres of the land reserved for it, leaving an area of 590 acres for the Institute. DW1 produced a letter dated 18th September, 1989 to support this chronology of events.

63. DW1 stated that he was aware that PW1 had written to the PS, Ministry of Agriculture requesting to be allocated land owned by the Institute. The said letter was sent to him for comments. It was his evidence that he made his comments on 17th April 1997 and informed the Permanent Secretary that all the land allocated to the Institute had been planned for and there was no land for excision.

64. DW1 denied that he authorised the allocation of the suit property to the Plaintiffs as alleged.

65. It was the evidence of DW1 that the Plaintiffs renewed their application to have the suit property allocated to them vide a letter dated 24th September 1997. However, DW1 stated that after that, nobody authorised the allocation of the suit property to the Plaintiffs during his tenure as the Principal of the Institute.

66. In cross-examination, DW1 stated that the Institute's land was 590 acres although the Institute did not have a title for it.

67. It was the evidence of DW1 that the Institute gave 12 acres of its land to the Primary School and 18 acres to the other two schools, that is the Kibarani School for the deaf and Kilifi Secondary School.

68. It was the evidence of DW1 that his opinion was sought on whether the land the Plaintiffs had applied to be allocated was available for allocation. It was his evidence that he opposed the allocation of the Institute's land and instead explained how the said land should be utilised. According to DW1, the land that the Plaintiffs wanted allocated to them had already been planned for by the Institute.

69. DW2 was the Principal of the Defendant's predecessor, Kilifi Institute of Agriculture between 1999 until 2007.

70. It was the evidence of DW2 that while taking over as the Principal of the Institute, DW1 informed him of the numerous attempts by people to have the institute's land set aside for the purpose of settlement and putting up jua kali shades, which attempts the Institute and the Ministry of Agriculture were against.

71. It was the evidence of DW2 that in the year 2002, the Ministry of Lands declared the Part Development Plan in respect to the land that the Plaintiffs are claiming as invalid. According to DW2, the said PDP was never approved. It was the evidence of DW2 that when he went to see the then District Physical Planner on the issue of the PDP that was circulating in town, the District Physical Planner disowned the PDP that was in possession of the Plaintiffs by way of a letter dated 19th February 2003.

72. It was after the District Physical Planner disowned the PDP that the Plaintiffs were relying on that DW2 informed the Director of Agriculture that the alleged PDP in respect to part of the Institute's parcel of land was illegal. According to DW2, by the time he was informing the Director of Agriculture about the illegal PDP vide a letter dated 21st February 2003, some of the claimants had already moved on the disputed land.

73. DW2 informed the court that he discussed the issue of the encroachment by the claimants on the institute's land with the District Commissioner. He also informed the PS Ministry of Agriculture of the encroachment. By way of a letter dated 13th May, 2005 addressed to PW 1, the District Commissioner asked the Plaintiffs and anybody else who had encroached on the suit property to vacate.

74. According to the witness, by the year 2005, there was no house on the suit property and that the encroachment by the claimants was by way of fencing and subdiving the suit property.

75. The evidence of DW2 was that by a letter dated 20th May 2005, the PS Ministry of Agriculture directed that the invasion of the Institute's land should stop.

76. DW2 finalised his evidence in chief by stating that the Plaintiffs have never been allocated the suit property by the Kilifi Institute of Agriculture. It was his evidence that all the concerned Government offices have resisted the Plaintiffs' invasion of the Defendant's land and that the Defendant was issued with a letter of allotment for land measuring 239 Ha (approximately 590 acres) on 10th April 2006 leaving the other land for the three schools.

77. In cross-examination, DW2 stated there were no structures at all on the suit property in 1999 and that the PS, Ministry of Agriculture never agreed to the encroachment of the Institute's land.

78. The Defendant's Vice-Chancellor, DW3, informed the court that he was appointed to head the Defendant, which is the successor of Kilifi Institute of Agriculture, in 2007. It was his evidence that he started fencing the 239 Ha piece of land that had been allocated to the Defendant

but stopped when this suit was filed.

79. It was the evidence of DW3 that the Commissioner of Lands confirmed by his letter dated 30th November 2007 that the suit property belonged to the Defendant.

The Plaintiff's submissions:

80. The Plaintiffs' counsel summarised the evidence adduced by the witnesses in his written submissions.

81. The Plaintiffs' counsel submitted that the suit property was allocated to the Plaintiffs and that they moved on the property in 1995. Counsel submitted that the land in question never belonged to Kilifi Institute of Agriculture; that under the Land Acquisition Act, the Government has powers to compulsorily acquire any land for use by itself or for any public use and that the letter of allotment issued to the Defendant is null and void.

82. Counsel submitted that the Plaintiffs have since been issued with the letters of allotment in respect to the suit property. Counsel relied on the legal Maxim *"Ominia prarasumuntur legititime fact denec probature in contatium"* to buttress his evidence. Counsel also relied on the provisions of Section 119 of the Evidence Act.

83. The Plaintiffs' counsel submitted that the developments by the Plaintiffs were authorised by the Defendant and that indeed it is the Defendant's former Principal, together with the then District Commissioner who showed the squatters the suit property in 1992. Consequently, it was submitted, the Defendant is estopped from going back on the permission they gave to the Plaintiffs to occupy the suit property. Counsel relied on the provisions of Section 120 of the Evidence Act and the **case of Centuary Automobiles Ltd Vs Housing Blamer Ltd, Civil Appeal No. 68 of 1964.**

84. The Plaintiffs' counsel further submitted that even if the Plaintiffs do not have a Certificate of Title in respect to the suit property, the Plaintiffs cannot be said to be trespassers having been allowed on the land by the Government.

85. In his oral submissions, Dr. Khaminwa, counsel for the Plaintiffs, submitted that in a situation where a party has acquired land, the precautionary principle should be invoked by the court to minimise the risk that is likely to arise if people were to be evicted.

86. Counsel submitted that both the Plaintiffs and the Defendant do not have a title to the suit land and that it is the Plaintiffs who have usufructuary rights over the suit land as opposed to the Defendant.

87. Counsel submitted that possession of land is as good as ownership and that in any event the Defendant has vast land at its disposal. Counsel availed to the court four sets of books in land law to buttress his arguments. The court has considered the pronouncements that were made by the authors of the said books.

The Defendant's submissions:

88. The Defendant's counsel submitted that some of the Plaintiffs illegally stated entering the suit property from the year 2004; that the Plaintiffs' application for the suit property was never allowed and that the suit property has always been owned by the Ministry of Agriculture.

89. The Defendant's counsel further submitted that other than the two Plaintiffs whose letters of allotment were produced in evidence, no other Plaintiff has a letter of allotment and that there was no proof that the said two letters of allotment were ever paid for.

90. Counsel submitted that the PDP which was allegedly used to allocate the Defendant's land to the two Plaintiffs was found to have been irregularly approved and was subsequently cancelled by the Director of Physical Planning.

91. The Defendant's counsel further submitted that the list of the Plaintiffs was manipulated for purposes of this case. Counsel pointed out the names of people on the list who share identity card numbers thus showing the unclear identity of the Plaintiffs in this matter. Counsel relied on the cases of **R Vs Commissioner of Lands and Another Nairobi Misc. Application No. 395 of 2012 and Kipsioro Community Self Help Group Vs the AG, Eldoret E& L Petition Number 10 of 2013.**

Analysis and findings:

92. This is a representative suit in which about 308 Plaintiffs are praying for a declaration that part of the land known as L.R. No. 5046/1 and 5024/1 belong to them. The Defendant, which is the successor in law of Kilifi Institute of Agriculture, is also claiming the same land.

93. The issues that this court has been called upon to determine is whether the suit property was allocated to the Plaintiffs; whether the Plaintiffs are entitled to the suit property and whether the Defendant is the owner of the suit property.

94. According to the evidence of the 1st Plaintiff, PW 1, and the then Town Clerk of Kilifi Town Council, PW2, the initiative to upgrade the informal settlements within Kilifi, that is Mtaani and Kisumu Ndogo, commenced in 1990 with the actors being the Ministry of Local Government, the Town Council of Kilifi, the Ministry of Lands and Settlement, the Provincial administration and the Residents of Mtaani and Kisumu Ndogo. The upgrading of the two informal settlements, otherwise known as Mtaani Kisumu Ndogo upgrading scheme, was funded by a German affiliated NGO known as the Germany Technical Corporation (GTZ).

95. To facilitate the upgrade of Mtaani and Kisumu Ndogo estates, three committees were established. The first one was the Residents Committee chaired by PW1. The second committee was the Task Force Committee chaired by the then Town Clerk, PW2, while the third one was known as the Project Promotion Committee chaired by the Deputy Commissioner of Lands.

96. The role of the Residents Committee was to safeguard the interests of the Residents in Mtaani and Kisumu Ndogo informal settlement schemes during the implementation of the upgrading project. The Task Force Committee was to deal with the technical issues that were to arise during the upgrading of the two areas while the Project Promotion Committee was to deal with the issue of the allocation of the land within the upgraded scheme.

97. The implementation of the project involved preparation of the scheme plan for the two areas, picking of existing structures within the two areas, drawing up of plans to show the plots and the existing structures, open spaces, roads, streets and other public utilities.

98. The plan that was drawn showed that many structures in Mtaani and Kisumu Ndogo had been affected by roads, open spaces and overcrowded structures in one plot. In a nut shell, the available plots in the upgraded Mtaani and Kisumu Ndogo areas were fewer than the people who had settled there. According to the evidence of PW 1 and PW 2, the affected people had to move out of the two informal settlements and the process to identify land to accommodate them started.

99. According to the evidence of PW1, the then Coast Provincial Commissioner instructed the then Kilifi District Commissioner to lead the process of identifying land for people who had been displaced from Mtaani and Kisumu Ndogo areas.

100. According to the evidence of PW1, the Residents Committee, in collaboration with the District Commissioner, identified the suit property which was reserved for the then Kilifi Institute of Agriculture, the predecessor of the Defendant and threee public schools, as an ideal place to resettle the people displaced from Mtaani and Kisumu Ndogo. This was done sometimes in the year 1995.

101. It was the evidence of PW1 that after identifying the suit property, he approached the then principal of Kilifi Institute of Agriculture, DW 1, who showed him the area that the Plaintiffs would be allocated.

102. It was the evidence of PW1 that the area that he was shown by the Principal of the Institute, DW1, was part of 100 acres which was partly being used by three schools, that is, Kibarani Primary School, Kibarani School for the Deaf and Kilifi Township Secondary School.

103. On his part, the then Principal of the Institute, DW1, denied that he ever agreed to have the land which was reserved for the Institute and the then three existing schools allocated to the Plaintiffs as alleged.

104. Having identified the ideal land for resettling the squatters who had missed out on plots in Mtaani Kisumu Ndogo estates, it was the evidence of PW1 and PW2 that the issue of formally applying for the land began in earnest.

105. The first letter that PW1 produced in evidence is dated 2nd April 1996 authored by himself, the chairman of the Residents Committee, and addressed to the District Commissioner. In the letter, PW1 was reminding the District Commissioner (DC) of the need to acquire land measuring about 33 acres so as to settle over 80 genuine people that had been displaced from Mtaani Kisumu Ndogo areas. The last paragraph of the said letter reads as follows:

> **"My hope therefore is for you to take <u>immediate action and identify the site before things go out of hand</u> and we lose the donor support for this very important project in Kilifi." (emphasis mine).**

106. That letter was copied to the Provincial Commissioner, Coast Province and the Team Leader, GTZ.

107. The letter of 2nd April 1996 does not mention if indeed PW1 had met the Principal of Kilifi Institute of Agriculture or identified the suit property for the purpose of settling the over 80 squatters. Indeed, the letter clearly shows that as at 2nd April 1996, the Residents Committee or the District Commissioner had not identified land for the purpose of settling the displaced people.

108. The Plaintiffs produced in evidence a letter dated 25th October 1996 which was authored by the District Commissioner, Kilifi and addressed to then Minister for Agriculture. In the letter, the DC stated as follows:

> **"We would like to apply for the piece of land marked A in the sketch attached to assist us to solve the problem of upgrading of Mtaani and Kisumu Ndogo estate of Kilifi Town....."**

109. On the face of the letter, it would appear that the then Minister of Agriculture received the letter and marked it to his Permanent Secretary on 19th February, 1997 with the following comments.

> **"I know the project. I approve their request".**

110. The sketch which was supposedly attached on the letter dated 25th October 1996 was not annexed on the copy that the PW 1 produced in court. It is therefore not clear what or which portion of land was approved for allocation by the Minister for Agriculture on 19th February 1997.

111. On 9th May 1997, the then Town Clerk of Kilifi Town Council, PW 2, wrote a letter to the Permanent Secretary, Ministry of Agriculture

and made reference to the letter I have referred to above. The penultimate paragraph of the letter by the Town Clerk to the PS, Ministry of Agriculture reads as follows:

> **"While we greatly appreciate the Minister's response towards our request <u>we are yet to receive an official communication from your end which we shall forward to the Commissioner of Lands for formal allocation of the land subject of this matter</u>."**

112. The letter by the Town Clerk confirmed that the Plaintiffs had not received official communication from the Ministry of Agriculture to have its land allocated to the squatters who had been displaced from Mtaani and Kisumu Ndogo estates. The letter also confirmed that the Clerk was aware that even after the Ministry of Agriculture formally accedes to the allocation of its land, it is only the Ministry of Lands that could formally allocate to the Plaintiffs the land.

113. The letter by the Town Clerk to the PS was copied to the Minister of Agriculture, the D C and the Residents Committee.

114. It would appear that the Town Council of Kilifi wrote another letter dated 10th March 1998 to the PS, Ministry of Agriculture and copied it to the Commissioner of Lands over the issue of being allocated part of the land reserved for the Kilifi Institute of Agriculture.

115. I say so because by way of a letter dated 3rd April 1998 produced by PW1, the Commissioner of Lands sought the approval of the Ministry of Agriculture to have the suit property allocated to the Plaintiffs. The letter states as follows:-

> **"...In this regard, Kindly favour me with your comments and or recommendations in respect of the same as the land involved is part of Kilifi Institute of Agriculture."**

116. The Commissioner of Lands in that letter, just like the Town Council, appreciated the fact that the land in question was already reserved for the Kilifi Institute of Agriculture and could not be allocated without the approval of the parent Ministry.

117. Separately, the then Kilifi District Commissioner vide a letter dated 27th September, 1997 had made another request to the Permanent Secretary in the Ministry of Agriculture to have 12.5 acres of land belonging to the Institute allocated to the Jua Kali sector. It would appear that the PS, Ministry of Agriculture, was receiving quite a number of requests to have the Institute's land allocated to people and organisations. In his response of 4th November 1997 addressed to the D.C, the PS, Ministry of Agriculture wrote as follows:

> **"……It is therefore strongly suggested that the administration endeavours to seek alternative land sites for the project mentioned while assisting the Ministry of Agriculture in protecting the Institute's land from claims that may run counter to the intended national objectives for its establishment."**

118. In the same letter, the PS made reference to the request that had been made by the DC and the Town Council on behalf of the Plaintiffs as follows.

> **"This Ministry currently has a request from the Kilifi Town Council for some land from the same institution to supplement the GTZ settlement project. This issue we have discussed with you (*sic*) and I had indicated to you that since the land identified had been given to the schools, your DDC decides on whether it should go to the schools or to GTZ settlement programme."**

119. The schools referred to in the letter by the PS, Ministry of Agriculture were Kibarani Primary School, Kibarani School for the Deaf and Kilifi Township Secondary which had been allocated part of the land that had been acquired by the Government for the Defendant's predecessor's use.

120. The three schools had been allocated approximately 30 acres out of the 629 acres of land that had been acquired by the Government by partly compulsorily acquiring it and by buying the other part from Coastal Development Limited.

121. The evidence on record shows that the three schools were only allowed to utilize 30 acres of the entire land measuring approximately 623 acres reserved for the then Kilifi Institute of Agriculture. DW1 produced in evidence a letter dated 18th September 1989 from the Office of the President, authored by the Permanent Secretary, Office of the President addressed to the Permanent Secretary, Ministry of Agriculture which stated as follows.

> **"It is agreed that Kilifi District Development Committee may go ahead with plans to excise thirty (30) acres of the Kilifi Institute of Agriculture land for utilization of twelve (12) and eighteen (18) acres by a primary school and an institute for disabled respectively....<u>it has been noted that the remaining 570 acres will all be utilised by the institute of agriculture</u>".**

122. The land which was reserved for use by the Institute, which was the Defendant's predecessor, was therefore approximately 570 acres while the two schools were only entitled to 30 acres, according to the letter of 18th September, 1989.

123. Indeed, the entire land that was acquired by the Government for the Institute was already surveyed although the title document had not been issued. According to the letter dated 22nd June 1995 by the then principal of the Institute, DW 1, to the District Surveyor, the parcels of land belonging to the Institute had been registered as L.R. No. 9402/R, measuring 50.01 Ha, L.R. No. 5024/2 measuring 71.23 Ha and L.R. No.5024/1 and 5046/1 measuring 103.94 ha.

124. The land reserved for the Institute measuring a total of 256.62 Ha (approximately 649.05) was therefore identifiably by way of survey maps, the lack of a title notwithstanding.

125. The letter by the PS, Ministry of Agriculture dated 4th November 1997 and addressed to the DC, Kilifi district, which I have reproduced above, shows that the Ministry of Agriculture never conceded to the allocation of its land to the Plaintiffs.

126. It is also not true that DW1, the then Principal of the Defendant's predecessor, acceded to the allocation of part of the Institute's land to the Plaintiffs as alleged by PW1 and PW 2. I have arrived at this conclusion based on the oral evidence of DW1 and the letter dated 17th April 1997 authored by DW1 and addressed to the PS, Ministry of Agriculture. In the letter, DW1 stated as follows:

> **"Recently the Kilifi Town Council applied for allocation of 30 acres of land to settle squatters under the GTZ sponsored programme.....after keen study and observation of the on goings, the Kilifi Town council is not sincere on the purpose of the project and is only using GTZ as a cover. The actual truth of the matter is that individual needs (greed) for plot allocation is more than community consideration. The office of the physical planning is very much concerned that if such allocation is allowed, then a disturbing slum of structures will spring up next to such elite surrounding institutions like the Kilifi Institute of Agriculture, Kilifi Secondary and others. This will not conform well to the environmental harmony expected in Town Planning. Already, a strange sketch has been drawn from unknown sources and is widely circulating in Town perhaps with ulterior motive."**

127. The other reasons that made the Principal, DW 1, to strongly oppose the allocation of the land that the Plaintiffs had applied for, according to his letter of 17th April, 1997, were as follows:

> **(a) Part of the area applied for had earlier been officially excised from the Institute's farm land and allocated to the existing neighbouring institutions.**
>
> **(b) The area had been fenced off for the purpose of grazing and browsing of the Institutes livestock.**
>
> **(c) The institute needed space for the staff housing.**

128. PW1 informed the court that they disowned the Part Development Plan dated 23rd November 1998 which he produced in evidence because the land they had applied for was reduced by 20 acres by people who wanted to grab the 20 acres.

129. It was the evidence of PW1 that pursuant to the said PDP, two letters of allotment were issued, one to himself and the other one to the 2nd Plaintiff. However, according to PW 2, they informed the Commissioner of Lands to stop the issuance of the other letters of allotment because a proper and valid PDP had to be drawn first.

130. 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 allotees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of **African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013** where Njagi J held as follows:

> **"Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."**

132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed. As I have stated above, the land that the Plaintiffs had applied for was already surveyed, having been acquired by the Government from juristic persons and reserved for the Kilifi Institute of Agriculture and three other schools.

133. Indeed, it was with the realization that the land in question had been reserved for public use that the Plaintiffs, through the District Commissioner, the Town Council and the Commissioner of Lands did seek in writing for the consent of the Ministry of Agriculture to have the suit property allocated to the Plaintiffs.

134. It was also with the realization that the suit property had been reserved for public use that the Director of Physical Planning informed the then Commissioner of Lands vide a letter dated 20th September 2002 of the cancellation of the PDP that had been prepared in respect to the suit property. The Director of Physical Planning stated as follows:

> **"At the time the Part Development Plan was presented to me, I was assured that the site was falling within Government land and I assumed that your office was aware of the request by the applicants.....i have since discovered that this particular site forms part of land owned by the Agriculture Institute, Kilifi and I wish to officially withdraw the said Part Development Plan...You should therefore consider the same as cancelled."**

135. In a nut shell, the Director of Physical Planning confirmed that the land in question was not unalienated Government land and was not therefore available for alienation.

136. The cancellation of the PDP in respect to the land that had been allocated to the Plaintiffs was further confirmed by the Kilifi District Physical Planning Officer's letter dated 27th May 2005 and addressed to the District Commissioner and the Principal of Kilifi Institute of Agriculture.

137. The District Commissioner also abandoned his earlier pursuit to have the suit property issued to the Plaintiff vide his letter dated 13th May, 2005 addressed to the Residents Committee in which he stated as follows:

> **" I have information that you have illegally encroached on Kilifi Institute land…You are asked to stop further development and vacate the land immediately or else legal action will be taken against you."**

138. On 10th April 2006, a letter of allotment was issued to the Permanent Secretary, Treasury, in respect to the suit in favour of Kilifi Institute of Agriculture for an area of 239 Ha (approximately 597.5 acres). The letter of allotment was issued on the basis of the already existing survey plans considering that the land was initially private land before it was compulsorily acquired by the Government and handed over to the Institute and the three public schools. The Defendant's predecessor paid the requisite fees of Kshs.3,600 for the said letter of allotment.

139. Vide a letter dated 30th November 2007, the Commissioner of Lands confirmed that indeed the 239 hectares belonged to the Kilifi Institute of Agriculture.

140. To prove that they are entitled to the suit property, the Plaintiffs produced in evidence the Minutes of the Town Council of Kilifi. The Minutes shows that the Council resolved that the Ministry of Lands & Housing should nullify the allocation of the land it had earlier made contrary to the list of the chairman of the Residents Committee and that the Commissioner of Lands be requested to issue fresh letters of allotment to the rightful owners whose houses were affected during the upgrading of Mtaani/Kisumu Ndogo.

141. The Minutes from the Council resolving that the people on the list prepared by the Mtaani/Kisumu Ndogo Residents Committee should be allocated the suit property is inconsequential in law because the land in question was not Trust land as defined under the repealed Constitution and the Trust Land Act. The Council did not therefore have the legal mandate to dictate to the Commissioner of Lands on how and to whom he should allocate the suit property, considering that the suit property is Government land.

142. A draft PDP for the proposed extension of Mtaani Kisumu Ndogo dated 5th March 1997 together with a list of 308 beneficiaries, who are the Plaintiffs in this case, was produced by the Plaintiffs in this court.

143. The draft PDP has no evidential value considering that it does not have a PDP number and the same was never approved. Its origin is unknown and it was neither authenticated by the District Physical Planner nor by the Director of Physical Planning. Indeed, not a single letter of allotment was issued by the Commissioner of Lands to the Plaintiffs pursuant to the said PDP.

144. As I have already indicated above, land reserved for public institutions or for any other public purpose cannot be said to be unalienated Government land as defined under the repealed Government Lansd Act and the Physical Planning Act.

145. Evidence has been placed before this court to show that the Government acquired the suit property by purchasing part of it from the Coast Development Company and by acquiring another portion compulsorily. The entire land, which was already surveyed, was then allocated to the Kilifi Institute for Agriculture for educational purpose. Later on, 30 acres of this land was hived off and allocated to three other public schools for public purpose.

146. The reasons for the acquisition of the land in dispute by the Government is captured in the letter dated 4th November 1997 by the then PS in the Ministry of Agriculture as follows:

> **"Agricultural Training at the certificate level is an operation that requires a critical mass of farm land to ensure effective theoretical and practical teaching. It may be remembered that when it was decided to locate the Training facility at Kilifi, the Government farm available at Kibarani then, was considered to be inadequate. It was thus found necessary for the ministry to purchase an additional land from Mr. Keen to increase the acreage that would be ideal as a teaching tool for the intended students capacity of 400.....As a coordinator of the Government development programmer in your district, it will me more prudent for you to strengthen the already established institution and develop others, rather than destroy or mutilate the current established one and replace them with new ones. This, in itself, may not be development."**

147. The former Kilifi Institute of Agriculture is now a fully-fledged university, pursuant to legal notice number 164 of 23rd August, 2007. How can it be said that they do not require the entire land that was previously reserved for the Institute when the population of the students and the number of courses being offered has increased? The Defendant indeed requires more land considering that it does not only now offer agricultural courses but other disciplines too.

148. Even if the Defendant does not utilize the entire land previously reserved for Kilifi Institute of Agriculture, the law provides that the Commissioner of Lands, under the repealed Government Lands Act, could not allocate Government land reserved for public purpose to individuals for their private use.

149. Section 3 of the repealed Government Lands Act, which is the applicable law in this case, provides that the President may, subject to

any other law, make grants and dispositions of any estates, interests or rights in or over *unalienated* Government land.

150. Section 9 of the same Act provides that the Commissioner of Lands may cause any portion of a township which is not required for public purpose to be divided into plots and may be disposed of in the prescribed manner.

151. The above two sections clearly shows that land reserved for public purporse cannot be allocated to individuals. This position has been reinstated at Article 62 (1) (b) of the Constitution. The Article has defined "public land" to include land lawfully held, used or occupied by any State organ. Such land cannot be disposed of or otherwise used except in terms of an Act of Parliament.

152. The issue of land which has been set aside for public purpose not been available for allocation by the President or the Commissioner of Lands has been up held in numerous decisions.

153. In the case of **Lalitchandra Dugarshankar Padya & Another Vs Saled Awale & Another, Mombasa HCCC No. 87 of 2001**, Justice Maraga , as he was then held as follows:

> **" I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government Land Act, not available for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void."**

154. In **African line transport Co. Ltd Vs the AG, Mombasa HCCC No. 276 of 2003,** Njagi J. held as follows:

> **"Finally, there is nothing on record to suggest that the site was ever surrendered back to the Government. Having been alloted to the NYS as a public utility, there was nothing left to be re-allocated to Mr. Omari and the subsequent grant to him was therefore irregular."**

155. In the case of **H.H. DR. Syedna Mohammed Burhennuddin Saheb & Others Vs Benja Properties Ltd, Nairobi HCCC NO. 73 of 2000,** Visram J, as he was then, held as follows;

> **"In any event the letter of allotment purchased by the Defendant had expired, and was subject to a disclaimer. In any event, that letter was worthless because it purported to allot land under the Government Land Act that was not available for allotment."**

156. In **James Joram Nyaga & another Vs The AG and Others,** Nyamu J, as he was then, and Wendo J held as follow:

> **"We therefore hold that the suit land having been acquired for public purpose, that is construction of road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use."**

157. While discussing the concept of public trust and public interest, Nyamu J, as he was then, in the case of **Kenya Guards Allied Workers Union Vs Security Guards Services & 38 Others Nairobi HC Misc 1159 of 2003,** stated as follows;

> **"How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title. Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public plot such as a hospital by an individual violates the public or national interest and therefore a violation of the constitution. I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins".**

158. I am in agreement with the sentiments of the Judges in the above cases.

159. The Plaintiffs, as acknowledged by PW1, PW2 and PW3, were aware that the land in question was reserved by the Defendant's predecessor and three other public schools. Indeed, they did apply for the consent of the Defendant's predecessor to be allocated the said land but that consent was never given. The Commissioner for Lands also asked for the consent of the Defendant's predecessor to allow him to allocate to the Plaintiffs the suit property which consent was also denied.

160. No evidence was placed before me to show that the Commissioner of Lands allocated the said land to the Plaintiffs, which would have been illegal in any event.

161. The PDP that was prepared in respect to part of the land that the Plaintiffs were claiming was rightfully cancelled by the Director of Surveys. With the cancellation of the PDP, the two letters of allotments dated 8th august 2002 in the name of Nelson K. Chai, the 1st Plaintiff, for a plot measuring 0.2 ha and the other one in the name of Lawrence Gohu, the 2nd Plaintiff, of the same date and acreage cannot stand. In any event, the said two letters of allotment lapsed after 30 days from the date of issuance because the said two individuals did not pay the requisite fees.

162. I agree with the sentiments expressed by the Principal of Kilifi Institute of Agriculture, DW 1, in his letter dated 17th April, 1997 that the Kilifi Town Council was not sincere, together with the Residents committee, when they applied to be allocated the Defendant's land.

163. I say so because although the Plaintiffs claim that they were displaced from Mtaani and Kisumu Ndogo informal settlements, no evidence was placed before me to indicate that an exercise was conducted either by the GTZ or the Town Council to ascertain the number of the people or households that were staying in the two estates before the upgrading project commenced.

164. There is also no empirical evidence to show the exact number of the people within the two estates who were displaced due to the re-planning and upgrading of the two estates.

165. The practical thing that should have happened during the so called upgrading scheme in the two estates was to ascertain the number of the people that were going to be affected before proceeding any further with the project. It was only after establishing where the people who were to be displaced would be re-located to that such an exercise should have commenced.

166. The insincerity in the Plaintiffs' claim to be settled on land reserved for the Defendant and the three other public schools is further shown by the fact that initially, it was said that approximately 80 people had been displaced from Mtaani/Kisumu Ndogo estates. However, that number, without any plausible explanation, swelled to 308.

167. Some of the people in the list of the claimants share identity card numbers thus compromising the authenticity of the claimants.

168. What is even more intriguing about the list of the 308 Plaintiffs, who are said to have been displaced from Mtaani and Kisumu Ndogo informal settlements, is that one of them is the then Town clerk, PW 2, who was on the fore front, on behalf of the Town Council of Kilifi, in pushing for the allocation of the Defendant's land to the Plaintiffs.

169. The said former Town Clerk testified in this court as PW2. When asked why he was on the list of the people that were meant to be allocated the Defendant's land, he stated that he was amongst the people who were displaced from the two informal settlement schemes!

170. That in my view cannot be true. The fact that then Town Clerk, PW2, was also supposed to benefit from the allocation of the suit property shows that the interests of the Plaintiffs to be allocated the suit property was more than resettling people who are said to have been displaced from Mtaani and Kisumu Ndogo estates.

171. If the Town Council indeed wanted to settle genuine people who had been displaced, the Council, in consultation with the national Government, should have set apart Trust land pursuant to the provisions of sections 117 and 118 of the repealed Constitution to resettle such people and not to encourage the Plaintiffs to encroach on land reserved for public purpose.

172. The Plaintiffs in this matter informed the court that they took possession of the property in 1995 even before applying for it. That, if it is true, can only amount to an act of trespass on the Defendant's land or Government land.

173. It does not matter whether the land in question was or was not alienated Government land. However genuine the Plaintiffs' plight was, they could not occupy the suit property before the mechanism of allocating to them the land had been followed and the letters of allotment issued to them. Any other mode of possession or occupation of land, be it Government or private land can only amount to an act of lawlessness and hooliganism and should be frowned upon by the court.

174. What is more disturbing in this case is that the Plaintiffs, even before being formally allocated with the suit property, engaged a private surveyor who carried out survey work, subdivided the land and started developing their respective plots.

175. This in my view was an ill-advised move by the Plaintiffs and they shall suffer the consequences of their actions considering that the land in question was not available to them in the first place. It is inconsequential, although sad, that the Residents Committee collected money from the Plaintiffs to subdivide the suit property and that the Plaintiffs have heavily invested in the development of the land.

176. In a recent decision that was delivered on 19th June 2014 in **Mombasa Technical & Training Institute Vs Agnes Nyevu Charo & 106 others, Mombasa Civil Appeal Number 282 of 2010,** the Court of Appeal held as follows.

> **"Regardless of the length of time the respondents remained on the suit property, their status remained that of illegal squatters. In considering the legitimacy of the respondents' expectation, we cannot fail to take note of the fact that the issue of land and squatters in this country is a sensitive and emotive issue in view of the number of people who are landless. To create a precedent that a legitimate expectation for allocation of Government land can arise out of an occupation declared illegal by statute would be opening a pandoras box which would compound the problem of land by encouraging squatters invasion of Government land. Further, it would be tantamount to introducing the doctrine of adverse possession in Government land. This would be inimical to the public policy of maintaining law and order..... Finally it is not lost on us that the allocation of the suit property to the appellant was an allocation for public purposes to wit a public school/college. In the circumstances, we come to the conclusion that the process resulting to the decision of the 108th Respondent to allocate the suit property to the appellant cannot be faulted...."**

177. I am bound by the above decision. Indeed, the sentiments by the Court of Appeal in the above decision apply in this case, word for word. The Defendant and its predecessor, together with Kibarani Primary School and Kibarani school for the deaf were set up by the Government for public purpose. The suit property was set aside for them and a letter of allotment has since been issued to the Defendant in respect to the suit property. This court cannot fault the Commissioner of Lands for issuing to the Defendant a letter of allotment for the entire land.

178. Where land has been reserved for public purpose, like in this case, any allocation of such land to private persons cannot be recognised by the court. Public interest in land will always outweigh an individual's right to own the same property. It therefore does not matter that the

Plaintiffs had a legitimate expectation to be allocated the suit property.

179. Even if it was to be argued that the suit property is unalienated Government land, which is not the position, any attempt by this court to allow the Plaintiffs to own the suit property would be an usurpation of the powers conferred to the President and the Commissioner of Lands under the repealed Government Lands Act and the National Land Commission under the current Constitution. That was the position that was taken by the **Court of Appeal in the case of Emfil Limited Vs The Registrar of Titles Mombasa & others, Mombasa Civil Appeal Number 312 of 2012** and in the **Mombasa Technical & Training Institute case** *(supra).*

180. In the circumstances, I find that the Plaintiffs have not proved their case on a balance of probabilities. On the other hand, the Defendants have proved its case.

181. For the reasons I have given above, I dismiss the Plaintiffs Plaint dated 22nd July 2009 with costs and allow the Defendant's counterclaim dated 15th October 2010 in the following terms.

(a) The 308 Plaintiffs and any other trespassers in occupation of the Defendant's land being L.R. No.5046/1, 5024/1, 5024/2 5046/2 and 5046/5 be and are hereby evicted.

(b) A permanent mandatory injunction be and is hereby issued restraining the 308 Plaintiffs or any other person acting under them from continuing being in occupation and or trespassing on the Defendant's land mentioned above either by themselves, their agents, servants, and or any person(s) drawing title from them.

(c) The Plaintiffs to pay to the Defendant the costs of the Counter claim.

Dated and delivered in Malindi this **31st** day of **October,** 2014.

O. A. Angote

Judge