



**Liyavo Farmers Co-operative Society v Kamau, Mukanzi & Litala (Being Sued as the Trustees of International ChildCare Trust Kenya) & 8 others; Area Member of Parliament, Kwanza Constituency & another (Interested Parties) (Environment & Land Case 37 of 2018) [2024] KEELC 1317 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1317 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 37 OF 2018**

**FO NYAGAKA, J  
MARCH 12, 2024**

**BETWEEN**

**LIYAVO FARMERS CO-OPERATIVE SOCIETY ..... PLAINTIFF**

**AND**

**ROSEMARY WAMBOI KAMAU, PIUS MUKANZI & JACKYLINE CHIMOLI  
LITALA (BEING SUED AS THE TRUSTEES OF INTERNATIONAL  
CHILDCARE TRUST KENYA) ..... 1<sup>ST</sup> DEFENDANT**

**CHILD RESCUE KENYA ..... 2<sup>ND</sup> DEFENDANT**

**DAVID JAMES MBOGHO ..... 3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**SETTLEMENT TRUSTEE ..... 5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, TRANS NZOIA COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**MINISTRY OF AGRICULTURE ..... 7<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 8<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 9<sup>TH</sup> DEFENDANT**

**AND**

**AREA MEMBER OF PARLIAMENT, KWANZA  
CONSTITUENCY ..... INTERESTED PARTY**

**COUNTY GOVERNMENT OF TRANS NZOIA ..... INTERESTED PARTY**



## JUDGMENT

1. The plaintiff is a registered cooperative society under the Cooperative *Societies Act*, Chapter 490 of the Laws of Kenya. It instituted this suit by way of a Plaint dated 05/04/2018 and filed on 09/04/2018. It prayed for the following reliefs:-
  - a. A mandatory injunction compelling the defendants to vacate the premises or suit property and/or deliver vacant possession to the plaintiff and/or its tenants;
  - b. A permanent injunction restraining the 1<sup>st</sup> to 9<sup>th</sup> defendants from alienating, selling, transferring and/or dealing with land parcel no. Trans Nzoia/Liyavo/212;
  - c. An order that the sub-division, alienation, sale and subsequent transfer of land parcel no. Trans Nzoia/Liyavo/212 to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was illegal, fraudulent and made in abuse of procedure and is void ab initio;
  - d. Subsequent to prayer (c) above, an order of cancellation of all subdivisions, sale and subsequent transfers arising from land parcel no. Trans Nzoia/Liyavo/212 made to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants;
  - e. Subsequent to prayer (c) and (d) above, the 4<sup>th</sup> and 6<sup>th</sup> defendants be and are hereby ordered to jointly and severally rectify the register book so as to remove the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the title deed thereto with respect to land parcel no. Trans Nzoia/Liyavo/212 to revert back to the proprietorship of the plaintiff;
  - f. An order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their employees, agents or servants be ordered to vacate the suit property within 30 days from the date of judgment;
  - g. General damages/mesne profits against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants for trespass to land parcel no. Trans Nzoia/Liyavo/212 from the year 2000 to the date of judgment;
  - h. Costs of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants entered appearance on 07/05/2018. They filed their joint Statement of Defence on 21/05/2018. The 3<sup>rd</sup> Defendant entered appearance on 25/05/2018. He filed his Statement of Defence on 22/07/2019. They all denied the averments set out in the Plaint and prayed that the suit be dismissed with costs.
3. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 9<sup>th</sup> defendants were represented by the Office of the Attorney General of the Republic of Kenya. They entered appearance on 31/05/2018 and filed their joint statement of defence on 01/11/2018. They averred that the records in the land's registry lawfully and legally represented a true account of the facts on the ground. They urged this court to find that the suit was unmerited and thus be dismissed with costs.
4. Despite service of summons to enter appearance and file a defence, the 8<sup>th</sup> defendant never entered appearance nor filed any statement of defence.

### The Plaintiff's Case

5. The Plaintiff called two (2) witnesses to the stand; PW1 Erustus Erick Omurimi, a member and Secretary of the Plaintiff and PW2 Hellen Injete Imbunye, the Sub-County Cooperatives Officer,



Kwanza Sub-County situated in the County of Trans Nzoia. PW1 adopted his witness statement dated 15/11/2021 while PW2 testified on oath.

6. Their evidence was that the plaintiff, alias shirika farm is a juristic person comprised of one hundred and fifty (150) farmers, being members from the Liyavo Settlement Scheme. Upon registration, it was issued with Certificate Number 2040 issued on 01/04/1971 produced as P.Exhibit 2.
7. Prior to its registration, members were squatters until a resettlement policy was rolled out by the 1<sup>st</sup> President of the Republic of Kenya between 1968 and 1978. It was these members that would later on be resettled at Liyavo Settlement Scheme. The plaintiff relied on an extract for the local dailies dated 02/11/1972 speaking to the President's address to the nation. He marked it as P.Exhibit 3.
8. The settlement in the scheme took place over land parcel No. Trans Nzoia/Liyavo/212 alias L.R. No. 5751, measuring 2,802 acres that was originally occupied by a white settler, John Davies together with his brother Peter Davies. Following independence, white settlers surrendered their leases back to the government to facilitate the resettlement process.
9. During the resettlement process, landless Kenyans were asked to register their names in their respective sub-locations through their local chief barazas. This process took place in 1973. In Trans Nzoia County, registered persons reported to the District Commissioner, for vetting, interviewing and approval by the vetting board. The letter dated 31/05/1973 produced as P.Exhibit 10, addressed to all chiefs in Trans Nzoia and the District Commissioner attached a list of settlers selected for Maridadi, Liyavo and Sitatunga areas to be settled on 08/06/1973. That attached list was however not adduced in evidence. The addressees were asked to advise settlers to assemble in Liyavo Farm at 0800 hours and bring their National Identity Cards (I.D.) cards and a letter of identification in the case of women.
10. Following clearance from the vetting committee, individual members visited Liyavo Scheme for verification of their personal details. Once that was done, members were asked to pick a ballot paper. Each person was photographed with their respective ballot paper containing their names, the name of the settlement scheme and the plot number that they were settled in. They were then issued with allotment letters with affixed pictures of themselves. Each member was equitably granted 2.5 acres. In 1984, an additional 2.5 acres was issued. It was in this second issue that members were asked to pay Kshs. 6,000.00 by way of a charge to the Settlement Fund Trustee.
11. It was after this process that members occupied the settlement scheme. They proceeded to live and farm on their respective parcels of land. This was preceded by the registration of the Plaintiff, a cooperative society, purposed to collectively provide manual labour to the Settlement Fund Trustee. The members would in turn be paid their wages which essentially converted to the purchase price for the 2.5 acres. This was converted to a loan until payment in full to the Barclays Bank International Limited. In addition, farmers sold their farm produce and purchase fertilizers. Any surplus was used to purchase the unallocated land. According to PW1, manual labour was supplied for ten (10) years between 1972 and 1982.
12. The settlement of the members took place in an area part of which was hived off for the suit land. It was later demarcated into a public utility plot in 1983 for use by members of the Liyavo Farmers' Co-operative Society; the plaintiff herein.
13. On settlement of the purchase price, the then president Mzee Jomo Kenyatta, in one of his visits in 1978, accompanied by his vice president Daniel Moi, appreciated the members for fulfilling their end of the bargain. He thereafter instructed the Ministry of Agriculture and the Settlement Fund Trustee to henceforth handover the management of the plaintiff to its members. He also warned members to



- exercise caution against unscrupulous persons. PW1's testimony was that compliant members were also issued with their respective discharges of charge.
14. In that same year, surveyors visited the suit land indicative that they were instructed by then President to subdivide the suit land for registration purposes. However, that exercise did not materialize following the untimely death of the President in August, 1978.
  15. The handover of the society from the Settlement Fund Trustee to its members took place after an unreasonable delay. That was in 1984. According to PW1, it was unceremonious. Furthermore, the 2<sup>nd</sup> president of Kenya's Republic reduced the funding of its activities.
  16. The plaintiff took over the affairs and management together with its acquired assets including the suit parcel of land. Built therein were maize stores with grain dryers, a machinery shed, a dryer house, stores, an engine room, sunflower shed, mechanic house, tool house and a demonstration area.
  17. The suit land was occupied in the year 2000 through the plaintiff's elected officials. Its members actively engaged in farm activities to improve their livelihoods and manage the assets of the Co-operative Society within the parameters of the law and in trust for its members.
  18. Allotment of the parcel of land took place in two (2) phases. During the second phase commenced in 1985, the suit land was demarcated as a cereals store to be used by the plaintiff's members. However, larger portions of the suit land were allegedly fraudulently subdivided and transferred by the then District Settlement Officer, Mr. John Kosgey to political cronies of the KANU government.
  19. In 1990, the plaintiff's noticed suspicious activities of encroachment of their cereals store. Frantic efforts to kick out the intruders were met with futility as they lacked support from the government. Things went out of control in 2000 when portions of the suit property had been illegally and fraudulently invaded by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  20. It was at this point that they discovered that large portions of the suit land had been furtively subdivided, sold and transferred to the said defendants. The plaintiff produced and marked as P.Exhibit 5 the title deed in the name of the 1<sup>st</sup> defendant. The plaintiff restated that the 1<sup>st</sup> defendant was not a member of the plaintiff. It also produced green cards in the name of the 1<sup>st</sup> defendant marked P.Exhibit 13(a), (b) and (c) respectively. According to the plaintiff, the suit land was solely purposed for public utilities for the benefit of the farmers and not individual ownership.
  21. Following this discovery, the Plaintiff lodged a complaint before the Truth Justice and Reconciliation Commission which in turn compiled a report. It was reported that the suit land was given to one hundred and fifty (150) people who were landless. Additionally, the land was subdivided and members given 2.5 acres. The rest of the plot was given to top government officials. He produced and marked it as P.Exhibit 15.
  22. The plaintiff stated that the purported subdivision and transfer violated the 1<sup>st</sup> President's express orders allocating land to the Plaintiffs in L.R. No. 5751 vide a letter of offer dated 01/11/1972 in exercise of his Presidential powers.
  23. It accused the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants of illegally transferring the land in their favor. That their actions amounted to fraud and illegality, occasioned in conjunction with the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants. Regarding Kitale ELC No. 53 of 2012; International Child Care Trust Kenya vs. David James Mbogo, the plaintiff lamented that it was never enjoined in the proceedings.



24. In its letter dated 03/01/2017 produced as P.Exhibit 7, the 1<sup>st</sup> defendant denied that it was in occupation of plot No. 212 illegally. It advised the Plaintiff to pursue the matter in court if it was dissatisfied with its lawful occupation of the said parcel of land.
25. Further, that the resultant effect of the defendants' actions occasioned loss and damage. The plaintiff contended that it never executed any sale agreements, transfer and consent forms in favor of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That they were never notified by the relevant Ministry on the change of user. Furthermore, the Cereals and Produce Board were registered as owners of the suit land in trust for the plaintiff. It is for those reasons that the plaintiff filed suit urging this court to grant the reliefs sought.
26. When cross examined, PW1 stated that he did not file the Plaintiff's resolution to demonstrate that he was the plaintiff's secretary; that the plaintiff did not write to the President, accepting his offer; that they were never issued with a title deed; that their claim did not lie for L.R. No. 5751; that the 1<sup>st</sup> defendant occupied the suit land in 1990 and in 2000 but only filed suit in 2018; that albeit being aware of Kitale ELC No. 53 of 2012, they never sought to enjoin themselves in the proceedings; that he was not aware of the judgment in that matter; that he did not adduce the list of the one hundred and fifty (150) members; that he did not know that the suit land was transferred to the Cereals and Produce Board in December 1983; that a settlement officer was best placed to enumerate the suit land's history; that PMFI.14 letter dated 01/09/2011 was in respect to Sitatunga Cooperative Society and not the plaintiff and further did not refer to plot No. 212.
27. The Plaintiff called PW2, one Helen Injete Imbuye. She testified that she joined the Trans Nzoia office in 2019. Her duties included overseeing cooperative societies' activities, supervising their elections, registration, training and civic education, conflict resolution and compliance. She was the custodian of the plaintiff's file; the oldest document in the file was dated 12/11/1993. She explained that members of a cooperative society, in this case the plaintiff, were only entitled to ownership and generation of titles in respect to the suit land after passing a resolution. Thereafter, they would liaise with the relevant Ministry to set aside any acreage for public utilities.
28. She recalled that the suit land namely plot No. 212 was reserved as a public utility. Their office was to ensure that the public utility plot is adhered to accordingly. She concluded that the registration of the plot in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was illegal since it was reserved for a public utility. Withal, the suit property had not been converted by way of a change of user. Finally, the parcel of land was currently vacant.
29. When cross examined, PW2 stated that the plaintiff had 199 members; that there was no letter of allotment or title in the name of the plaintiff; that the accountability list was prepared on 03/03/2020; that plot No. 212 was reserved for the Cereal Produce Board and not the plaintiff; that the 2802 acres were surveyed and allotted by the Settlement Fund Trustee (the initial owners) to the plaintiff; that each member of the plaintiff was issued with a letter of allotment and a charge; that there was no inventory of assets owned by the plaintiff; that the core business of the plaintiff was to settle its members; that the plaintiff never bought or sold produce from its members on their behalf.
30. Explaining that the cancellation of '20' at the bottom right hand part of the certificate in favor of the year 1971 was done in error, PW2 stated that on discovery of that, she wrote to the commissioner to inquire as to its reasons. The commissioner wrote back indicating that it was in error because they were using the wrong Government printers papers. The original was thus sent back by way of G4S courier services. It was then returned with a stamp marked 'replacement' by the state department of cooperatives in Nairobi to indicate that in future, the certificate would be replaced without an error.



She clarified that the error did not invalidate the entire document. The said word had however not been endorsed.

31. While cooperative societies must notify them of any of their AGMs, PW2 was only in receipt of Minutes of the plaintiff's AGM held once on 05/12/2016. That they (the Cooperative Society office) must also be in attendance to supervise their meetings and elections. Since they have never conducted any meetings from 2016, it can be rationally presumed that the plaintiff's objectives had been met and thus it did not exist. She then clarified that she had never visited the suit land and would thus not know of its current position. Finally, only the Settlement Fund Trustee could explain the evolution of the property to the ownership of the 1<sup>st</sup> defendant.

## **The Defendants' Case**

### **a. The 4<sup>th</sup> - 9<sup>th</sup> Defendants' Case**

32. DW1 Crecencia Atiento, the Land Adjudication and Settlement Officer Trans Nzoia County had been employed since 2018. She produced the file in respect to land parcel no. Trans Nzoia/Liyavo/212 as 4-9 D.Exhibit 6. She confirmed indeed that from the file, vide a letter of offer dated 01/11/1972, the President offered the plaintiff the piece of land containing by measurement 2802 acres (1123 ha) and known as Land Reference No. 5751 which piece of land is situated in Trans Nzoia District. The offer was subject to the issuance of a grant to be made under the provisions of the Government [Land Act](#) and a title issued under the Registration of Titles Act.
33. According to the accountability list, showing allottees and acreage of parcels of land and marked 4-9 D.Exhibit 1, the said plot, measuring five (5) acres, was set aside for the Cereals and Produce Board as a 'P.U' translated to a public utility. It was thus unavailable for discharge by the Settlement Fund Trustee.
34. In the normal conduct of business, an allottee is issued with a letter of allocation from their office and are informed of the terms and conditions. Thereafter, the boundaries for the said plot are identified after paying a 10% deposit of the purchase price. If payment is made outrightly, the purchaser is issued an outright of purchase document. If payment is paid in installments, the purchaser is given a discharge of charge upon clearing the loan. The discharge of charge is not to be confused with a transfer document. Thereafter, the discharge of charge document is taken to the land registrar for registration and issuance of a title deed to the allottee.
35. Regarding allocations to public utilities, she testified that they're public land and remain under the control and ownership of the government or government owned companies. They are not available for allotment to private owners. For that reason, the suit land was reserved for ownership by the Cereals and Produce Board, a state corporation.
36. Other public utilities in the accountability list included plot No. 37 measuring approximately 2 acres for a nursery school, plot No. 84 measuring approximately 2.5 acres for a cattle dip marked 'undischarged', plot No. 204 for a church marked 'discharged', plot No. 5, 6, 7, 8, 9, 10 and 11. For the school, the title is pursued by the Ministry of Education, the cattle dip by committee members and for the church by its members or trustees. If not pursued, that does not vitiate their reservation.
37. That currently, the Land Laws (Amendment) Act of 2012 allows for conversion of a public utility plot into private ownership. It is under the preserve of the 8<sup>th</sup> defendant. If the parcel of land is huge, the process involves the National Assembly. Any land within a County Government must also pass through the County Assembly for approval while land within the National Government must be approved by the National Assembly. Before enactment of the said statute, public land could only be converted to private land by way of public auction, alienation or set aside.



38. Sometime in 1989, the suit parcel of land was re-allocated to J. K. Koskei upon his request vide a letter dated 13/01/1989 produced as 4-9 D.Exhibit 2. The said letter revealed that the plot had deteriorating structures. It didn't disclose who had erected those structures. His request was considered and granted by the Minister for Lands.
39. The said J. K. Koskei was a former District Land Adjudication and Settlement Officer in Trans Nzoia County. This could be discerned from his letter dated 17/11/1994 alongside that dated 14/07/1989 executed by the same person. The letters were written in his capacity as an applicant and District Land Adjudication and Settlement Officer respectively.
40. J.K. Koskei's request was accepted vide a letter dated 26/04/1989 marked 4-9 D.Exhibit 3 which he accepted on 14/09/1989. He was given an allotment letter dated 23/12/1991 marked as 4-9 D.Exhibit 3. He was issued with a charge instrument produced as 4-9 D.Exhibit 4 requiring him to pay the purchase price in the sum of Kshs. 78,309.00. The allottee paid an initial sum of Kshs. 7,725.00 and was issued with a receipt accordingly marked as 4-9 D.Exhibit 5. The property was discharged in 1996 from the Settlement Fund Trustee.
41. She stated that the above allocation was erroneous as the parcel of land was not available for private ownership as purported. It is for the above reasons that DW1 contended that the property ought not to revert to the plaintiff but the Cereals and Produce Board.
42. On cross examination, DW1 stated that the Settlement Fund Trustee could not take back land already set aside; that the 4<sup>th</sup> - 9<sup>th</sup> defendants did not have a letter of allocation; that J. K. Koskei sold the portion allocated to him to the 1<sup>st</sup> defendant; that any public land taken away ought to be recovered; that Liyavo Settlement Scheme was land bought by the government from white settlers to issue to landless Kenyans upon application; that the plaintiff is at liberty to pursue a case concerning public utilities; that she could not ascertain who prepared the accountability list; that the Cereals and Produce Board have never complained; that the transfer of the plot from J. K. Koskei to the 1<sup>st</sup> defendant was approved by the Land Control Board without objection; that the plaintiff was never allocated any parcel of land and did not form part of the committee list.
43. According to the green card in respect to the suit land namely Trans Nzoia/Liyavo/212, the registration was opened on 14/06/1996 and registered in the name of the Settlement Fund Trustee. A charge and discharge of charge were registered on 01/07/1996 to Settlement Fund Trustee for a sum of Kshs. 78,309.00. The 2<sup>nd</sup> entry was a transfer from Settlement Fund Trustee to the 1<sup>st</sup> defendant trustees on 17/07/1996. A title deed was issued on 01/07/1996.
44. On 06/10/1997, the property was acquired by way of transmission to the estate of S.O. Ekisa and a title deed issued. The 3<sup>rd</sup> defendant registered a caution claiming beneficiary interest on 13/05/1998. Thereafter, the property was transferred in the names of the 1<sup>st</sup> defendant's trustees on 29/12/2000 and a title deed issued. It was then canceled by decree of the Bungoma High Court Civil Suit No. 71 of 2000 on 16/07/2004.
45. On 27/07/2012, the registration of entries 2, 4 and 5 to the benefit of the 1<sup>st</sup> defendant's trustees were canceled by way of edict in Kitale High Court Civil Suit No. 121 of 2007 and in that regard, the property was issued to the 3<sup>rd</sup> defendant on 06/09/2012. The property was then transferred to the 1<sup>st</sup> defendant and a title deed issued on 20/06/2018.
46. DW1 then stated that J. K. Koskei transferred his parcel of land to the 3<sup>rd</sup> defendant. Following his application for consent to transfer the suit land dated 22/05/1992, a letter of consent was issued by the



Land Control Board. That consent letter 23/07/1992 was not opposed. There is also a duly executed transfer document. That transaction was not opposed by the Cereals and Produce Board.

**b. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Case**

47. The 1<sup>st</sup> defendant, DW2 called Theresia Maria Heasman, a trustee of the 1<sup>st</sup> defendant. She adopted her witness statement dated 21/05/2021 as her evidence in chief. Her evidence was that the suit property belongs to the 1<sup>st</sup> defendant, a Non-Government Organization registered under the Non-Government Organization Act on 15/09/1994. Copy of certificate of registration produced and marked as D.Exhibit 3.
48. In further support of its existence, DW2 produced its objectives captured in a letter dated 13/05/2005 as D.Exhibit 4, KRA PIN Certificate Number P051110907G as D.Exhibit 5, a letter dated 05/02/1999 from the Ministry of Home Affairs marked as D.Exhibit 6 and a list of its authorized trustees, DW2 included, marked as D.Exhibit 7.
49. She recalled that it was acquired from their forerunner Misemwa Village Project in the late 1980s and have been in occupation peacefully, quietly and without any interruption. In that vein, the plaintiff has neither never occupied nor been allocated the same. Furthermore, the persons named as trustees of the plaintiff ceased membership several years ago.
50. Her further evidence was that the suit land has since been utilized to conduct its activities. The 2<sup>nd</sup> defendant is their tenant on the suit property and had been in occupation for ten (10) years.
51. Explaining its acquisition, she testified that the property was acquired from the Settlement Fund Trustee. However, their former, the 3<sup>rd</sup> defendant herein, attempted to fraudulently register suit property in his favor. That the land was purchased from J. K. Koskei by the 3<sup>rd</sup> defendant, as trustee of the 1<sup>st</sup> defendant, on 22/05/1992.
52. According to DW1, the suit land was properly transferred to J. K. Koskei since it was never canceled by the relevant authorities. During the process of transfer from J. K. Koskei to the 3<sup>rd</sup> defendant as trustee of the 1<sup>st</sup> defendant, an application dated 22/05/1992 was made to the Land Control Board for consent to transfer and the consent given on 09/07/1992.
53. The 3<sup>rd</sup> defendant however took advantage of the 1<sup>st</sup> defendant's lack of registration since it could not acquire property following the absence of registration. Resultantly, the 1<sup>st</sup> defendant successfully prosecuted its position having filed suit in Kitale ELC No. 53 of 2012 that was determined in its favor. The judgment was produced and marked as D.Exhibit 1. The judgment was not appealed. Consequently, the suit was registered in its name once Gazette Notice No. 2673 of 23/03/2018 produced as D.Exhibit 8 advertised for cancellation of the title in the name of the 3<sup>rd</sup> defendant. DW2 contended that the suit was within the plaintiff's knowledge but it however elected not to participate in those proceedings. She urged this court not to interfere with those findings and instead uphold the same.
54. DW2 stated that the Plaintiff's claim was time barred. In addition, the 1<sup>st</sup> defendant spent millions investing on the suit property to support various projects. She contended that L.R. No. 5751 does not exist. She also observed that the accountability list relied on by the 4<sup>th</sup> – 9<sup>th</sup> defendants was undated. As such, one could not ascertain when it was prepared. However, it was stamped on 03/03/2020, after the present suit had been filed. It was furthermore incomplete. In view of the above, the 1<sup>st</sup> defendant urged this court to dismiss the suit with costs.



55. On cross examination, DW2 explained the relationship between the 1<sup>st</sup> and 3<sup>rd</sup> defendant insofar as acquisition of the suit property is concerned; that when they acquired the land, they were informed that although the land had been set aside for the Cereals and Produce Board, the Board had already closed down. As such, the property was available for allocation; that the board, the Director General and the Land Registrar did not participate in Kitale ELC No. 53 of 2012; that the property needed improvement from the structures available therein; that although J. K. Koskei, absent the present proceedings, was the 1<sup>st</sup> allottee, the suit land was registered 1<sup>st</sup> in time in their favor; that their acquisition of the suit land was never objected to other than the disputes in court; that she did not adduce a list of trustees of the 1<sup>st</sup> defendant; that though she was given a power of attorney to testify on behalf of the 1<sup>st</sup> defendant, it was not produced before the court. She furthermore did not adduce documents of transfer; that the present dispute concerns whether the suit land is a public utility plot while the former suit, as filed by the 1<sup>st</sup> defendant concerned whether the 2<sup>nd</sup> defendant held the suit in trust for the 1<sup>st</sup> defendant; that she could not establish if public utility land could be privately transferred; that the accountability list was not brought to its attention when the suit land was being purchased; that only the Settlement Fund Trustee could explain the change of ownership in particular from a public entity to private ownership; that DW1 said in her evidence that the transfer of ownership from the Cereals and Produce Board to J. K. Koskei was erroneous.
56. According to the charge document, the suit land was transferred from the Settlement Fund Trustee to the 1<sup>st</sup> defendant, contradicting her evidence that the suit land was transferred from the J. K. Koskei to the 3<sup>rd</sup> defendant. She explained that during the original purchase, the 1<sup>st</sup> defendant disowned that the land was authoritatively placed in the 3<sup>rd</sup> defendant's name. The 3<sup>rd</sup> defendant was arrested for theft by servant where he was convicted. The criminal court directed that the land be transferred from the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant. On appeal, the court found that the trial court lacked the jurisdiction to transfer the suit land. Ultimately however, the suit land was transferred in their name.
57. DW1 further could not ascertain if the allocation to J. K. Koskei was cancelled. She could not ascertain if the allocation to the 1<sup>st</sup> defendant was a super imposition over the original allocation to J. K. Koskei.

### **c. The 3<sup>rd</sup> Defendant's Case**

58. DW3 the 3<sup>rd</sup> Defendant adopted his witness statement dated 01/11/2019. He testified that he purchased the suit land from J. K. Koskei, a Lands and Settlement Adjudication Officer, for a consideration sum of Kshs. 250,000.00 on 22/05/1992. Although there was no sale agreement, DW3 was issued with a receipt evincing payment of the said sums of money marked 3<sup>rd</sup> D.Exhibit 1. He also produced the application for consent to transfer and the letter of consent, both from the Land Control Board, marked 3<sup>rd</sup> D.Exhibit 2 and 3<sup>rd</sup> D.Exhibit 3 respectively.
59. That the said J. K. Koskei purchased the suit land following his successful application for allocation of the same on 13/01/1989. He was ultimately given an allotment letter dated 23/12/1991.
60. The 3<sup>rd</sup> defendant's evidence was that he was the owner of Misemwa Village Project, a Community Based Organization. He thus denied he had any ties to the 1<sup>st</sup> defendant in that year contending that it did not exist. He testified that he knew David Lamond, a friend who disclosed to him that he was intent on soliciting money from the United Kingdom. He gave DW3 Kshs. 250,000.00 so that DW3 could buy property in his name.
61. The suit land has been the subject of several litigious suits; In Kitale HCCC No. 121 of 2007, the title issued to the 1<sup>st</sup> defendant's trustees was cancelled and issued to DW3 on 06/09/2012. Thereafter in Kitale ELC No. 53 of 2012, the title was issued to the 1<sup>st</sup> defendant herein. The judgments were



produced and marked as 3<sup>rd</sup> D.Exhibit 4 and 3<sup>rd</sup> D.Exhibit 5. He relied on the green cards produced in evidence and marked as 3<sup>rd</sup> D.Exhibit 6 to explain the search history of the parcel of land. Instructively, the plaintiff never claimed ownership during the subsistence of the suits.

62. During occupation of the parcel of land, DW3 testified that the same was used for agriculture. He took over the said parcel with permanent structures erected thereon. No party raised any issue as to his ownership of the said parcel of land. He was however charged and convicted with the offence of theft by servant. He would then successfully appeal that decision.
63. DW3 maintained that he purchased the suit land bereft of fraud. Furthermore, the plaintiff's suit was barred by limitation of time. For those reasons, DW3 urged this court to dismiss the suit with costs.
64. On cross examination, he stated that he did no further search to establish ownership of the suit land before purchasing it; he denied knowing the 1<sup>st</sup> defendant's trustees; that he never worked for the 1<sup>st</sup> defendant; though he claimed an interest in the suit land, he did not file a counterclaim herein; that he never saw any buildings erected as the property of the Cereals and Produce Board; the suit land was not a public utility; that there was no change of user; that the property was unencumbered and without any occupants; that he did not adduce the registration certificate of his CBO; that David Lamond was not one of the trustees of the 1<sup>st</sup> defendant; that the title deed ought to be registered in his name; that he did not appeal against Kitale ELC No. 53 of 2012; that the title to J. K. Koskei was never canceled; that the accountability never existed during his purchase of the suit land; he did not obtain a copy of the registry index map; that if the suit land was set aside for a public utility, then it ought not to have been allocated to private persons; that he could not understand the effect of a cancellation on the green card; that if the title is canceled, it should revert back to the Settlement Fund Trustee.
65. On the accountability list, DW3 testified that it was not authenticated since it was not captured in the letterhead of the Settlement Fund Trustee. Furthermore, it could not be verified that it came from the said office. In any event, it came after the fact since it was prepared in 2020, two (2) years after filing suit. Finally, services for conducting a search did not exist at the time he was purchasing the property.

### **Written Submissions**

66. At the close of the hearing, parties filed and exchanged written submissions. The Plaintiff filed its written submissions dated 22/08/2023 on 23/08/2023. It framed five (5) issues for determination as follows: on whether the suit land was a public utility, the plaintiff relied on the evidence of PW1 and DW1 as well as the accountability list produced and marked as 4-9 D.Exhibit 1 in evidence to submit in the affirmative. In that regard, the transfer of the suit land to J. K Koskei and the subsequent transfers were irregular and unlawful since the suit land was only preserved as a public utility. That since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were constantly on a blame game as to who was wrong, that gave rise to suspicious activities occasioned by all of them. For those reasons, they could not rely on the principle of innocent purchaser for value without notice. It urged this court to revert the land back to the Settlement Fund Trustee.
67. Thirdly, the plaintiff submitted that its members enjoyed a beneficial interest over the property. Having been designated as a cereal store, members were to reap benefits from its use. For that reason, it urged this court to find that its members held a beneficial interest in the suit land. The plaintiff continued that in light of the above, it was entitled to the reliefs sought with costs.
68. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their joint written submissions dated 25/08/2023 on that day. They submitted that the claim was barred by limitation of time having been filed seventeen (17) years after the cause of action arose; outside the restricted timelines of twelve (12) years. Furthermore, the suit in



- Kitale ELC No. 53 of 2012 settled the issue as to ownership. That judgment has never been appealed or set aside.
69. The defendants rebutted the evidence of the plaintiff as follows: they were never issued with letters of allotment; the offer letter from the 1<sup>st</sup> President of the Republic of Kenya was conditional on fulfilment of certain obligations not met by the plaintiff; the certificate of registration was suspicious; there was no proof of authority to file suit; and no inventory of assets was issued. As such, the plaintiff could no claim ownership.
70. Dissecting the evidence of their co-defendants, the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that their joint statement of defence confirmed that the suit was properly, lawfully and in good faith transferred from the Settlement Fund Trustee and ultimately to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Thus any contradictions by DW1 ought to be dismissed and disregarded since parties are bound by their pleadings.
71. The defendants then submitted that no evidence was adduced to demonstrate that the suit land was a public utility. In fact, the Cereals and Produce Board was not even enjoined in these proceedings. Finally, it was submitted that the 2<sup>nd</sup> defendant was wrongly enjoined in these proceedings. They urged this court that in light of the foregoing, the suit be dismissed with costs.
72. The 3<sup>rd</sup> defendant filed his written submissions dated 15/09/2023 on that day. He framed three (3) issues for determination; on whether the suit was barred by the Limitations of Actions Act, looking at the plaintiff's pleadings at paragraph 30 and 31, the cause of action arose in 1990 and in 2000; going outside the 12-year limitation period set out in section 7 of the Act. Be that as it may, any claim for trespass was defeated by registration of the suit land in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 17/07/1996.
73. On whether fraud had been proved, no evidence had been adduced to justify a holding in that regard. That the transfers in respect to the suit land were procedural. In fact, it is the plaintiff who has never demonstrated that it was in occupation of the suit land. That the evidence of DW1 in respect of the fact that the suit land could not be privately owned was not captured in the pleadings and was thus untenable.
74. The 3<sup>rd</sup> defendant urged this court to dismiss the suit with costs since there was no element of fraud, his co-defendants gave evidence contradicting their pleadings and thus ought to be disregarded, the suit land was not a public utility, the suit land was never allocated to the plaintiff, necessary witnesses and defendants were not enjoined in the proceedings, since the suit was the subject of previous proceedings, the plaintiff could not purport to act as they did and finally, the judgment in Kitale ELC No. 53 of 2012 remained binding on the parties.
75. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants filed their written submissions jointly dated 11/10/2023 on 24/10/2023. They framed two (2) issues for determination. On the 1<sup>st</sup> one, whether the suit property was reserved as a public utility plot, they submitted in the affirmative on the strength of their witness accounts, the accountability list, the cross examination of DW2 and DW3 and the evidence of the plaintiffs. It was reserved for the Cereals and Produce Board that did not surrender for re-allocation and wasn't waived through change of user, amendment or surrender. It was thus unavailable for allocation to private persons. Consequently, any land mapped out for public use ceased to become unalienated land.
76. In light of the above, the title could not stand as favored to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as it was obtained by means of a corrupt scheme, ICT proceeded with the transaction negligently or recklessly, and in concurrence with DW3, the title ought to revert back to the Settlement Fund Trustee, J. K. Koskei abused his public office to obtain the property illegally and no evidence was adduced to demonstrate that he complied with the conditions and obligations of the allocation.



77. Lastly, on whether the plaintiff was deserving of the orders sought, they submitted suit could only revert back to the Settlement Fund Trustee by way of rectification of the register since all entries must be canceled. It cannot thus be registered in the plaintiff's name. They urged that a mandatory injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from using or interfering with its ownership was well in order. Finally, the plaintiff was not entitled to general damages for mesne profits and costs since this was a public interest litigation.

### **Analysis and Disposition**

78. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. This court postulates that the following issues for determination and the same shall be determined sequentially:

#### **i. Whether the suit land was a public utility plot preserved for the Cereals and Produce Board?**

79. The crux of the dispute lies on the question whether the suit land was preserved by the government at the Liyavo Settlement Scheme as a public utility plot. According to the plaintiff, as well as the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants, the suit land namely Trans Nzoia/Liyavo/212 measuring 2.2 ha (5 acres) was preserved for use by the public as a public utility parcel of land. It was therefore not available for allocation to private persons.
80. In her evidence, DW1, a land and adjudication settlement officer, relying on the suit's historical background captured in its file marked 4-9 D.Exhibit 6, the 1<sup>st</sup> President of the Republic of Kenya offered the plaintiff Land Reference No. 5751 measuring 2802 acres vide a letter of offer dated 01/11/1972. The offer was made subject to the provisions of the Government Land Act and the Registration of Titles Act.
81. DW1 further relied on the accountability list prepared on 03/03/2020 showing allottees and acreage of parcels of land and marked as 4-9 D.Exhibit 1. Accordingly, the said plot, measuring five (5) acres, was set aside for the Cereals and Produce Board as a 'P.U' translated to a public utility. It was thus unavailable for discharge by the Settlement Fund Trustee. She however could not ascertain who prepared the list.
82. DW1 explained that allocation letters are issued to successful allottees upon complying with the terms and conditions of allotment. If payment is paid in installments, the purchaser is given a discharge of charge upon clearing the loan. Thereafter, the discharge of charge document is taken to the land registrar for registration and issuance of a title deed.
83. She stated that the said process was not applicable to public utilities since they were not available for allotment. Those properties designated for public utility plots were only owned by the government or state corporations. In the present case, the suit land was owned by the Cereals and Produce Board. She however added that public land could be owned privately by first undergoing conversion through public auction, alienation or set aside.
84. Having explained as much, DW1 concluded that the transfer of the said parcel of land to J. K. Koskei in 1989 was that erroneous and unlawful. Though it was indicative that the plot had deteriorating structures, she could not ascertain who had erected them.
85. Courts have held time and again that public land reserved for public utility plots must be sanctified and remain so until legally turned into private lands. They will not be available for allocation as they are



held in trust for the people. In *Dorice Atieno Rajoru & 145 Ors vs. Mjahid Suo-chairman Harambee Maweni Committee self-help group & 2 Ors* [2016] eKLR, the court stated:

“Indeed, it is trite that plots for public utilities and open spaces are usually surrendered to either the Council, the County Government or the National Government. It is either the County Government or the National Government that is required to hold plots meant for public utilities on behalf of residents of the place where such plots are situated. In fact, in the normal course of things, the Council, or the County Government, cannot approve a subdivision scheme exceeding a particular acreage unless and until the scheme provides for open spaces and plots for public utilities which are usually surrendered to the Council (or the County Government). That is what must have happened in this case.”

86. It is instructive to note and remember that public utilities are not to be confused with public land which was classified by the repealed Government *Land Act*, the applicable statute, as unalienated government land. Section 2 of the Act defines the same as “government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”
87. According to DW1 and the PW1, the land was reserved for a public utility plot to be transferred to the Cereals and Produce Board. While we agree with the parties that public utilities are not available for allocation, the question we must ask ourselves is whether evidence has been established to demonstrate that the suit land is a public utility plot.
88. Firstly, I note that according to the defence filed by the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants, the suit land was registered in the name of the Settlement Fund Trustee on 14/06/1996 and was public land. Since it was government land, it was subject to management and disposal of the law. From their pleadings, which parties are bound by, the suit land was initially public land and not a public utility plot as they would later purport to testify in their evidence.
89. Secondly, as rightly pointed out by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, DW1’s testimony was not in consonance with what was initially pleaded. In their evidence, the said defendants purported to state that the property was reserved as a public utility plot yet their pleadings contended that the land was public land.
90. Thirdly, the accountability list relied on remained questionable for the following reasons; firstly, it was only prepared after the case had been filed. Secondly, DW1 could not ascertain who authored it. Its origin and source, noting that it bore no letterhead of any public and/or relevant office comes to the fore. Thirdly, the document appeared incomplete. A cursory perusal shows that Table III coming below Table II, failed to list those discharged properties. Was the document thus complete? Was it doctored? In my view, I am not convinced that it gave an accurate and true account of what was on the ground. That document cannot purport to lay or formulate any basis as to determine that the suit land was a public utility plot.
91. Fourthly, public utility plots are only held by the National or County Government and cannot thus be held by a State Corporation. In any event, that said state corporation, the Cereals and Produce Board, was not enjoined or never made such claim as to its issuance under its name.
92. In *Huzefa Amirali & another vs. County Government of Uasin Gishu & another* [2014] eKLR, this court held as follows:

“I agree with Mr. Kamau for the plaintiffs, that there is no evidence tabled that the suit land is public utility land. Nothing whatsoever has been shown to this court to even hint that



the suit land is a public utility. There would have been nothing easier than to display the Part Development Plan to show that the land was set aside as a public utility plot. In any event, if the defendants believe that the land is public utility land, then what they need to do is to file an appropriate action to have the plaintiffs' title cancelled on the basis that it is an illegitimate title.”

93. This court takes the same approach. Nothing would have stopped the plaintiff or the defendants from adducing the Part Development Plan to show that the land was set aside as a public utility plot. They further failed to adduce evidence in support of the provision of a public utility. The accountability list did not assist its case.
94. The plaintiff's evidence was that allotment of the parcel of land took place in two (2) phases. During the second phase commenced in 1985, the suit land was demarcated as a cereal store to be used by the plaintiff's members. That structures were erected therein to store their cereals. However, no evidence was adduced as to demonstrate that indeed those structures belonged to the Cereals and Produce Board or even existed. They didn't adduce photographic evidence that would have assisted this court to be persuaded in their favor. Suffice to state that DW2 and DW3 have never seen those structures on the suit land.
95. Finally, it was also strange to observe that though the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants contended that any public utility plot taken away ought to be recovered, they never filed a counterclaim seeking for those orders. Instead, they murkily supporting the plaintiff's case to the extent that it was at liberty to pursue a case concerning public utility plots. If indeed the property was in the name of the Cereals and Produce Board as a public utility plot, nothing would have impeded them from also filing an application to have them enjoined in the proceedings or, since the property is a public utility plot, having the suit land declared that it be reverted back to the relevant offices. Their inaction puts their evidence, during the hearing of the suit, into question as to its veracity.
96. In my view, I am not satisfied to hold that the suit land was a public utility. For that reason, I find that the suit land was not a public utility as alleged.

## **ii. Whether the title to the suit land was obtained by means of fraud or a corrupt scheme?**

97. According to the green card marked P.Exhibit13(a), (b) and (c) respectively and 3<sup>rd</sup> D.Exhibit 6, the suit land is currently registered in the name of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's title deed marked P.Exhibit 5 was also adduced into evidence. However, the plaintiff contends that the suit land, registered in the 1<sup>st</sup> defendant remains fraudulent and is one for cancellation.
98. Section 26 (1) of the [Land Registration Act](#) provides that the certificate of transfer issued by the Registrar shall be taken a prima facie evidence that the person named as the registered proprietor is the absolute and indefeasible owner. That title shall not be subject to challenge unless it can be established that the title was obtained by means of fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme.
99. The apex Court in Kenya, that is the Supreme Court of Kenya, in recent jurisprudence similarly affirmed that a title document was not conclusive or sufficient proof of ownership. The holder of that document must demonstrate that the process of acquisition from inception was legal and lawful.
100. It must be borne in mind that at the onset, the suit land was public land and as defined by the statute governing, that is the repealed Government [Land Act](#), un-alienated land.



101. The transactional history in respect to the suit file is as follows: Sometime in 1989, the suit parcel of land was re-allocated to J. K. Koskei upon his request vide a letter dated 13/01/1989 produced as 4-9 D.Exhibit 2. His request was considered and granted by the Minister for Lands. J. K. Koskei's request was accepted vide a letter dated 26/04/1989 marked as 4-9 D.Exhibit 3 which he accepted on 14/09/1989. He was given an allotment letter dated 23/12/1991 marked as 4-9 D.Exhibit 3. He was issued with a charge instrument produced as 4-9 D.Exhibit 4 requiring him to pay the purchase price in the sum of Kshs. 78,309.00. The allottee paid an initial sum of Kshs. 7,725.00 and was issued with a receipt accordingly marked 4-9 D.Exhibit 5. The property was discharged in 1996 from the Settlement Fund Trustee.
102. The 3<sup>rd</sup> defendant testified that he purchased the suit land from the said J. K. Koskei. Following an application for consent to transfer the suit land dated 22/05/1992, a letter of consent was issued by the Land Control Board. That consent letter 23/07/1992 was not opposed.
103. According to the green card in respect to the suit land, its registration was opened on 14/06/1996 in the name of the Settlement Fund Trustee. A charge and discharge of charge were registered on 01/07/1996 to its favor for a sum of Kshs. 78,309.00. The 2<sup>nd</sup> entry was a transfer from Settlement Fund Trustee to the 1<sup>st</sup> defendant trustees namely A.C. Asikoyo, S.O. Ekisa and SR. W. Kamau on 17/07/1996. A title deed was issued on 01/07/1996.
104. On 06/10/1997, the property was acquired by way of transmission to the estate of S.O. Ekisa and a title deed issued. Joseph Allision, A.C. Asikoyo & R. W. Kamau were the appointed administrators of his estate. The 3<sup>rd</sup> defendant registered a caution claiming beneficiary interest on 13/05/1998.
105. Thereafter, the property was transferred in the names of the 1<sup>st</sup> defendant's trustees, as listed in this suit, on 29/12/2000 and a title deed issued. It was then canceled by decree of the Bungoma High Court Civil Suit No. 71 of 2000 on 16/07/2004.
106. On 27/07/2012, the registration of entries 2, 4 and 5 to the 1<sup>st</sup> defendant's favor was cancelled by way of edict in Kitale High Court Civil Suit No. 121 of 2007 and in that regard, the property was issued to the 3<sup>rd</sup> defendant on 06/09/2012. The property was then transferred to the 1<sup>st</sup> defendant and a title deed issued on 20/06/2018.
107. Other than the entries made pursuant to a decree, the parties contended that the suit land passed hands either by way of allocation or transfer from one proprietor to another. While the 3<sup>rd</sup> defendant explained that he acquired the suit land from J. K. Koskei, it is not clear whether the said J. K. Koskei was a lawful and registered proprietor of the suit land as the first in time. We must first deconstruct the acquisition from the government to J. K. Koskei.
108. Several documents were adduced to demonstrate that he was allocated the said portion of land. This included his application letter dated 13/01/1989, acceptance letter from the ministry dated 26/04/1989, the applicant's acceptance letter dated 14/09/1989, letter of allotment dated 23/12/1991 and a charge instrument dated 23/12/1991.
109. In the same vein, the 1<sup>st</sup> defendant contended that the suit property was acquired by way of allocation through the 3<sup>rd</sup> defendant. Its witness testified that though the suit land had initially been allocated to J. K. Koskei and subsequently sold to the 3<sup>rd</sup> defendant as its trustee, the property was directly acquired from the Settlement Fund Trustee. That it could only acquire ownership years later since it had operated without registration.
110. The Supreme Court of Kenya in *Dina Management Limited vs. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) aptly set out



the procedure for the allocation of unalienated land. They cited the case of Nelson Kazungu Chai & 9 others vs. Pwani University [2014] eKLR to hold as follows:

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

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. Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.

A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

111. In the present case, although it was testified that J. K. Koskei was allocated the suit land that was subsequently sold to the 1<sup>st</sup> defendant, and furthermore that the suit land was allocated to the 1<sup>st</sup> defendant from the Settlement Fund Trustee, none of the witnesses testified that they followed due procedure. For instance, this court was not given the benefit of scrutinizing the Part Development Plan which is mandatorily required for this process to kick off. It may have been perhaps why he was never issued with a title. We shall however not enter into that arena of speculation.
112. On the part of the 1<sup>st</sup> defendant, no evidence was adduced as to even demonstrate an iota of allocation that took place from the Settlement Fund Trustee. A look at the second entry in the green card suggest that the plot was allocated to it. Without any evidence to explain that it complied with the process, this court cannot purport to find that the process was lawful.
113. At the onset, it is not clear how the 1<sup>st</sup> defendant acquired ownership of the suit land. What can be confirmed is that the process was unprocedural and unlawful; creating a ripple effect on the subsequent entries made on the title deed. As stated by the Supreme Court in Dina Management Limited vs. County Government of Mombasa & 5 others (Supra) where the 1<sup>st</sup> registered owner failed to acquire the title regularly, it follows that ownership of the suit property could not be protected under Article 40 of *the Constitution* since no good title could pass over an irregular process. It is thus immaterial that no objections were raised as to the process.
114. Although the defence of 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants’ is that the suit land was allocated to J. K. Koskei upon successful applications to the Minister for Land and Housing on 13/01/1989 and that the subsequent registrations were done in good faith and upon certifying the necessary completion documents, duly executed, were availed and upon compliance with all the necessary procedural requirements, I cannot uphold the same based on my above analysis. I thus conclude that the ownership of the 1<sup>st</sup> defendant of the suit land was unprocedural and unlawful.



### iii. Whether the present suit was barred by limitation of time?

115. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the suit filed by the plaintiff was barred by limitation of time. They argued that the plaintiff, who contended that the cause of action arose in 1990, when suspicious activities of encroachment arose around the stores and in 2000, when they discovered that the suit land was illegally and fraudulently invaded and transferred to them without the plaintiff's knowledge was barred by the statute of limitation. They relied on Section 7 of the [Limitation of Actions Act](#) which bars the institution of a suit for recovery of land after twelve (12) years to argue that the suit was a non-starter.
116. The plaintiff complained of acts in their nature fraudulent resulting to trespass to property. In its evidence, the plaintiff noticed in 1990, suspicious activities of encroachment of their cereal store. Frantic efforts to kick out the intruders were met with futility as they lacked support from the government. Things went out of control in 2000 when portions of the suit property had been illegally and fraudulently invaded by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It was at this point that they discovered that large portions of the suit land had been furtively and fraudulently subdivided, sold and transferred to the said defendants.
117. This court, in its Ruling dated 29/05/2020, found that the suit was not statutorily barred since the suit was one for trespass. That as long as trespass continued, a new cause of action arose. The court cited the case of Raichand Shah vs. Mistry Walji Naran Murji [2014] eKLR that held as follows and which court adopts that finding:

“..... Clerk and Lindsell on Torts 17<sup>th</sup> edition at paragraph 17.02 states:

“Every continuance of trespass is fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues...”

The defendant was in continuous wrongful possession from 1<sup>st</sup> January, 1990 (a day after the lease determined) up to after 24<sup>th</sup> November, 2004 when the plaintiffs sold the premises to Vantage yet in respect of the plaintiffs, their cause of action first arose in June, 1985 when they became owners of the property. So from June, 1985 to 24<sup>th</sup> November, 2004, a new cause of action arose each day the defendant continued to be in wrongful possession.”

118. I would not wish to depart from that holding. For that reason, I find that the suit was not statutorily barred. This is because the 1<sup>st</sup> and 2<sup>nd</sup> defendants were still in occupation of the suit land. The statute of limitation does not apply to the circumstances of this case.

### iv. Whether the plaintiff has any right of claim?

119. The plaintiff claimed that it was the lawful registered proprietor of all that parcel of land namely Trans Nzoia/Liyavo/212 measuring five (5) acres. It explained the process of acquisition that upon registration having obtained certificate of registration number 2040 issued on 01/04/1971, members were offered Liyavo Settlement Scheme L.R. No. 5751 measuring 2,802 acres by the 1<sup>st</sup> president as their parcel of land vide a letter of offer dated 01/11/1972.
120. The plaintiff's members were interviewed, vetted and approved. Thereafter, they were issued with a ballot paper containing their names, the name of the settlement scheme and the plot number that they were settled in. They were then issued with allotment letters with affixed pictures of themselves. Each member was equitably granted 2.5 acres. In 1984, an additional 2.5 acres was issued. It was in this second issue that members were asked to pay Kshs. 6,000.00 by way of a charge to the Settlement Fund



- Trustee. The funds were paid in the form of wages to Barclays Bank Limited. They further stated that they were settled on the suit land demarcated as a public utility.
121. Thereafter, surveyors visited the suit land indicative that they were instructed by then president to subdivide the suit land for registration purposes. However, that exercise did not materialize following the untimely death of the President in August 1978. Built therein were maize stores with grain dryers, a machinery shed, a dryer house, stores, an engine room, sunflower shed, mechanic house, tool house and a demonstration area.
  122. Allotment of the parcel of land took place in two (2) phases. During the second phase commenced in 1985, the suit land was demarcated as a cereal store to be used by the plaintiff's members.
  123. While the plaintiff laid out a vivid picture in the manner of how the suit land was acquired, the plaintiff failed to adduce crucial documents in support of its position. For instance, the plaintiff did not produce the allotment letters that were issued to its members. In fact, DW1 and PW2 confirmed that the members of the plaintiff were never given letters of allotment. It did not produce any receipts as evidence of payment of the loan to Barclays Bank Limited. It also did not produce the ballot papers that were allegedly given as well as the list of its members.
  124. Looking at the initial offer from the 1<sup>st</sup> President, not only did the plaintiff fail to explain how they proceeded to acquire the suit land in writing but also it is apparent that they were offered land parcel No. alias L.R. No. 5751 and not the suit land. Unconvincingly, the plaintiff stated that it was resettled on that parcel of land. That evidence was not corroborated by any other witness.
  125. In fact, the plaintiff stated that the purported subdivision and transfer violated the 1<sup>st</sup> President's express orders allocating land to the plaintiff's in L.R. No. 5751 vide a letter of offer dated 01/11/1972 in exercise of his Presidential powers. In my view thus, they had not established their acquired right to the suit land. If anything, they ought to have sought for the entire L.R. No. 5751 that was offered to them as their premise in filing the present suit.
  126. In addition, DW1, DW2 and DW3 maintained that members of the plaintiff have never been in occupation of the suit land. In fact, DW2 stated, and which fact was not disputed, that the persons named as trustees of the plaintiff ceased membership several years ago. If the plaintiff's core business was to settle its members, was it serving any purpose as at the time of the dispute? Could it be that they were phantom persons in the circumstances?
  127. Explaining that the cancellation of '20' at the bottom right hand part of the certificate in favor of the year 1971 was done in error, PW2 stated that on discovery of that, she wrote to the commissioner to inquire as to its reasons. The commissioner wrote back indicating that it was in error because they were using the wrong government printers. The original was thus sent back by way of G4S courier services. It was then returned with a stamp marked 'replacement' by the state department of cooperatives in Nairobi to indicate that in future, the certificate would be replaced without an error. She clarified that the error did not invalidate the entire document. The said word had however not been endorsed.
  128. The above explanation was completely unsatisfactory. This is because PW2 did not adduce those letters as purportedly exchanged. Furthermore, nothing could authenticate the alleged error. In this court's view, the document may have been manufactured for the purpose of a corrupt scheme of things. I therefore find that since it was not authentic, the plaintiff failed to establish that it had the standing to sue.
  129. While cooperative societies must notify them of any of their AGMs, PW2 continued that it was only in receipt of minutes of the plaintiff's AGM held once on 05/12/2016. That they must also be in attendance to supervise their meetings and elections. Since they have never conducted any meetings



from 2016, it can be rationally presumed that the plaintiff's objectives had been met and thus did not exist. Again, it is apparent that indeed the plaintiff ceased to exist a while back. The present person, the absence of its list of members and further supporting documents, could not purport to lay claim.

130. Finally, when cross examined, PW1 stated that he did not file the plaintiff's resolution to demonstrate that he was the plaintiff's secretary. The plaintiff further failed to adduce authority to file suit. For those reasons, I find that the plaintiff had no right to claim over the suit land.

**v. Whether the plaintiff proved its case on a balance of probabilities?**

131. I have found that transfer of the suit land to the 1<sup>st</sup> defendant and the subsequent transfers improper in light of the unlawful procedure obtained by the 1<sup>st</sup> registered owner.

132. Although the 1<sup>st</sup> defendant successfully prosecuted its position in Kitale ELC No. 53 of 2012 thereby paving way for registration once Gazette Notice No. 2673 of 23/03/2018 advertised for cancellation of the title in the name of the 3<sup>rd</sup> defendant, that decision could not sanitize an illegality. Indeed, the said dispute questioned the issue of a trust between the 1<sup>st</sup> and 3<sup>rd</sup> defendants. Furthermore, no other parties were present as to explain the historical acquisition of the suit land together with issues of fraud.

133. The 2<sup>nd</sup> defendant contended that it was wrongly enjoined in the proceedings. However, since the 2<sup>nd</sup> defendant is in occupation of the suit land, and the dispute concerns trespass too, there was no misjoinder of parties in the manner alleged.

134. Section 13(5) of this court's Act empowers me to make any order and grant any relief as the court deems fit and just. I note that the plaintiff is not successful in its bid to obtain the ownership of the suit land. However, the wheels of justice will always keep turning, and as the Bible says, "But let justice roll on like a river, righteousness like a never-failing stream!" (Amos 5: 24), and this Court must continuously uphold this principle of justice flowing like a river. The ownership of the land must revert to the owner who legally owned it before irregularities and illegalities set it. That is where justice leads this Court to. It is for these reasons that I make the following orders:

- a. A declaration be and is hereby made that the alienation, sale and subsequent transfer of land parcel no. Trans Nzoia/Liyavo/212 to the 1<sup>st</sup> defendant as the 1<sup>st</sup> registered owner on 17/07/1996 was illegal, made in absence of procedure and is void ab initio.
- b. A declaration be and is hereby made to the extent that any subsequent entries made on the suit land after 14/04/1996 were unprocedural in light of (a) above and were thus void ab initio.
- c. Subsequently, an order of cancellation is hereby issued in respect of all transactions, subdivisions, sale and subsequent transfers arising from land parcel No. Trans Nzoia/Liyavo/212.
- d. The 6<sup>th</sup> defendant shall rectify the register book so as to remove the names of all parties therein and the title deed thereto with respect to land parcel No. Trans Nzoia/Liyavo/212 shall revert back to the proprietorship of the Settlement Fund Trustee.
- e. Each party shall bear its own costs of the suit.

135. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED IN KITALE VIA ELECTRONIC MAIL THIS 12<sup>TH</sup> DAY OF MARCH 2024.**

**HON. DR. IUR FRED NYAGAKA**



**JUDGE, ELC, KITALE.**

