



**Kamau & another t/a Nemka Commercial Agencies v Fletcher (Sued on behalf of the Sisters of Mercy) & 2 others; Patel & another (Interested Parties) (Environment & Land Case 237 of 2007) [2024] KEELC 3948 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3948 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 237 OF 2007  
SO OKONG'O, J  
APRIL 25, 2024**

**BETWEEN**

**NELSON MWANGI KAMAU & DAVID MBURU GIBSON T/A NEMKA  
COMMERCIAL AGENCIES ..... PLAINTIFF**

**AND**

**SISTER ELIZABETH FLETCHER (SUED ON BEHALF OF THE SISTERS OF  
MERCY) ..... 1<sup>ST</sup> DEFENDANT**

**SISTER TERESIA NJONGE (SUED ON BEHALF OF MUKURU PROMOTION  
CENTRE) ..... 2<sup>ND</sup> DEFENDANT**

**THE BOARD OF GOVERNORS/SCHOOL COMMITTEE OF ST CATHERINE'S  
SCHOOL (SUED THROUGH AGNES MORAA) ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**KAMAR KUMAR RAMANBHAI PATEL DINKA R KUMAR RAMANBHAI  
PATEL PRATKHISA KUMARI KAMAR KUMAR PATEL SARMINSTABEN  
DINKAR KUMAR PATEL ..... INTERESTED PARTY**

**NJOROGE GERISHON KINUTHIA ..... INTERESTED PARTY**

**JUDGMENT**

1. This suit was commenced by way of a plaint dated 5<sup>th</sup> March 2007. The plaint was amended on 27<sup>th</sup> February 2009. In their amended plaint which was filed on 4<sup>th</sup> March 2009, the Plaintiffs sought the following reliefs against the Defendants;

- a. A permanent prohibitory injunction restraining the Defendants from trespassing, wasting, alienating, attempting to fence off, fencing off, continuing with fencing off, entering,



constructing, dumping any building materials and/or interfering in whatsoever manner with all that parcel of land known as L.R No. 209/11881 situated at South B Nairobi (hereinafter referred to only as “the suit property”) and/or any of its subdivisions namely; L.R Nos. 209/15668-15718 (hereinafter together referred to as “the portions of the suit property” and individually as “Plot Nos. 15668, 15669, 15670, 15671, 15672, 15673, 15674, 15675, 15676, 15677, 15678, 15679, 15680, 15681, 15682, 15683, 15684, 15685, 15686, 15687, 15688, 15689, 15690, 15691, 15692, 15693, 15694, 15695, 15696, 15697, 15698, 15699, 15700, 15701, 15702, 15703, 15704, 15705, 15706, 15707, 15708, 15709, 15710, 15711, 15712, 15713, 15714, 15715, 15716, 15717 and 15718”);

- b. An order compelling the Defendants to pull down, demolish and/or remove any fence, structures and/or buildings put up on the suit property or its subdivisions in default of which the Plaintiffs be at liberty to pull down, demolish and/or abate the nuisance created by the Defendants at the Defendants’ costs;
  - c. For the purposes of maintenance of peace and order, the OCPD Embakasi Division do avail the Plaintiffs’ security to facilitate the implementation and/or service of any orders issued herein;
  - d. General damages for trespass, loss of developments and machinery on the suit land;
  - e. Costs of the suit and interest; and
  - f. Any other or further relief that this court may deem fit and just to grant.
2. The Plaintiff’s case
  3. The Plaintiffs averred that at all material times, they were the lawful proprietors of the suit property having purchased the same from the National Social Security Fund on or about 27<sup>th</sup> February 2004 at a consideration of Kshs. 33,500,000/-. The Plaintiffs averred that the suit property was subdivided and the sub-plots given land reference numbers L.R Nos. 209/15668-15718 (portions of the suit property). The Plaintiffs averred that the Defendants were the officials and/or office bearers of Sisters of Mercy, Mukuru Promotion Centre and St. Catherine’s School which occupied a parcel of land known as L.R No. 8254 (hereinafter referred to only as “the school land”) situated adjacent to the suit property.
  4. The Plaintiffs averred that on diverse dates in 2006 and 2007, the Defendants encroached and trespassed on the suit property and built and/or caused to be built or constructed thereon illegal structures on one side of the suit property to deprive the Plaintiffs of the property and/or appropriate the suit property to themselves or the school. The Plaintiffs averred that the Defendants by themselves, their agents and/or servants also engaged in fencing the suit property after damaging the fence that was put up by the Plaintiffs.
  5. The Plaintiffs averred that the said construction, encroachment and trespass were illegal as the Plaintiffs were the lawful owners of the suit property and the Defendants had no legal right and/or authority to occupy the suit property.
  6. The Plaintiffs averred that in pursuit of the said illegal acts, the Defendants mobilised hooligans from the neighbouring slums who destroyed the drainage, roads, sewerage works and fence that had been put up by the Plaintiffs on the suit property thereby causing the Plaintiffs great loss and damage. The Plaintiffs averred that the Defendants also destroyed by stoning and subsequently burning the machinery that the Plaintiffs assembled on the suit property for use in developing the same.
  7. The Plaintiffs averred that despite demand and notice of intention to sue, the Defendants refused, failed and/or neglected to vacate the suit property.



8. The 1<sup>st</sup> Defendant's case
9. In her statement of defence dated 21<sup>st</sup> July 2009, the 1<sup>st</sup> Defendant denied that the Plaintiffs were the lawful owners of the suit property. The 1<sup>st</sup> Defendant averred that she was neither an official nor an office bearer of St. Catherine's School. The 1<sup>st</sup> Defendant averred that the suit disclosed no or any reasonable cause of action against her. The 1<sup>st</sup> Defendant denied that she encroached or trespassed on the suit property. The 1<sup>st</sup> Defendant denied that she mobilised hooligans who destroyed the Plaintiffs' property.
10. On a without prejudice basis, the 1<sup>st</sup> Defendant averred that the suit property was designated for public use and that the same was being used as a playground for school children and as such the alleged sale of the same to the Plaintiffs was irregular and/or illegal. The 1<sup>st</sup> Defendant averred that no good title could pass to the Plaintiffs or any purchaser of the suit property.
11. The 1<sup>st</sup> Defendant averred that if the suit property was registered in the name of the Plaintiffs then the property was unlawfully and irregularly alienated since the same was public land reserved for educational purposes. The 1<sup>st</sup> Defendant reiterated that no good title to the suit property passed to the Plaintiffs in the circumstances. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiffs' suit with costs.
12. The 2<sup>nd</sup> Defendant's case
13. In her amended statement of defence dated 27<sup>th</sup> July 2009, the 2<sup>nd</sup> Defendant averred that she was wrongly sued and that the orders sought by the Plaintiffs could not be issued against her. The 2<sup>nd</sup> Defendant averred that the suit property was intended to be used as a public utility land and as such the same could not be allocated for private development. The 2<sup>nd</sup> Defendant averred that the Plaintiffs lacked any interest in the suit property and as such the orders sought could not be issued in favour of the Plaintiffs. The 2<sup>nd</sup> Defendant prayed that the Plaintiffs' suit be dismissed with costs.
14. The 3<sup>rd</sup> Defendant's case
15. The 3<sup>rd</sup> Defendant (formerly the 4<sup>th</sup> Defendant) filed her statement of defence on 19<sup>th</sup> February 2009. The 3<sup>rd</sup> Defendant averred that the school land was public utility land set aside for public use in 1968. The 3<sup>rd</sup> Defendant denied that the Defendants trespassed on the suit property. The 3<sup>rd</sup> Defendant averred that it was the Plaintiffs who grabbed a portion of the school land. The 3<sup>rd</sup> Defendant denied that the Defendants mobilised hooligans who destroyed the Plaintiffs' properties. The 3<sup>rd</sup> Defendant denied that the Plaintiffs suffered any loss or damage. The 3<sup>rd</sup> Defendant prayed that the Plaintiffs' suit be dismissed with costs.
16. The Plaintiffs filed a reply to the Defendants' statements of defence aforesaid. The Plaintiffs averred that the Defendants were directly involved in the running of St. Catherine's School and as such were guilty of planning, organising, encouraging and/or participating in the acts complained of by the Plaintiffs. The Plaintiffs denied that the suit property was reserved for public use and averred that there was no nexus between the suit property and the school land. The Plaintiffs averred that in any event, the Defendants' had no locus standi to defend public land. The Plaintiffs averred that at the time they were purchasing the suit property from the National Social Security Fund (hereinafter referred to only as "NSSF"), there was only a slight encroachment on the boundary of the suit property. The Plaintiffs averred that massive encroachment ensued after they purchased the property. The Plaintiffs averred that they obtained a good title from the NSSF.
17. The evidence tendered by the Plaintiffs



18. The hearing of the suit commenced before Muchelule J. (as he then was) on 18<sup>th</sup> October 2010. One of the Plaintiffs, David Mburu Gibson (PW1), told the court that Nemka Commercial Agencies was an enterprise carrying out the business of buying and selling land. He stated that he purchased the suit property from NSSF at Kshs. 33,500,000/- following an advertisement in the Daily Nation Newspaper in 2003. He stated that he entered into an agreement of sale with NSSF on 27<sup>th</sup> August 2004. He stated that he was shown the suit property by NSSF. He stated that the property was fenced. He stated that he carried out a search that confirmed that the property was registered in the name of NSSF. He stated that apart from the fence, the suit property was not developed. He stated that he paid the purchase price in full.
19. He stated that he agreed with NSSF that he was purchasing the suit property so that he could subdivide the same and sell portions thereof to third parties. He stated that he started the subdivision process before he completed the sale agreement with NSSF. He stated that the suit property was subdivided into 51 sub-plots of about 30 feet by 90 feet. He stated that he sold the sub-plots and remained with 5. He stated that some of the purchasers of the sub-plots had paid the purchase price while others had not made payment as they were waiting for him to develop the necessary infrastructure. PW1 stated that he surrendered the original title for the suit property to the Commissioner of Lands so that he could be issued with titles for the sub-plots. He stated that he took the suit property in the same state in which he found it. He stated that there was a problem with the boundary of the property adjacent to St. Catherine's Primary School (hereinafter referred to only as "the school"). He stated that upon survey and identification of the beacons, it was found that the school had encroached on the suit property by 6 metres. He stated that the school was being managed by the Catholic Sisters of Mercy and that several attempts were made to resolve the boundary dispute without any success. He stated that whereas the school owned a parcel of land known as L.R No. 209/8254 (the school land), he and his co-plaintiff owned L.R No. 209/11881 (the suit property). He stated that the two parcels of land were adjacent to each other.
20. PW1 stated that the Ministry of Lands confirmed that the suit property and the school land were separate and distinct parcels of land. He stated that he tried to take possession of the suit property and make access roads, storm water trenches and sewerage lines but all were destroyed. He stated that the suit property was handed over to him by NSSF on 8<sup>th</sup> September 2005. He stated that at the time, there was already an encroachment on the land by the school. He stated that he did not complete the work he was doing on the suit property. He stated that the 3<sup>rd</sup> Defendant and others mobilised parents, staff and pupils of the school to resist their occupation and use of the suit property claiming that it was part of the school's playground. PW1 stated that his activities were restricted to the suit property and that he did not cross over to the school land. He stated that the mob chased him and his workers out of the suit property. He stated that all that he had done on the suit property were destroyed. He stated that after evicting him from the suit property, the school constructed goalposts and temporary classrooms on the property. He stated that NSSF filed a suit against the 3<sup>rd</sup> Defendant and others namely, Nairobi HCCC No. 819 of 2005.
21. PW1 stated that the school put up temporary classrooms made of iron sheets on the suit property before the Plaintiffs brought this suit. He stated that it was after he removed the live hedge put up by the school that had encroached into the suit property by 6 metres that the school evicted them from the property and occupied the same. He stated that before the school's forceful entry on the suit property, the same was vacant. The property had no buildings and was not in use. He stated that the suit property was not public land and that it was the school's land that was in the Ndungu Report. He stated that he had sued the 1<sup>st</sup> Defendant because she was the Superior of the Sisters of Mercy who were the sponsors of the school and that she was at the scene during the confrontation between the Plaintiffs and the



- school. He stated that the 2<sup>nd</sup> Defendant was the Headmistress of the School at the material time. He stated that although the 2<sup>nd</sup> Defendant claimed that she was in charge of Mukuru Promotion Centre, the Centre was working together with the school and that the 2<sup>nd</sup> Defendant participated in mobilising the parents of the school to chase the Plaintiffs out of the suit property. He stated that the 3<sup>rd</sup> Defendant was the Chairlady of the School's Parents and Teachers Association(PTA) at the material time.
22. He stated that the suit property was subdivided and that some of the purchasers of the sub-plots had not completed making payment of the purchase price. He stated that he had also not surrendered some of the titles to the purchasers of the said sub-plots. He stated that he paid Kshs. 33,500,000/- for the property and spent Kshs. 12,000,000/- to develop roads and sewer lines on the property which were largely destroyed. He stated that he held the Defendants liable for the said destruction. He urged the court to grant the prayers sought in the plaint. PW1 produced several documents as exhibits in support of their claim which I will refer to later in the judgment.
23. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, PW1 admitted that the Plaintiffs were not registered as the owners of the suit property. PW1 stated that they had agreed with NSSF that NSSF would transfer the sub-plots to those who would purchase the same from the Plaintiffs. He stated that it was not true that the Plaintiffs never complied with the terms of their agreement of sale with NSSF. He stated that those who had purchased the sub-plots were 51 and that NSSF was to transfer the plots directly to them. He stated that the arrangement they had with NSSF was normal in land transactions. He admitted that the Plaintiffs never paid Stamp Duty for the suit property and that the agreement the Plaintiffs had with NSSF did not refer to third parties or beneficiaries of the sub-plots. He reiterated that the Plaintiffs retained 5 sub-plots. He stated that the Plaintiffs had brought the suit on their behalf and on behalf of the persons who had purchased the sub-plots. He admitted that he had no written authority from the said purchasers of the sub-plots to file the suit on their behalf.
24. PW1 stated that although the Plaintiffs were not registered as the owners of the suit property, they had an agreement for sale with NSSF. PW1 stated that the school had fenced part of the suit property without authority and when it failed to remove the fence after being asked to do so, the Plaintiffs removed the same. He stated that he did not know why the school had fenced a portion of the suit property. He stated that the Plaintiffs did not require a court order to pull down the school's fence. He stated that he knew in 2005 that the school was laying a claim to the suit property. He stated that he was not aware that the suit property was initially part of L.R No. 209/8254(the school land). PW1 reiterated that he sued the 1<sup>st</sup> Defendant because she was a member of the Board of Governors and a sponsor of the school. He stated that the 1<sup>st</sup> Defendant was in the crowd that chased them from the suit property. He stated that Nelson Mwangi Kamau, the co-plaintiff was his partner.
25. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, PW1 stated that he was a party to the agreement of sale with NSSF. He stated that the agreement was executed on his behalf by his co-plaintiff. He stated that he had not produced any evidence of the existence of Nemka Commercial Agencies or of the fact that it was a partnership. He admitted that it was indicated in the agreement of sale that Nemka Commercial Agencies was a limited liability company. He admitted that the Plaintiffs did not pay stamp duty on the transfer of the suit property. He stated that the stamp duty was paid by the purchasers of the sub-plots. PW1 stated that he sued the 2<sup>nd</sup> Defendant as the Head Teacher of the school. He stated that he was not aware that the school was owned by the City Council of Nairobi. He stated that it was the 3<sup>rd</sup> Defendant who told him that the 2<sup>nd</sup> Defendant was the Head Teacher of the school. He stated that except for 5 plots, the Plaintiffs had sold all the sub-plots to third parties and that the same were at various stages of the conveyance. He stated that the properties were being transferred directly to the third parties by NSSF and that his interest in the said properties was that some of the sub-plots had not been transferred to the third parties and that for the third parties who



- had titles for their sub-plots, they had not obtained vacant possession of the said plots. He admitted that the suit property no longer existed because it had been subdivided.
26. He stated that NSSF had advertised the suit property for sale in the Newspapers. He stated that he did not have a copy of the advertisement. He stated that the property was offered to the Plaintiffs for sale by NSSF and the Plaintiffs accepted the offer. He stated that he had not produced the letter of offer and the letter accepting the same. He admitted that the Plaintiffs did not pay the balance of the purchase price within 90 days from the date of the agreement with NSSF. He stated that the balance of the purchase price was paid in full in March 2006. PW1 stated that he was aware of the dispute over the suit property. He stated however that the court had given the suit property to NSSF a fact that he learnt of in 2006. He stated that he knew that the suit property had a problem. He stated that he had not tried to recover the monies that he paid from NSSF. PW1 denied the claim that he had no interest in the suit property. He denied further that the Plaintiffs were agents of NSSF. He stated that the Plaintiffs had paid a deposit when he discovered that the suit property had a dispute. He stated that he paid the purchase price in instalments. He stated that he sued the 2<sup>nd</sup> Defendant because she was one of those managing the school.
27. The hearing of the matter proceeded before Nyamweya J. (as she then was) on 30<sup>th</sup> April 2014. The advocates for the 3<sup>rd</sup> Defendant did not turn up and as such lost the opportunity to cross-examine PW1. PW1 was re-examined and closed his evidence. In re-examination, he told the court that there was no dispute between the Plaintiffs and NSSF because NSSF handed over vacant possession of the suit property to them albeit with some encroachment by the school on a part of the property. He stated that the suit property was not transferred to the Plaintiffs because he was advised by the officers from the Ministry of Lands that after the subdivision of the suit property, the sub-plots could be transferred directly from NSSF to the purchasers. He denied that this was a plot to avoid paying stamp duty. PW1 stated that he was a beneficial owner of the suit property having paid for it and, that gave him a right to maintain the suit.
28. The Plaintiffs' second witness was Margaret Osolika (PW2). PW2 told the court that she was working with NSSF as a legal officer. PW2 adopted her witness statement filed in court on 6<sup>th</sup> June 2012 as part of her evidence in chief. She stated that NSSF purchased the suit property from Hamco Kenya Ltd. in 1995 at Kshs. 32,000,000/- and the same was registered in the name of NSSF on 29<sup>th</sup> May 1995. She stated that when NSSF purchased the suit property, it was vacant and there was no dispute over it. She stated that NSSF subsequently sold the suit property to the Plaintiffs through an agreement of sale dated 29<sup>th</sup> February 2004 at Kshs. 33,500,000/- which was paid in full. She stated that the Plaintiffs wished to subdivide the suit property and sell portions thereof to third parties. She stated that NSSF approved the subdivision exercise. She stated that after the Plaintiffs completed the payment of the purchase price, NSSF gave them the completion documents.
29. PW2 stated that when NSSF gave the Plaintiffs possession of the suit property in 2004, the school had encroached on the property by extending its boundary into the suit property by about 6 metres and had put up some structures on the encroached area which it claimed to own. PW2 stated that the Plaintiffs were not able to take possession of the suit property. She stated that this forced NSSF to file a suit (Nairobi HCCC No. 819 of 2009) against the school over the harassment that was being meted out against the Plaintiffs. She stated that the school had its parcel of land which was separate and distinct from the suit property. She stated that the suit property was not public land. She stated that the property belonged to Hamco Kenya Ltd. which sold it to NSSF which in turn sold it to the Plaintiffs. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not known to her. She stated that she only knew the 3<sup>rd</sup> Defendant who were the owners of the school.



30. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, PW2 stated that she joined NSSF after the sale of the suit property to the Plaintiffs. PW2 stated that her statement to the court was based on the records in her possession and what she had been told. She stated that the suit property was not registered in the name of the Plaintiffs because there was an agreement that the property would be subdivided and sold to third parties. PW2 told the court that NSSF informed the Plaintiffs about the dispute over the ownership of the suit property. She stated that she was not aware of how Hamco Kenya Ltd. (Hamco) acquired the suit property. She stated further that she was not aware that NSSF had been informed that the suit property was public land. She maintained that the suit property was not reserved for public use at the time it was acquired by NSSF.
31. This court took over the matter on 17<sup>th</sup> December 2015 and continued with the hearing of the same from where it stopped before Nyamweya J. (as she then was) on 30<sup>th</sup> July 2014. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, PW2 stated that the sale of the suit property by NSSF to the Plaintiff was handled by NSSF's external advocates in accordance with the instructions given by NSSF. She stated that the suit property was valued before it was sold to the Plaintiffs. She stated that the property was sold to the Plaintiffs but not transferred to them. She stated that NSSF extended the completion period upon request by the Plaintiffs. She stated that the Plaintiffs requested that portions of the suit property be transferred directly to those who had purchased the same from the Plaintiffs.
32. PW2 denied that NSSF aided the Plaintiffs to avoid paying stamp duty. PW2 admitted that the suit property was subdivided into 51 sub-plots and ceased to exist. She stated that the suit that was filed by NSSF against the school was not prosecuted. She stated that she did not know why the 2<sup>nd</sup> Defendant was sued by the Plaintiffs. PW2 maintained that the suit property was not reserved for public use.
33. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, PW2 reiterated that the suit property was not public land and that at the time NSSF sold it to the Plaintiffs, it belonged to NSSF.
34. On re-examination, PW2 stated that NSSF's title had never been challenged. PW2 stated that the school had its own land which was separate and distinct from the suit property. PW2 stated that it was the school that was trying to grab the suit property from the Plaintiffs. PW2 stated that the 2<sup>nd</sup> Defendant was rightly sued.
35. On examination by the court, PW2 stated that NSSF purchased the suit property from Hamco on 29<sup>th</sup> May 1995 at Kshs. 32,100,000/- and sold the property to the Plaintiffs on 27<sup>th</sup> February 2004 at Kshs. 33,500,000/-.
36. The Plaintiffs' last witness was Simon Kairu Mwaura (PW3). PW3 was a surveyor. He adopted his witness statement dated 25<sup>th</sup> May 2012 as part of his evidence in chief. He stated that the suit property and the school land were separate and distinct parcels of land which were adjacent to each other. He stated that he was involved in the subdivision of the suit property into 51 sub-plots. He stated that when he went to the ground, there was a barbed wire fence that was wrongly placed on the boundary between the suit property and the school land. He stated that the barbed wire fence encroached on the suit property by a margin of about 6 metres.
37. He stated that at the time, the suit property was not developed while the school land had a school. He stated that the encroached part of the suit property was not developed. He stated that he could not tell whether the suit property was hived from the school land or not.
38. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, PW3 stated that he subdivided the suit property in 2004. He stated that when he was carrying out the subdivision, the only dispute on the



ground was over the boundary between the suit property and the school land. He stated that the dispute was not over title to land.

39. On cross-examination by the 2<sup>nd</sup> Defendant's advocate, PW3 stated that he was instructed by the Plaintiffs to carry out the survey and subdivision of the suit property. He stated that the Plaintiffs had the necessary approvals and that they gave him instructions verbally. He stated that the Plaintiffs told him that they were agents of the registered owner of the suit property. He stated that he was not the one who applied for subdivision approval on behalf of the Plaintiffs. He stated that the representatives of the Defendants were not present when he was carrying out the survey and subdivision of the suit property.
40. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, PW3 stated that he was instructed verbally and was given the scheme plan and the necessary approvals. He stated that apart from the scheme plan and the approvals he was not given anything else. He stated that his instruction was to identify the beacons, subdivide the land and obtain the deed plans.
41. On re-examination, PW3 stated that it was not necessary to involve the Defendants in the subdivision of the suit property. He stated that he had all the documents necessary to undertake the survey. He reiterated that the dispute on the ground concerned the boundary of the suit property and the school land and not ownership of the suit property.
42. After the close of the Plaintiffs' case, Mary Killeen (DW1) was the first to give evidence for the Defendants. DW1 told the court that she was a Sister of Mercy of the Province of Kenya. She stated that she had worked in Kenya for 43 years. She stated that she was a director of Mukuru Promotion Centre (hereinafter referred to only as "the Centre"). DW1 stated that Sisters of Mercy of the Province of Kenya (the Sisters) was a body corporate registered in Kenya. She stated that the Sisters were involved in assisting the poor. She stated that they were engaged in education, health and social support sectors.
43. DW1 stated that she was working at the Centre which was running schools in Mukuru slums and areas near the said slum. She stated that the Centre was also providing health and social support. She stated that the Centre was running Primary and Secondary Schools, and vocational institutions. She stated that the Sisters were collaborating with the national government and the county governments in Kenya in their work.
44. DW1 stated that the Sisters were the sponsors of St. Catherine's School (the school). She stated that from the mid-1990s, the government came in to assist them with the running of the school. She stated that the Sisters were finding it difficult to pay the teachers. She stated that the government provided 80% of the teachers at the school while they employed 20% of the teachers. DW1 adopted her witness statement dated 5<sup>th</sup> February 2019 filed in court on 6<sup>th</sup> February 2019 as her further evidence in chief. She also relied on her affidavit sworn on 6<sup>th</sup> March 2015 and filed on 9<sup>th</sup> March 2015 and the documents annexed to the affidavit of Agnes Moraa sworn on 17<sup>th</sup> April 2007 as exhibits "AM1" to "AM15". She produced the Sisters' Certificate of Registration as D.EXH.1.
45. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, DW1 stated that she was the head teacher of the school between 1992 and 1996. DW1 stated that she was the founder of Mukuru Promotion Centre (the Centre). She stated that she founded the Centre in 1985 and that the school was started as part of the Centre. She stated that the school was taken over by the Nairobi City Commission in 1997 and that the Sister's role remained that of sponsors only. She stated that while working at the school as a teacher, she was employed by the Teachers Service Commission(TSC). She stated that the school was started on the land in dispute in 1993. She stated that the school had occupied the suit property since



1993. She stated that the school learnt that a portion of the school's land had been allocated to one, Limo. She stated that the allocation of the land to Limo was declared illegal in the Ndungu Report.
46. DW1 stated that in 1995, a group of people from the City Council of Nairobi evicted the school from the suit property and fenced the same. She stated that the fence around the suit property did not last for long. She stated that the history of the suit property was given in the affidavit of the 3<sup>rd</sup> Defendant. She stated that the approval of the subdivision of the suit property was cancelled and as such the same could not give rise to valid titles.
47. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, DW1 stated that the Sisters was founded in Ireland and came to Kenya in 1950s. She stated that Mukuru Promotion Centre (the Centre) was established by the Sisters and devoted to Mukuru Slums. She stated that Mukuru Promotion Centre was not a registered entity. She stated that it was being run under the Sisters. She stated that the Centre was run by officials and she was the director of the Centre. She stated that the Centre had had other directors. She stated that Sister Teresia Njonge, the 2<sup>nd</sup> Defendant, ceased to be a director of the Centre around 2008. She stated that Teresia Njonge had no interest in the property in dispute.
48. On cross-examination by the advocate for the Plaintiff, DW1 stated that the Sisters, the Centre and the school had a relationship. She stated that the 2<sup>nd</sup> Defendant was the sponsor of the school at one time and that she left the Centre around 2008. She admitted that the 2<sup>nd</sup> Defendant was at the Centre when the suit was filed. She stated that the school land was given to the school by the City Council of Nairobi in April 1993. DW1 stated that the school was moved from another area to the school land. She stated that the suit property and the school land were originally one parcel of land.
49. DW1 stated that the school was established in 1992 but moved to the school land in 1993. She stated that the school land was owned by the City Council of Nairobi. She stated that the school received a letter from the City Council of Nairobi to the effect that the Council had applied to the Ministry of Lands to have the suit property amalgamated with the school land for the expansion of the school. She stated that the City Council of Nairobi held the title for the school land in trust for the school. She stated that the school was a public school and that it became a public school in 1992 when the government posted Teachers Service Commission (TSC) teachers to the School.
50. DW1 stated that the school was in occupation of the suit property until 1994 when the school was informed that the suit property had been excised from the school land and allocated to another person and the school was forced to move to the school land. DW1 stated that the school playing field was on the suit property. She stated that the school had been allowed to level the suit property and use it. She stated that the suit property was hived from the school land which was allocated to the City Council of Nairobi on 23<sup>rd</sup> March 1968 in 1990s. DW1 stated that the land from which the suit property was created was reserved for a road that was never constructed. DW1 stated that the Ndungu Commission recommended that the title that had been issued to Limo be revoked. She stated that Simon Limo was the owner of the suit property at the time of the Ndungu Report. She stated that Limo was the owner of Hamco Kenya Ltd. She stated that the school was forced to move to the school land. DW1 reiterated that the school was a public school and that Mukuru Promotion Centre (the Centre) was merely supporting the school.
51. On re-examination, DW1 stated that in 1993, the school was on the suit property and that they were following up on the allocation of additional land for the school but the file disappeared at the Land Office. She stated that the land they were seeking was next to the school land. She stated that the school had complained to the Ndungu Commission about the allocation of its land to Simon Limo and sought the revocation of the same.



52. Next to give evidence was the 2<sup>nd</sup> Defendant, Teresia Waithira Njunge (DW2). DW2 adopted her witness statement as her evidence in chief. She stated that Mukuru Promotion Centre (the Centre) was started by the Sisters of Mercy (the Sisters) to serve the children at the school. She stated that the Centre provided education and books to the children to give them equal opportunity. She stated that the Sisters had partnered with the City Council of Nairobi to provide the school with teachers. She stated that the Centre provided some of the teachers while others were provided by the City Council/ County Government. She stated that the school was a government school. She stated that the Centre also employed the support staff who worked at the school. She stated that the Centre also provided health and rehabilitation facilities. She stated that all these services were being rendered to the slum dwellers.
53. DW2 stated that the Centre was being run by the Sisters which was started in Ireland. She stated that she worked at the Centre as a director under the Sisters from 2006 until 2008. She stated that she was a Sister. She stated that from the Centre, she moved to Egerton University as a lecturer. She stated that she had no personal interest in the suit property. She stated that she did not own the land in dispute and had never attempted to acquire interest in the same. She stated that the Centre as an organisation also had no interest in the suit property. She stated that she served as a director of the Centre between 2006 and 2008 after taking over from Orla Cawley. She stated that at the time she became a director of the Centre, there was already a dispute between the school and NSSF over the suit property.
54. She stated that the school was situated on L.R No. 209/8254(the school land). She stated that several documents were handed over to her which were contained in her bundle of documents which she produced as D.EXH.2. DW2 stated that the suit property was public land.
55. On cross-examination by the 1<sup>st</sup> Defendant's advocate, DW2 stated that she was still a member of the Sisters. She stated that the land that was allocated to Limo was excised from the school land and that it was that parcel of land that was the subject of the Centre's complaint to the Ndungu Commission. She stated that the Centre sought the revocation of the title of the parcel of land that was excised from the school land which was the suit property.
56. On cross-examination by the Plaintiffs' advocate, DW2 stated that the Sisters would channel the assistance they wished to give through the Centre. She stated that the School would receive assistance from the Centre. She stated that the school was not the only institution that was receiving assistance from the Centre. She stated that the Centre would monitor how the money that was donated was being used. DW2 stated that she was a director of the Centre when the suit herein was filed. She stated that the only interest the Centre had on the suit property was the sponsorship that the Centre was giving to the school.
57. DW2 stated that Mariakani School and St. Catherine's School (the school) were separate and distinct and that both were City Council of Nairobi schools. She stated that the school was a public school. She stated that the government provided the school with teachers and some books. She denied that the school wanted to grab the suit property.
58. On re-examination, DW2 stated that when the Centre started supporting schools, it started with Mukuru Primary School. She stated that thereafter they decided to set up a new school. She stated that they asked the head teacher of Mariakani Primary School to give them that school's playing field to set up the new school.
59. The last witness was the 3<sup>rd</sup> Defendant, Agnes Moraa James (DW3). DW3 stated that she became a parent at the school in 1999 and was elected as an official of the Parents and Teachers Association (PTA) of the school in 2005 before ascending to the position of the chairperson of the PTA. She stated that



- she served as the chairperson of the PTA until 2015. DW3 adopted her witness statement dated 28<sup>th</sup> February 2019 as part of her evidence in chief. She stated that in her position as the chairperson of the PTA of the school, she came across several documents concerning the dispute before the court. DW3 produced the documents in her bundle of documents as D.EXH. 3. She stated that the suit property was initially being used by Mariakani Primary School. She stated that St. Catherine's Primary School (the school) was started by the Sisters for children who never used to attend school. She stated that the children were from Mukuru Nyayo slums whose parents could not afford to pay school fees. She stated that the school was not charging school fees and was not insisting on formal school uniforms.
60. DW3 stated that the City Council of Nairobi allowed the Sisters to start the school which initially consisted of temporary structures. She stated that the school started with 80 pupils which increased in number to 406. She stated that someone by the name of Limo came and demolished the structures from which the school was operating and pushed the school towards the river. She stated that the land where the structures stood was now being used as a playground. She stated that at the time of her testimony, the school had about 1000 pupils. DW3 stated that the disputed land should be left alone for the school for slum children.
61. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, DW3 stated that she was a member of the school's PTA from 1999 until 2015. She stated that the 2<sup>nd</sup> Defendant was known to her and that she was a director of the Centre. She stated that the 2<sup>nd</sup> Defendant was not a member of the school's PTA. She stated that the Centre was just sponsoring the school and had no interest in the suit property. She stated that the suit property was owned by the school and not NSSF.
62. On cross-examination by the advocate for the Plaintiff, DW3 stated that the suit property was part of the school land. DW3 stated that when the suit was filed, she was the chairperson of the school's PTA and the 2<sup>nd</sup> Defendant was the sponsor of the school. DW3 stated that Mariakani Primary School was opposite St. Catherine's Primary School (the school) and Mukuru Primary School was in Mukuru Kayaba. DW3 reiterated that the suit property was excised from the school land. She denied that the suit property and the school land were different.
63. On re-examination, DW3 stated that the parcel of land in the Ndungu Report, L.R No. 209/8254 (the school land) was reserved for Mariakani Primary School and St. Catherine's Primary School (the school). She stated that the land was allocated to Simon Limo who demolished the structures that had been put up thereon by the school. She stated that the letter of allotment dated 11<sup>th</sup> November 1992 added land measuring 7.38 acres to the school land that was already owned by the school. She stated that this was an addition to the then existing playing field that measured 4.25 acres.
64. The Interested Parties did not give evidence at the trial but made an application for the court to visit the suit property to appreciate the evidence that was adduced by the parties, particularly the surveyors. There being no objection to the application, the court visited the site on 24<sup>th</sup> May 2023. The parties and their advocates were present during the site visit. The court was taken around the disputed parcel of land by the parties. The notes and photographs taken during the site visit are on record.
65. After the site visit, the court directed the parties to make closing submissions in writing. The Plaintiffs filed submissions dated 10<sup>th</sup> August 2023. The Plaintiffs framed six issues for determination by the court namely; whether there was a distinction between the suit property owned by the Plaintiffs and school land on which the school was situated; if the answer to that question was in the affirmative, whether the suit property was public or private land and whether the Plaintiffs were the bona fide owners of the suit property having purchased the same from NSSF; whether the Defendants had trespassed on the suit property; whether the Plaintiffs were entitled to general damages, and who is liable for the costs of the suit?



66. On the first issue, the Plaintiffs submitted that L.R No. 209/11881 (the suit property) and L.R No. 209/8254 (the school land) were separate and distinct parcels of land. The Plaintiffs submitted that there was no evidence adduced by the Defendants showing that the suit property and the school land did not exist as independent parcels of land. The Plaintiffs submitted that the Defendants' contention that the suit property was public land and that the same was allocated to the school was not supported by evidence. The Plaintiffs submitted that there was also no evidence that the suit property was excised from the school land. The Plaintiffs submitted that the documents produced by the Defendants that dated back to 1982 showed that the school land existed even at that time. The Plaintiffs submitted that the parcel of land that was allocated to the Nairobi City Commission by the Commissioner of Lands through a letter of allotment dated 11<sup>th</sup> November 1992 which the Commission subsequently allocated to the school was the school land. The Plaintiffs submitted that if at all the suit property was excised from the school land, the land reference number for the school land could have changed.
67. The Plaintiffs submitted further that what the land that eventually became the suit property was before the creation of the suit property was irrelevant because land use changed from time to time due to population increase and development needs. The Plaintiffs submitted that what was relevant was that at the material time, the land was allocated by the government to the person who sold the same to NSSF from which the Plaintiffs acquired the same. The Plaintiffs submitted that whatever the case, the origin of the suit property was not the school land.
68. On the second issue, the Plaintiffs submitted that the Defendants' argument that the suit property was public land was hard to follow. The Plaintiffs submitted that the letter dated 1<sup>st</sup> August 2006 addressed to the school by the Commissioner of Lands left no doubt that the suit property was allocated by the government to a private developer who sold the same to NSSF which in turn sold the same to the Plaintiffs. The Plaintiffs submitted that they purchased the suit property from NSSF which had indefeasible title over the same. The Plaintiffs cited Section 26(1) of the [Land Registration Act](#) 2012 in support of this submission. The Plaintiffs submitted that the suit property was not mentioned in the Ndungu Report and that even if it had been mentioned in the said report, that alone could not invalidate the title. The Plaintiffs submitted that the land that was mentioned in the Ndungu Report was the school land. The Plaintiffs submitted further that the land in the Ndungu Report was allocated to one, Simon Limo while the suit property was allocated to Hamco Kenya Limited.
69. The Plaintiffs submitted that they were bona fide purchasers of the suit property without notice of the Defendants' claim over the same. In support of this submission, the Plaintiffs relied on the definition of a *bona fide* purchaser in [Black's Law Dictionary](#), 9<sup>th</sup> Edition, Uganda Court of Appeal decision in [Katende v. Haridar & Company Ltd.](#) [2008]2 E.A 173 and [Samuel Kamere v. Land Registrar, Kajiado](#) [2015]eKLR. The Plaintiffs submitted that the suit property was private property and that the Plaintiffs were bona fide purchasers thereof without notice of any defect in its title.
70. On the issue of whether the Defendants trespassed on the suit property, the Plaintiffs submitted that the common boundary between the suit property and the school land was marked with beacons. The Plaintiffs submitted that the Defendants admitted that some of their buildings were on the suit property. The Plaintiffs submitted that it was clear during the site visit that the suit property had been converted by the Defendants into a playing ground. The Plaintiffs submitted that there was irrefutable evidence that the Defendants trespassed on the suit property. The Plaintiffs submitted that the evidence of PW3 showed the extent of the Defendants' encroachment as at 2012. The Plaintiffs submitted that they had adduced sufficient evidence showing that the Defendants had trespassed on the suit property and urged the court to make a finding to that effect.



71. On whether the Plaintiffs were entitled to the reliefs sought, the Plaintiffs submitted that they had demonstrated that the Defendants had trespassed on the suit property and as such they were entitled to the reliefs sought. The Plaintiffs submitted that they were entitled to the injunction sought in prayers 1 and 2 of the amended plaint. In support of this submission, the Plaintiffs cited *Giella v. Cassman Brown* [1973] E.A 358. The Plaintiffs submitted further that they were entitled to damages from 2005 when they were denied the use of the suit property. In support of this submission, the Plaintiffs cited *Kenya Group Ranch v. Samuel Oruta & 9 others*[2021]eKLR and *Duncan Nderitu Ndegwa v. KPLC Limited & another*[2013]eKLR. On the measure of damages recoverable, the Plaintiffs cited *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 45 paragraph.26 page 1503, *Philip Ayaya Aluchio v. Crispinus Ngayo* [2014]eKLR, *Nakuru Industries Limited v. S.S.Mehta & Sons* [2016]eKLR and *Willesden Investments Limited v. Kenya Hotel Properties Limited*, NBI HCC No. 367 of 2000.
72. The Plaintiffs submitted that by about 2007 when the Defendants invaded the suit property, the Plaintiffs had already put in place some infrastructure on the suit property such as roads, drainage, and beacons in accordance with the subdivision approval issued by the City Council of Nairobi which were all damaged by the Defendants. The Plaintiffs submitted that they had been denied the use of the suit property since 2007; a period of 16 years and/or the proceeds of sale of the subplots. The Plaintiffs prayed that they be awarded a sum of Kshs. 30,000,000/- as general damages for trespass.
73. On the issue of costs, the Plaintiffs submitted that costs follow the event. The Plaintiffs submitted that there was no reason why they should not be awarded the costs of the suit. The Plaintiffs prayed that they be awarded the costs of the suit.
74. The 1<sup>st</sup> Defendant filed submissions dated 17<sup>th</sup> July 2023. The 1<sup>st</sup> Defendant submitted that the Plaintiffs' suit was incurably defective. The 1<sup>st</sup> Defendant submitted that the Plaintiffs suit was bad for misjoinder and non-joinder. The 1<sup>st</sup> Defendant submitted that the Plaintiffs who acted all along as sole agents of NSSF had no legal capacity to institute the suit on behalf of their principal. The 1<sup>st</sup> Defendant submitted that the purported oral variation of the agreement of sale dated 27<sup>th</sup> February 2004 between the Plaintiffs and NSSF was ineffective as it offended the provisions of Section 98 of the *Evidence Act*, Chapter 80 Laws of Kenya. The 1<sup>st</sup> Defendant submitted that the Interested Parties were peripheral parties to the suit who had no substantive claims against the Defendants.
75. The 1<sup>st</sup> Defendant submitted that the completion of the sale of the suit property and the purported subdivision of the property during the pendency of Nairobi HCCC No. 819 of 2005 was a violation of the doctrine of *lis pendens*.
76. The 1<sup>st</sup> Defendant submitted that the Commissioner of Land's letter dated 1<sup>st</sup> August 2006 in which he purported to determine the legal status of the suit property was inconsequential since the letter was written during the pendency of Nairobi HCCC No. 819 of 2005. The 1<sup>st</sup> Defendant submitted that the suit property was public utility land and as such the Commissioner of Lands had no power to sanction its alienation.
77. The 1<sup>st</sup> Defendant submitted that through a letter dated 6<sup>th</sup> September 2005, the Permanent Secretary, Ministry of Lands notified the NSSF that the suit property was reserved for public use and that the status of the land had not changed. The 1<sup>st</sup> Defendant submitted that the Permanent Secretary, Ministry of Lands notified the Permanent Secretary Ministry of Labour and Human Resource Development through a letter of the same date that the title that was held by NSSF in respect of the suit property was illegal.
78. The 1<sup>st</sup> Defendant cited *Dina Management Ltd. v. County Government of Mombasa & 5 Others* [2023]eKLR and submitted that a registered proprietor of land acquires an absolute and indefeasible



title only if the allocation is legal, proper and regular. The 1<sup>st</sup> Defendant submitted that a court of law cannot on the basis of indefeasibility of title sanction an illegality or give its approval to an illegal or irregularly obtained title.

79. The 1<sup>st</sup> Defendant submitted that NSSF was notified of the illegality in the root of the title that it was holding over the suit property by the Permanent Secretary, Ministry of Lands. The 1<sup>st</sup> Defendant submitted that to escape from the position it found itself in concerning the suit property, NSSF engaged in the impugned transaction with the aim of illegally, unprocedurally and corruptly disposing of the suit property. The 1<sup>st</sup> Defendant submitted that the disposal of the illegal title held by NSSF was carried out through the connivance of the Plaintiffs and the Commissioner of Lands.
80. The 1<sup>st</sup> Defendant submitted that the Plaintiffs did not produce at the trial evidence of payment of stamp duty and a certificate of title issued to them by the registrar as purchasers of the suit property. The 1<sup>st</sup> Defendant reiterated that the purported variation of the terms of the written agreement of sale entered into between the Plaintiffs and NSSF was contrary to the provisions of Section 98 of the *Evidence Act*, Chapter 80 Laws of Kenya. The 1<sup>st</sup> Defendant submitted that the Plaintiffs admitted that their interest in the suit property was not registered and that they referred to themselves as sole agents of NSSF.
81. The 1<sup>st</sup> Defendant submitted that the Plaintiffs did not produce any evidence showing that they were authorised by any of the Interested Parties to file a suit on their behalf. The 1<sup>st</sup> Defendant submitted that the Plaintiffs were aware that St. Catherine's Primary School (the school) was a public school and as such a suit against the school should have been brought against the Attorney General on behalf of the Ministry of Education or any other entity responsible for schools.
82. The 1<sup>st</sup> Defendant submitted that the evidence on record showed that the Plaintiffs were not registered as the owners of the suit property at the time of filing the suit nor were they authorised by the Interested Parties to sue on their behalf. The 1<sup>st</sup> Defendant submitted further that the Plaintiffs in their capacity as sole agents of NSSF could not bring a suit on behalf of NSSF. In support of this submission, the 1<sup>st</sup> Defendant relied on *Wareham t/a AF Wareham & 2 others v. Post Office Savings Bank* [2004]eKLR.
83. The 1<sup>st</sup> Defendant submitted that this was a case of wrong Plaintiffs suing wrong Defendants. The 1<sup>st</sup> Defendant submitted that the Plaintiffs instituted this suit without being the registered owners of the suit property and against parties who had no interest in the suit property. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiffs' suit with costs.
84. The 1<sup>st</sup> Defendant submitted that the Plaintiffs were not bona fide purchasers of the suit property for value without notice. The 1<sup>st</sup> Defendant submitted that the Plaintiffs admitted in evidence that they knew in 2005 that the school was laying a claim to the land in dispute and that they were aware of the existence of Nairobi HCCC No. 819 of 2005. The 1<sup>st</sup> Defendant submitted that NSSF was barred under the doctrine of lis pendens from transferring the suit property to a third party during the pendency of Nairobi HCCC No. 819 of 2005. The 1<sup>st</sup> Defendant submitted that all the transfers of the sub-plots that originated from the suit property to third parties were effected in 2006 and 2007 during the pendency of Nairobi HCCC No. 819 of 2005. The 1<sup>st</sup> Defendant submitted that the said transfers were null and void under the doctrine of lis pendens the same with the letter by the Commissioner of Lands dated 1<sup>st</sup> August 2006 in which he purported to determine the legal ownership and validity of alienation of the suit property.
85. The 1<sup>st</sup> Defendant submitted that where a proprietor's root of title is challenged, the proprietor must do more than producing the impugned instrument of title to prove the legality of the title. The 1<sup>st</sup> Defendant submitted that the proprietor must show that the acquisition of the title was legal, formal



- and free from any encumbrance. The 1<sup>st</sup> Defendant submitted that a perusal of the Location Plan for the proposed subdivision of the suit property (see page 69 of the Plaintiffs' bundle of documents) and the plan attached to the Nairobi City Commission's letter of Allotment dated 11<sup>th</sup> November 1992 (see pages 6 to 8 of Defence Exhibit 3) shows that the suit property was created from what was formerly Tsavo Road, a public utility land.
86. The 1<sup>st</sup> Defendant submitted that the Plaintiffs did not produce in evidence a letter by the original allottee of the suit property to the Commissioner of Lands applying to be allotted the property and a Part Development Plan for the suit property before it was allotted to the first allottee. The 1<sup>st</sup> Defendant submitted that allocation of the suit property to the original allottee amounted to an abuse of power by the Commissioner of Lands.
87. In conclusion, the 1<sup>st</sup> Defendant submitted that the Plaintiff's suit had no substratum in fact and law and urged the court to dismiss the suit with costs.
88. The 2<sup>nd</sup> Defendant filed submissions dated 19<sup>th</sup> October 2023. The 2<sup>nd</sup> Defendant framed five issues for determination by the court namely; whether the 2<sup>nd</sup> Defendant was a proper party to the suit, whether the Plaintiffs had any interest in the suit property and hence locus standi to commence and pursue the suit, whether the suit property was public property and intended to be used as public utility, whether the 2<sup>nd</sup> Defendant was involved in any acts of violence against the Plaintiffs and whether there was a competent suit before the court.
89. On the first issue of whether the 2<sup>nd</sup> Defendant was a proper party to the suit, the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant was sued in her capacity as an official and a representative of Mukuru Promotion Centre (the Centre) which was the sponsor of the school. The 2<sup>nd</sup> Defendant submitted that St. Catherine's Primary School (the school) was a public school and that the Centre was just a sponsor of the school. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' witness admitted that the Plaintiffs did not check on the status of the school with the City Council of Nairobi. The 2<sup>nd</sup> Defendant submitted that the school was a public school under Section 43(1)(a) of the [Basic Education Act](#) 2013.
90. The 2<sup>nd</sup> Defendant submitted that Section 55 of the [Basic Education Act](#) 2013 creates a Board of Management for all public schools which is a body corporate with capacity to sue and be sued. In support of this submission, the 2<sup>nd</sup> Defendant cited [Presbyterian Foundation v. General of the Salvation Army](#)[2018]eKLR. The 2<sup>nd</sup> Defendant submitted that Section 27 of the [Basic Education Act](#) 2013 provides for the roles of the public school sponsors. The 2<sup>nd</sup> Defendant submitted that as between the school Board of Management and the school sponsors, it is the school's Board of Management which is best suited to file a suit on behalf of a school.
91. The 2<sup>nd</sup> Defendant submitted that since the school was a public school with a Board of Management which had the power to sue and be sued, the 2<sup>nd</sup> Defendant was wrongly sued and on that ground alone, the Plaintiffs' suit should be dismissed.
92. The 2<sup>nd</sup> Defendant submitted further that she was a director of the Centre between 2006 and 2008. The 2<sup>nd</sup> Defendant submitted that having left the Centre in 2008, a suit against her as a director of the Centre could not be sustained. The 2<sup>nd</sup> Defendant submitted that since she was sued in her capacity as a director of the Centre, the Plaintiffs should have amended the plaint to remove her from the suit when that position changed.
93. On whether the Plaintiffs had the locus standi to institute this suit, the 2<sup>nd</sup> Defendant submitted that to demonstrate their interest in the suit property, the Plaintiffs relied on the agreement of sale dated 27<sup>th</sup> February 2004 between the Plaintiffs and NSSF. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs



- placed no evidence before the court showing that they had agreed with NSSF to vary the terms of the said agreement of sale. The 2<sup>nd</sup> Defendant submitted that the purported variation of the agreement whereby the period for the payment of the balance of the purchase price was extended beyond the 90 days from the date of the agreement, and NSSF would transfer portions of the suit property directly to third party purchasers was contrary to the provisions of the [Law of Contract Act](#).
94. The 2<sup>nd</sup> Defendant submitted that the purportedly varied agreement of sale was riddled with several illegalities which could not be sanctioned by the court. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not prove that the suit property was at any time registered in their names. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs admitted that portions of the suit property were transferred to third parties before the suit property was registered in the Plaintiffs' names. The 2<sup>nd</sup> Defendant submitted that the Certificate of Title produced by the Plaintiffs in evidence showed that at no time was the suit property registered in the names of the Plaintiffs as was envisaged under clause 4 of the sale agreement between the Plaintiffs and NSSF.
95. The 2<sup>nd</sup> Defendant submitted that since the suit property was never registered in the names of the Plaintiffs, the Plaintiffs acted strictly as agents of NSSF for the purposes of selling the subdivisions (sub-plots) of the suit property to third parties. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs produced in evidence several letters in which they referred to themselves as agents of NSSF.
96. The 2<sup>nd</sup> Defendant submitted that an agent acting on behalf of a known principal cannot sue. In support of this submission, the 2<sup>nd</sup> Defendant cited *Mayfair Holdings Ltd. v. Ahmed* [1990]eKLR. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs had no locus standi to commence and maintain a suit against the 2<sup>nd</sup> Defendant.
97. The 2<sup>nd</sup> Defendant submitted that the orders issued by the court in Nairobi HCCC No. 819 of 2005 on 21<sup>st</sup> July 2005 in favour of NSSF left no doubt that NSSF was the registered owner of the suit property. The 2<sup>nd</sup> Defendant submitted that this was contrary to the Plaintiffs' claim that the sale agreement dated 27<sup>th</sup> February 2004 between them and NSSF gave them ownership of the suit property.
98. The 2<sup>nd</sup> Defendant submitted further that the subdivision of the suit property extinguished the previous title of the suit property which ceased to be capable of affording any rights and/or interests. In support of this submission, the 2<sup>nd</sup> Defendant cited [Margaret Nyokabi Mbugua & 5 others v. Ngenda New Farmers Co. Ltd.](#) [2019]eKLR. The 2<sup>nd</sup> Defendant submitted that the suit property having ceased to exist following the subdivision thereof, the court could not issue orders in respect thereof.
99. The 2<sup>nd</sup> Defendant submitted that even if it was assumed that the Plaintiffs were seeking orders in respect of the subdivisions of the suit property, no evidence was placed before the court by the Plaintiffs showing that they were the owners of the subdivisions of the suit property; L.R No. 209/15668-15718. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs had neither pleaded nor demonstrated any interest in the subdivided portions of the suit property that had been transferred and registered in the names of third parties.
100. On whether the suit property was public land, the 2<sup>nd</sup> Defendant submitted that the suit property was public land reserved for a school and a dispensary. The 2<sup>nd</sup> Defendant submitted that the suit property was irregularly allocated to a private developer by the Commissioner of Lands.
101. On whether the 2<sup>nd</sup> Defendant was involved in any form of violence against the Plaintiffs, the 2<sup>nd</sup> Defendant submitted that no evidence was placed before the court to demonstrate that the 2<sup>nd</sup> Defendant encroached or trespassed on the suit property or that she was involved in the construction of illegal structures on the property. The 2<sup>nd</sup> Defendant submitted that there was also no evidence that the



2<sup>nd</sup> Defendant was involved in the alleged mobilisation of hooligans who destroyed the developments that the Plaintiffs had undertaken on the suit property.

102. On the competency of the Plaintiffs' suit, the 2<sup>nd</sup> Defendant submitted that the Plaintiffs' suit was incompetent for want of a verifying affidavit. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' amended plaint was not accompanied by a verifying affidavit contrary to the provisions of Order 4 Rule 6 of the Civil Procedure Rules and as such the same should be struck out.
103. In conclusion, the 2<sup>nd</sup> Defendant urged the court to dismiss the Plaintiffs' suit against her with costs.
104. The 1<sup>st</sup> Interested Parties (the Interested Parties) filed submissions dated 27<sup>th</sup> July 2023. The Interested Parties submitted that they were the registered proprietors of the parcels of land known as L.R Nos. 209/15714, 15715, 15716, 15717 and 15718 (the subplots). The Interested Parties submitted that the subplots were the subdivisions of the suit property. The Interested Parties submitted that they purchased the subplots from NSSF with the consent of the Plaintiffs to clear the balance of the purchase price that the Plaintiffs owed NSSF on account of the suit property. The Interested Parties submitted that upon paying the purchase price for the subplots, they were issued with certificates of title. The Interested Parties submitted that they entered into sale agreements with NSSF around 3<sup>rd</sup> May 2006 contrary to the allegation by the Plaintiffs that there was no agreement of sale between the Interested Parties and NSSF.
105. The Interested Parties submitted that when they purchased the subplots, there was no dispute over the same and that the same were vacant save for the overgrown grass. The Interested Parties submitted that when they purchased the subplots, the same were registered in the name of NSSF. The Interested Parties submitted that after a dispute arose over the suit property, the Defendants fenced the subplots and started using the same as a playing ground thereby infringing on the Interested Parties' proprietary rights over the plots. The Interested Parties submitted that the trespass by the Defendants on the subplots was unlawful and illegal.
106. The Interested Parties submitted that they were innocent purchasers of the subplots for value without notice of the defect in the titles thereof. In support of this submission, the Interested Parties cited *Lawrence P. Mukiri v. Attorney General & 4 others* [2013]eKLR. The Interested Parties urged the court to find that the Interested Parties were bona fide purchasers of the subplots for value and issue an order for the eviction of the Defendants from the said plots. The Interested Parties also prayed for the costs of the suit.

107. Analysis and determination of the issues arising:

I have considered the evidence tendered in court by the parties in proof of their respective cases. The parties did not agree on the issues for determination by the court. The Plaintiffs filed their statement of issues dated 9<sup>th</sup> March 2009 (See page 107 of the Plaintiffs' bundle). The Defendants filed a statement of agreed issues dated 14<sup>th</sup> December 2010 on 15<sup>th</sup> December 2010. From the pleadings and the issues drawn by the parties, the following in my view are the issues arising for determination in this suit;

- a. Whether the Plaintiffs had the legal capacity to institute this suit;
- b. Whether L.R. No. 209/11881(the suit property) was reserved for public use and whether the same was lawfully allocated to the original allottee;
- c. Whether the suit property was lawfully sold to NSSF and subsequently to the Plaintiffs;
- d. Whether the Defendants trespassed on the suit property;
- e. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint;



- f. Whether the Interested Parties are entitled to any relief; and
  - g. Who is liable for the costs of the suit?
108. Whether the Plaintiffs had the legal capacity to institute this suit.
109. The Defendants contended that at all material times, the Plaintiffs dealt with the suit property merely as agents of NSSF. The Defendants contended that the Plaintiffs never acquired any legal interest in the suit property that could have entitled them to maintain an action against the Defendants whom they claimed were trespassers on the suit property. The Defendants contended that as agents of a disclosed principal, the Plaintiffs had no legal capacity to institute a suit against the Defendants. The Defendants contended that such a suit could only be instituted by the Plaintiffs' principal, NSSF which had filed a similar suit namely, Nairobi HCCC No. 819 of 2005, Board of Trustees of the National Social Security Fund v. Sisters of Mercy Kenyan Province & 2 Others (hereinafter referred to only as "the earlier suit").
110. I have found it very difficult to comprehend the nature of the arrangement that the Plaintiffs entered into with NSSF. First, the agreement of sale dated 27<sup>th</sup> February 2004 was between NSSF and Nelson Mwangi Kamau t/a Nemka Commercial Agencies. It is not clear how Nelson Mwangi Kamau's co-plaintiff, David Mburu Gibson who gave evidence at the trial came into the transaction. No evidence was tendered by the Plaintiffs showing that David Mburu Gibson was a partner in Nemka Commercial Agencies. Even the Certificate of Registration of Nemka Commercial Agencies which was referred to in the said agreement of sale as "a limited liability company" was not produced in evidence. The involvement of David Mburu Gibson (PW1) in the said agreement of sale was therefore not supported by any evidence.
111. Secondly, although the agreement between NSSF and Nelson Mwangi Kamau t/a Nemka Commercial Agencies (hereinafter referred to only as "the Plaintiffs") dated 27<sup>th</sup> February 2004 was referred to as "Sale Agreement", the conduct of the parties left no doubt that the Plaintiffs had no intention of purchasing the suit property and that the said agreement was just a formality to enable the Plaintiffs with the connivance of NSSF to subdivide and sell portions of the suit property to third parties at a huge profit even before paying for the same. Most of the obligations of the Plaintiffs under the purported agreement of sale were waived to enable them to achieve the said intended purpose. PW1's and PW2's claim that the terms of the said agreement were varied was not supported by any evidence. As rightly submitted by the Defendants, the Plaintiffs and NSSF could not materially vary an agreement required to be in writing orally.
112. According to the letter dated 27<sup>th</sup> March 2006 from NSSF to the Plaintiffs (page 96 of the Plaintiffs' bundle of documents), NSSF issued the Plaintiffs with original transfer duly signed and sealed in 2005. The other completion documents were issued to the Plaintiffs under cover of the said letter.
113. Even after NSSF released to the Plaintiffs all the completion documents, the Plaintiffs did not transfer the suit property to their names. The suit property was therefore not registered in the names of the Plaintiffs. The Plaintiffs were happy to act as agents of NSSF rather than pay stamp duty in excess of Kshs. 1,000,000/- and have the suit property registered in their names. As agents of NSSF and not otherwise, the Plaintiffs subdivided the suit property into 51 subplots, thirteen (13) of which had been transferred to third parties at the time of the filing of this suit. PW1 told the court that they had sold all the subplots to third parties save for five (5) plots that they had retained. All the transfers of the subplots to the said third parties were done by NSSF which retained the legal title in the suit property and its subdivisions. Even for the five (5) subplots which the Plaintiffs claimed to have been retained by them, no evidence was tendered showing that the same were registered in the names of the Plaintiffs.



114. As I mentioned earlier in the judgment, the Plaintiffs sought; a permanent injunction restraining the Defendants from having any dealing with the suit property, L.R No. 209/11881 and/or subdivisions thereof namely; L.R No. 209/15668-15718. I have made a finding that the suit property was not registered in the names of the Plaintiffs. It is also common ground that the suit property has been subdivided and as such does not exist. With regard to the subdivisions of the suit property, there is no evidence that any of the said subdivisions (subplots) is registered in the names of the Plaintiffs. In fact, the evidence on record shows that several subplots have been transferred by NSSF to the names of third parties while others have been sold and are awaiting transfer by NSSF. As rightly submitted by the Defendants, there is no evidence that any of the third parties to whom the subdivisions of the suit property have been transferred or sold authorised the Plaintiffs to institute this suit on their behalf.
115. I am in agreement with the Defendants that the Plaintiffs had no legal interest in the suit property and the subdivisions thereof that could clothe them with the legal capacity to institute a suit for trespass. A party who could institute and maintain an action against the alleged trespassers was NSSF, the registered owner of the suit property and such subdivisions thereof as have not been transferred to third parties. I am of the view that if the Plaintiffs wished to protect the beneficial interest if any that they had in the suit property, they should have joined the suit that had been instituted by NSSF. The Plaintiffs brought this suit while the suit by NSSF was pending. A legal owner and beneficial owners of the suit property could not maintain separate suits against the alleged trespassers.
116. In *Black's Law Dictionary*, 6<sup>th</sup> Edition, "Beneficial owner" is defined as ... "One who does not have a title to property but has rights in the property which are the normal incident of owning property. The persons for whom a trustee holds title to property are the beneficial owners of the property, and the trustee has a fiduciary responsibility to them."
117. In *Halsbury's Laws of England*, Volume 98 (2019) page 385 paragraphs 497 and 498, the authors have stated as follows:
- "A claim may be brought by or against trustees in that capacity without adding beneficiaries as parties. Unless the court otherwise directs, any judgment or order given in a claim in which the trustees represent the beneficiaries will bind the beneficiaries. In some cases, however, the beneficiaries should be made parties; and the court may at any stage of the proceedings order any of the beneficiaries to be made parties, either in addition to or in lieu of the previously existing parties.
- If one of the several trustees refuses to join a claimant in a proper claim or has a special interest which precludes him from doing so, he should be made a co-defendant. If no trustee is willing to institute a proper claim, the beneficiary may take proceedings for the administration of the trust by the court and obtain an order for liberty to use the trustee's name, or for a receiver who will use the trustee's name, in the institution of a proper claim."
118. In *Joseph Hayim Hayim v. Citibank NA* (1987) AC 730, the court held that:
- "...a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interest of the beneficiary in the trust estate."
119. The Plaintiffs who claim to be the beneficiaries of the suit property and its subdivisions have not demonstrated that NSSF, the legal owner of the suit property and its subdivisions which in the circumstances would be considered as holding the suit property and its subdivisions in trust for



the Plaintiffs was unwilling to institute the suit herein on their behalf or that there were special circumstances precluding NSSF from instituting the suit. It is therefore my finding that the Plaintiffs had no locus standi to institute the suit herein.

120. Whether L.R No. 209/11881(the suit property) was reserved for public use and whether the same was lawfully allocated to the original allottee
121. From the evidence on record, the suit property was created from land that was reserved for a road known as Tsavo. The undisputed evidence before the court shows that the land in question remained a road reserve until 1995 when the same was allocated to Hamco Kenya Limited. Hamco Kenya Limited (hereinafter referred to only as “Hamco”) was issued with Grant No. I.R 65381 on 24<sup>th</sup> February 1995. The said Grant was registered on 27<sup>th</sup> February 1995. On 29<sup>th</sup> May 1995; barely three (3) months after being allocated the suit property, Hamco which seemed to have had a ready market offloaded the former road reserve to NSSF which was the cash cow of the political elite at the time. Hamco paid a Stand Premium of Kshs. 3,600,000/- as a consideration for the suit property on or about 24<sup>th</sup> February 1995, sold the suit property to NSSF at Kshs. 32,000,000/- barely three months thereafter on 29<sup>th</sup> May 1995. To drive my point that NSSF was a cash cow, NSSF sold the suit property to the Plaintiffs about 9 years later on 27<sup>th</sup> February 2004 at Kshs. 33,500,000/-. After selling the suit property to the Plaintiffs at Kshs. 33,500,000/-, NSSF paid outstanding land rent totaling Kshs. 17,920,194/- as at 25<sup>th</sup> January 2006 (See Plaintiff’s exhibit 3). This means that after 9 years of holding the suit property, NSSF recovered only a sum of Kshs. 15,599,806/- less than half of what it paid for the suit property to Hamco.
122. Going back to the issue that I set out to answer, my finding from the evidence on record is that the suit property was created from a road reserve that was lying adjacent to the school land which road reserve the school was allowed to use by the City Council of Nairobi. The parcel of land had even been given a name, Tsavo Road.
123. I am of the view that the land from which the suit property was created having been reserved for public use as a road, the same was not unalienated government land that could be allocated to Hamco for private use. The land had already been alienated for public use as a road and as such, the Commissioner of Lands had no power to allocate the same to a private developer.
124. Section 3(a) of [Government Lands Act](#), Chapter 280 Laws of Kenya (now repealed) provides that;

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

  - (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

“Unalienated Government land” is defined in section 2 of the Government Lands Act 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”.
125. It is settled that land that was reserved for public use was considered as alienated land and as such the same is not available to the Commissioner of Lands for allocation for private use. The suit property



was registered under the [Registration of Titles Act](#), Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

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

126. Section 26 of the [Land Registration Act](#), Act, 2012 which repealed the [Registration of Titles Act](#), provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

127. Article 40 of the [Constitution](#) provides that:

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).



- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

128. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

129. In *Henry Muthee Kathurima v. Commissioner of Lands & Another* [2015] eKLR, the Court of Appeal stated that:

“We have considered the provisions of Section 26 of the *Land Registration Act* in light of the provisions of Article 40(6) of the *Constitution* and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the *Constitution*. Guided by Article 40 (6) of the *Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”

130. In *Adan Abdirahani Hassan & 2 others v Registrar of Titles & 2 others* [2013] eKLR, the court stated as follows:

“19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the



protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the [Registration of Titles Act](#) cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the [Government Land Act](#) or any other Act of parliament would be null and void ab initio.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that the [Constitution](#) protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the [Constitution](#), he must show that he has followed the due process in acquiring that which he wants to be protected.
24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the [Constitution](#) and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.
25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the [Registration of Titles Act](#), cap 281 or the [Registered Land Act](#), cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.
26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; [James Joram Nyaga & Another -v- The Hon. Attorney General and two others](#) where they held as follows:-

“The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to the express constitutional provisions. The question of fraud under section 23 of the [Registration of Titles Act](#) does not therefore arise and there would be no need to prove it in this case..... The applicants have challenged the process by which the land was repossessed from them. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent was not



a compulsory acquisition of that land. The land belonged to the public and the custodians were the Respondents. The notices issued by the Respondent were proper and sufficient time was given for verification for those who ought to have been in doubt of their titles...Due process was followed in the repossession of the suit land.””

131. It is my finding that the suit property was created from land that was reserved for public purposes. The allocation of the suit property to Hamco was therefore illegal, null and void. Hamco did not therefore have a valid title in the suit property that it could pass to NSSF from which the Plaintiffs purported to acquire the suit property. NSSF acquired a void title and that is what it passed to the Plaintiffs.

132. Whether the suit property was lawfully sold to NSSF and subsequently to the Plaintiffs

133. I have answered this issue above. Hamco had no valid proprietary interest in the suit property that it could pass to NSSF. Hamco’s title was void for the reasons I have given. That is what it conveyed to NSSF. The Plaintiffs who did not even have the property transferred to their names could not have acquired a better title than that which was held by NSSF. In *Macfoy v United Africa Co. Ltd.* [1961] 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

134. It follows from the foregoing that the void title held by Hamco could not confer any valid interest in the suit property upon NSSF and subsequently upon the Plaintiffs. Since NSSF and the Plaintiffs did not have a valid interest in the suit property, they had no right to subdivide the same. It follows therefore that the subdivision of the suit property on 25<sup>th</sup> May 2006 that gave rise to Plot Nos. 15668, 15669, 15670, 15671, 15672, 15673, 15674, 15675, 15676, 15677, 15678, 15679, 15680, 15681, 15682, 15683, 15684, 15685, 15686, 15687, 15688, 15689, 15690, 15691, 15692, 15693, 15694, 15695, 15696, 15697, 15698, 15699, 15700, 15701, 15702, 15703, 15704, 15705, 15706, 15707, 15708, 15709, 15710, 15711, 15712, 15713, 15714, 15715, 15716, 15717 and 15718 was illegal null and void. Consequently, NSSF and the Plaintiffs had no valid interest in the said subplots that they could transfer to the Plaintiffs and third parties.

135. Whether the Defendants trespassed on the suit property

136. The Plaintiffs brought this suit claiming that the Defendants had trespassed on their land. The Defendants challenged the legality of the Plaintiffs’ title and the Plaintiffs’ capacity to bring the suit. I have already made a finding that the Plaintiffs had no legal capacity to file this suit since they had no legal interest in the suit property and its subdivisions. The Plaintiffs could not therefore maintain a suit for trespass against the Defendants. To maintain an action for trespass against the Defendants, the Plaintiffs had to prove their title to the disputed parcel of land and not only the existence of the title but also that the title was a valid one having been acquired lawfully. The suit property is no longer in existence the same having been subdivided while the subdivisions of the suit property are either transferred to third parties or are in the name of NSSF. The title of the suit property was also invalid the same as the titles for the subdivisions as I have held. The Plaintiffs had also not taken possession of the suit property since their attempt to do so was resisted by the school. It is my finding therefore that a cause of action for trespass has not been established.



137. I wish to add that even if the Plaintiffs' trespass claim were considered on merit, I would not have found that the Defendants trespassed on the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were employees of charitable organisations that were supporting St. Catherine's school (the school) while the 3<sup>rd</sup> Defendant was at the time of filing suit the chairperson of the school's PTA. The Plaintiffs did not convince me that the Defendants personally or through their organisations committed any act of trespass on the suit property or its subdivisions. The Plaintiffs did not demonstrate that any of the Defendants entered the suit property and engaged in the acts of destruction complained of by the Plaintiffs. There is no evidence linking the Defendants to the alleged acts of trespass by those who were resisting the taking over by the Plaintiffs of the said road reserve that was being used by the school as a playing ground. There is also no evidence of the alleged acts of destruction said to have been caused by the Defendants.

138. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint

139. Due to the foregoing findings, I have to answer this issue in the negative. The Plaintiffs have failed to prove their claims against the Defendants. They are therefore not entitled to any of the reliefs sought in their amended plaint.

140. Whether the Interested Parties are entitled to any relief

141. The Interested Parties did not lodge any claim against the Defendants or the Plaintiffs. This court cannot therefore grant them any relief.

142. Who is liable for the costs of the suit?

Under section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and an incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. In this case, the Plaintiffs have failed in their claim against the Defendants. No reason has been put forward that would justify denying the Defendants the costs of the suit. The Defendants shall have the costs of the suit.

143. Conclusion

In conclusion, I find no merit in the Plaintiffs' suit. The same is dismissed with costs to the Defendants.

**DATED AND DELIVERED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kimani h/b for Mr. Njenga for the Plaintiffs

Mr. Mbugua h/b for Chiuri Ngugi for the 1<sup>st</sup> Defendant

Mr. Mukele for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

Mr. Mugambi for the 1<sup>st</sup> Interested Parties

N/A for the 2<sup>nd</sup> Interested Parties

Mr. Oguta-Court Assistant

