Kisiswa v BOM Marura Primary School (Environment & Land Case 66 of 2018) [2025] KEELC 430 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 430 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 66 OF 2018

FO NYAGAKA, J

JANUARY 30, 2025

BETWEEN

LYNNETTEE KAGEHA KISISWA .... PLAINTIFF

AND

BOM MARURA PRIMARY SCHOOL .... DEFENDANT

JUDGMENT

1. This suit reminds me of the childhood story my great grand parents, grandparents, parents and even primary school teachers used to tell us (children then) about the hyena and its huge insatiable appetite. The story went that they once loved a hyena that had an extremely “large” (insatiable) appetite for food. At one time a neighbouring friend who lived in a village in the forest, some hills yonder, prepared a very delicious meal. It sent a very good aroma throughout the village, the neighbouring ones and the entire forest. As air in the natural environment blows everywhere, it blew and caused the aroma to sweep through the hyena’s den. Mr. Hyena's smelled the aroma and its taste buds were greatly aroused. He made haste to search for the delicious meal. He could not wait to feast on it sumptuously! He ran down the road, following the aroma. Soon he got to a junction where at the road split into two. Uncertain from which of the paths the aroma came from and determined not to miss the food, he hesitated and decided to trudge his right-side legs onto the road to the right and the left-side one onto the road to the left. Off he walked, stretching himself more and more until he burst asunder. The moral of the story is similar to a proverb from the Kisii community: one cannot make or fashion (burn) two walking sticks at the same time and they come out well (literal translation). I hope someone wise will learn from the short African story and eschew the hyena’s character. And further, I hope that by the end of this Judgment one’s desire will not have been shattered. In any event the Holy Bible (in Hebrews 13: 5) advises that man should be content with what he/she has.

2. That said, by a Plaint dated 21st November 2017 and filed on 17th July 2018, the Plaintiff sued the Defendant, claiming that she was the owner of all that parcel of land known as Trans-Nzoia/ Sitatunga/60 measuring 2.3 hectares or thereabouts. Further, sometime in the year 1995, the

Defendant began moving and encroaching onto the said parcel of land. Over the years it put up structures on the suit land. Further, despite the many demands that the Defendant remove themselves from the suit land and the structures they had erected on her land they failed, refused or neglected to move out of it. She prayed for an order of eviction of the Defendant from the suit land and damages for trespass and illegal occupation and use of the said parcel of land.

3. The Defendant entered Appearance and filed a Defense and Counterclaim which were dated 15th March 2023. In the Defence the defendant denied the allegations that the Plaintiff was the owner of the suit parcel of land. They also denied encroaching onto or entering on the same parcel of land or ever trespassing on it. They pleaded that the suit was public land and meant for the School as per the community's decision following the Scheme's Accountability List. They also averred that the suit was incompetent, a non-starter, frivolous and vexatious and it did not disclose any reasonable cause of action against it. They averred further that the suit land was a public utility as per the Scheme Accountability List for Sitatunga Scheme No. 516 hence was not available for allocation to the Plaintiff. It was set aside for a water point, but members of the community decided to set it aside for a water tank at Siyoi, a neighbouring farm and set up a School on Plot No. 60. Through the decision the community set up a nursery school, known as Marura Nursery School in 1986, and in 1992 it set up Marura Primary School which was started by the Ministry of Education.

4. Further, despite the said plot being a public utility and a school having been established on their own, the Plaintiff applied to be allocated the same on the 3rd of November 1994. Despite the unlawful allocation of the suit land to the Plaintiff, the government opted to resettle her in Kitalale Settlement Scheme on plot number 854. She has acknowledged the allocation.

5. The defendant raised a Counterclaim by which it reiterated the contents of the Defence. Further, it pleaded that according to the Scheme Accountability List of Sitatunga Scheme No. 516, Plot No. 60 was set aside as a public utility and was not available for allocation. It contended that the Plaintiff's title created and derived out of Sitatunga Scheme No. 516 was procured irregularly and fraudulently and the title processing done through unlawful means hence it was void and a nullity ab initio.

6. The Defendant gave the particulars of fraud and illegality which this Court sums briefly as follows;

    1. That the plaintiff applied or purported to apply for a location on the suit land when she knew or ought to have known that it was a public utility;
    2. The Plaintiff handled or purported to hold letters of allotment over public land;
    3. She held a title deed to a public land;
    4. She misled or misrepresented the director of settlement on the status of the suit land hence procuring a subsequent illegal and void process;
    5. Obtaining title deeds over public land contrary to the provisions of the laws of Kenya; and
    6. Obtaining a title deed through forgery.

7. The Defendant thus sought the following reliefs, in the Counterclaim, against the Plaintiff:-

    1. A declaration that the plaintiff's title was fraudulently and unlawfully acquired and is a nullity ab initio for being part of a public utility.
    2. An order cancelling the plaintiff's title and entries made in the register thereof.
    3. An order directing the registration of plot number Trans Nzoia/Sitatunga/60 under the Principal Secretary, Ministry of National Treasury (reserved for Marura Primary School).

4. An order of permanent injunction restraining the plaintiff his (sic) servants, agents and or any other person acting under him (sic) from ever laying claim, interfering with, or in any manner dealing with the suit parcel of land herein.

8. The Plaintiff filed a Reply to Defense and Defense to Counterclaim which were dated 20th March 2023. She pleaded that she joined the issue with the defendants in the Defence dated 1st March 2023 (sic). Further, that she was a stranger to the allegations contained in the Defense. She averred that before her acquisition of the title to the parcel number Trans Nzoia/Sitatunga/60, the land was in the name of the Settlement Fund Transfer (SFT) from which she was lawfully allocated the land. In defense to the Counterclaim she denied that the plot was set aside as a public utility. Further, she denied that her acquisition of the title to the parcel of land was fraudulent, irregular. She denied all particulars or fraud set out in paragraph nine of the Counterclaim. She prayed for the dismissal of the Counterclaim and entry of judgment as prayed in the Plaint.

Evidence

9. The Plaintiff did not call any other witness than herself. She testified as PW1. She stated that she was a pensioner who resided in Nairobi. She used to work with the Barclays Bank of Kenya and retired in 2001. She adopted her statement dated 21st November 2017 as her evidence in-chief.

10. Her written statement was that she was allocated in a land parcel number Trans Nzoia/Sitatunga/60 by the Settlement Fund Trustees (SFT). She used to work with the Barclays bank of Kenya. As soon as she obtained the title she charged the same with her then employer, Barclays Bank, to secure a loan of Kenya Shillings 200,000/=.

11. After the Plaintiff was issued with the title she could not take possession because the community neighbouring the plot decided to interfere with it and could not allow her to occupy it. They started constructing a nursery school on it despite her protest. They did not budge. In due course, the nursery school was expanded to a primary school, now known as Marura Primary School, the Defendant in the matter.

12. She appealed to the local administration to intervene and assist her to access the land. Between 1996 and now, the local administration and the lands office had tried to assist her to gain access to and possession of the land, but the defendants were adamant and still occupied the land. The teachers from the school were using the land to grow crops for their own consumption and use. Hence, she decided to file the proceedings herein and have the defendant evicted therefrom and also pay damages.

13. During her oral testimony she added that she had filed a List of Documents dated the 21st November, 2018 and attached to its 16 documents. She added another List dated 4th April 2023 which was a correction of the original, with one document less than in the original List. She relied on the latter List. She produced the first document, being the title deed in respect of the suit land. She produced it as P.Exhibit 1. She produced a letter dated 7th March 1995 as P.Exhibit 2 and a letter dated 30th May 1996 as P.Exhibit 3, a Power of Attorney dated 14th March 1996 P.Exhibit 4. She stated that it was given by Nathan Luvai. She added that he wrote a letter dated 18th March 1996 which she produced as P.Exhibit 5 and another one dated 14th April 1996 as P.Exhibit 6. She stated that the District Officer (DO) Cherangani, one Mr. Farah K. M. wrote a letter dated 30th May 1996. She produced it as P.Exhibit 7 and also another letter by Mr. Luvai dated 10th August 1996 as P.Exhibit 8 and another one dated 19th March 1996 as P.Exhibit 9. The DO once again wrote another letter she produced as P.Exhibit 10. Mr. Luvai wrote another letter dated 18th January 1997 she produced as P.Exhibit 11. She produced her own letter to the headmaster of the Defendant school. It was dated 23rd July 1999. She produced it as P. Exhibit 12. She wrote a letter to the District Officer (DC) Kitale which she produced as P. Exhibit

13. She produced it as a certificate of officials such as P. Exhibit 14 and a demanded letter dated 8th June 2016 as P. Exhibit 15.

14. Regarding the handwriting by Mr. Luvai on P. Exhibit 6, it was not legible, and she could not read it or make a head or tail of what it was. She urged the court to ignore it.

15. On cross-examination the Plaintiff stated that she was allocated Plot No. 60 Sitatunga from SFT. Upon being asked a question in a letter dated 3rd November 1994, marked as DMFI 12, she admitted that it read she applied for Plot No. 60. At first, she denied the signature thereon as being hers but confirmed later that it was hers. She testified further she wrote in the letter the plot was free (meaning unoccupied). She added that she did due diligence. When shown, the Accountability List of Sitatunga Scheme marked as DMFI 1, she confirmed the Settlement Scheme in which she applied for a plot was Sitatunga Scheme 516. She admitted that item No. 5 on the Accountability List showed the plot was a Water Point and a public utility. She denied that that was the true fact.

16. She visited the plot in 2016, after she had been summoned by the DC. She found its occupant to be Marura Primary School. She insisted she allocated Plot No. 60: she did not buy it. She said she was issued with the title deed in the year 1994, on 2/12/1994. She went to occupy it, but she did not: she was called names by the community when she knew it was the owner.

17. Upon being referred in further cross-examination to DMFI 11 which was the Registration of the School (Defendant), she stated it showed that it was done on 16th February 1989. She wanted to take possession in 1994 and when she went to occupy it there was nothing on it to indicate that the School was being built on it. She met a lady who told her that she was residing on the land. There were no activities going on in the land. She was called names. When she reported to the Administration and the Lands Office, they tried to regain possession. She was already in possession up to 1996 but to date, she had been trying to regain it in vain. The Administration also tried to regain possession, but the school became adamant. In 2016 at Kachobora the school was told that it pays for the land, but it asked for time to consider that. It left with no answer. She did not have written Minutes of them the Kachibora meeting.

18. Upon being referred to DMFI 5, she stated that The Ministry of Lands and Settlement wrote to her a letter dated 18th August 2000. It stated that the allocation to her in the year 2000 superseded any earlier allocation and through it she was allocated a Plot at Kitalale Scheme. She added that the allocation was not connected with the current land although the letter indicated that it superseded any previous allocation. When referred to DMFI 6, which was a letter dated 19th December 2016 she said that she wrote to the National Land Commission about the issue.

19. About DMFI 7, a letter dated 1st February 2017, she stated that the NLC wrote a response in which it stated that the land was reserved as a Water Point and a public utility. Further, after that she was allocated Plot No. 854, and the community was kind enough to have her allocated an alternative Plot in Kitalale. Also, the letter stated that she did not have any claim to Plot No. 60. She added that Plot No. 854 Kitalale was not in exchange of Plot No. 60 Sitatunga.

20. Upon being referred to the DMFI 5, a letter dated 10th July 1997, she admitted that she wrote to the District Land Adjudication and Settlement Officer of Trans Nzoia. By it she wrote that she was allocated 10 acres in Kitalale Scheme. She stated that DMFI 15, the letter dated 18th August 2000, showed that the allocations preceded any earlier allocation. She admitted she had been allocated two plots by the Land Settlement and Adjudication Office, but she was unaware that plot No. 60 was a public utility although the document shown to her indicated as much. She admitted that she had occupied plot No. 854 Kitalale Scheme and developed it.

21. Upon re-examination PW1 stated that DMFI 1, the Accountability List, was certified as a copy of an original on 13th March 2023 but it did not show who had done it. The certification indicated that it was by the CLASO whose meaning she did not know. When she was allocated Plot No. 60, she did farm but could not remember when the Defendant Primary School started using the land. It had been using it for planting crops. Regarding Plot No. 854 Kitalale Scheme, she admitted that it indicated that it superseded any previous allocation but did not refer to Plot No. 60 Sitatunga Scheme. She admitted DMFI 7 referred to her complaint of 19th December 2016 in which she had wanted the Ministry of Education to vacate Plot No. 60 and the NLC to help in that process. About DMFI 9, she stated that she had been shown a 10-acre plot in Kitalale Scheme, and it had been surveyed. She only needed to do paperwork or speed up so that she obtains title thereto. But she did not have a title to the land as yet, but she had one for the parcel of land in Sitatunga.

22. Further, she added in her testimony that she applied for Plot No. 854 in Kitalale Scheme and she had an application for it. But when she showed the Court a copy of the application that she had which was an original of a typed copy it showed that it was a letter dated 19th June 1995 whose reference was, "Application For a residential plot in Kitale town." To this she stated that the application was for the parcel of land in Kitalale Scheme and she believed that that was how an application for the land was to be headed. She admitted that she knew the difference between a residential plot in town and a parcel of land in the rural or scheme area. She insisted that that was how she made her application.

23. At this answer, the Court noted that the witness was outrightly lying since Kitalale Scheme was very far situated from Kitale town and even so, the Kitalale land was 10 acres in size, in a purely agricultural setting and hence could not be a residential plot situated in town.

24. She admitted that she could not remember when the Marura Primary School, the Defendant, started occupying the parcel of land No. 60 Sitatunga.

25. At that too, the Court noted that from her demeanor the witness was lying or being deliberately evasive.

26. On being asked by the Court how many allocations of land she was given in Trans Nzoia County she stated that they were only two.

27. About the answer above the Court formed the opinion that they were the Plot No. 60 Sitatunga and Plot No. 854 Kitalale Scheme.

28. Upon being asked by the court why she did not develop Plot No. 60- Sitatunga, she answered that it was because the Defendant took possession thereof and became hostile to her and threatened her. That closed her case.

29. The Defendant called two witnesses, DW1, Bernard Barasa, the Headmaster of the School, and DW2, Cecentia Atieno, the County Land Adjudication Officer.

30. DW1 Joaz Wafula Barasa Justified as. 22nd January 2024. He stated that his testimony was in relation to plot No. 60 Sitatunga Scheme. He adopted his Statement, which he had written on the 15th of March 2023 as his evidence in-chief. He added that he had filed a List of Documents dated at the same date and another one dated 18th July 2023.

31. His written Statement was that he was Head Teacher of the Marura Primary School and the Secretary to the Board of Management (BOM). In 1989 the residents of Sitatunga started Marura Nursery School on parcel number Trans Nzoia/ Sitatunga/60 which had been reserved as a public utility. The Plot was, at first, for a water point but there was a water tank already built on the neighbouring Farm (Siyoi). The Nursery School was registered in 1989. In 1992, with the help of the Ministry of Education the community started the Marura Primary School. In 1994, the school had grown to Standard 3 and

then the community learned that the school plot had been allocated to the Plaintiff, and she was now demanding that the school vacate since she had a title deed. The Plaintiff complained to the District Officer (DO) and a meeting was held in 1996 to resolve the matter. The parents of Marura Primary School were in attendance together with the local leaders. It was resolved that the government allocate the Plaintiff 10 acres of land in Kitalale Scheme.

32. From the records the school obtained from the Ministry of Lands and Settlement the plaintiff was allocated 10 acres at Kitale Scheme, being plot number 854, and she acknowledged it. It was resolved at the meeting held in 1996 that once the Plaintiff had been allocated another plot, she was to surrender the title deed in respect of the suit land, but she never did. In 2016 the school received a letter from the Plaintiff's advocates ordering them to vacate the parcel of land and of the school would be sued subsequently, and the school was sued in this matter.

33. In his oral testimony he stated that he wished to rely on the documents the Defendant filed with the Lists of Documents dated the same date as the written Statement and the additional one. The first List had a set of fifteen (15) copies of documents as attachments. They were numbered serially to fifteen. The total of the documents was 28 of which he produced Documents 12, 13, 14, 18, 27 and 28 as D.Exhibit 12, 13, 14, 18, 27 and 28.

34. His further testimony was that the school filed a Counterclaim on the 15th of March 2023, in which it prayed for the cancellation of the title deed held by the Plaintiff in respect of the suit property and an order of injunction against her. He prayed that the Court grants the schools the reliefs sought and upon cancellation of the registration of the Plaintiff as owner of the parcel of land the land be registered under the Permanent Secretary, National Treasury because the school had been on the ground for over thirty (30) years.

35. On cross-examination DW1 stated that his written Statement was that plot No. 60 had been reserved as a public utility for a water point and not a school. It was reserved by the Ministry of Lands together with the community members of the Sitatunga Scheme. He did not know the Department of the Ministry of Lands which had reserved the land. There was already a water point in a neighbouring Farm, Siyoi which was at a higher ground. There was no necessity to have another water point. But the community wanted to start an Early Child Development (ECD) school. The plot was not available for our location to (private) individuals. The school did not apply to be allocated the land but the members of the Settlement Scheme resolved to start a nursery school on it. It was not available for allocation to private individuals.

36. As at 1994, the school was a primary school. The school found out that the plaintiff had been allocated the plot through the SFT. By the time of the allocation the school was on the ground from as early as 1986. The land was not vacant as the school was on the ground.

37. Upon being referred to the letter dated the 3rd November 1994, being an application for allocation (DMIFI 2) written by the plaintiff, he stated that the school applied to be allocated the land to have it formally registration of the school. He did not have the application letter of allocation. When referred to the letter dated 18th of November 2024 by the Director of Settlement (DMFI 3), he stated that the Director allocated the land to the plaintiff. When the members discovered that in 1996, was when the issue was brought up under the DC and discussed. It was resolved that the Plaintiff allocated land elsewhere as per the letter dated 24th May 1996 (DMFI 25). A year later, by a letter dated 27th May 1997 (DMFI 24), she received another letter which indicated that she was legally issued with the title deed but the land was a public utility. It was public land. He wondered how the land would be allocated to her.

38. When referred to paragraph six (6) of the Defense where it had been pleaded that the plaintiff fraudulently acquired the land, he stated that when the plaintiff was informed of the proposed change of land, she agreed to it. He referred to a letter dated 16th September 1997 (DMCFI 29). It showed that she was given 10 acres of land in Kitalale Scheme. The letter referred to Plot No. 60 Sitatunga.

39. He prayed for the cancellation of the title deed registered in the plaintiff's name because the allocation to her was made when the school was already existing and on the ground. He had the Minutes of the school to show that it existed. On the 10th of August 2000, the Provincial Land and Adjudication Settlement Officer in Rift Valley wrote the letter (DMFI 5) that the Plaintiff had been allocated plot No. 854 measuring approximately 4.05 hectares. The letter indicated that the allocation superseded any other previous one. The witness did not know whether the Plaintiff had paid some money to be allocated the suit land. He stated that if a title deed was cancelled, then there would be legal action to resolve the issue of the money she paid for processing the title and also the loan that she took over the parcel of land.

40. He added the plaintiff wrote a letter dated 11th November 2001 (DMFI 21) in which she committed to take the land in Kitalale Scheme. The letter was to the effect that she would exchange the plotting with the Sitatunga one directly. So, she agreed to be allocated the land in Kitalale Scheme. He did not know whether the Plaintiff had another title in the Kitalale Scheme.

41. Regarding the plaintiff's evidence that the school was not in existence in 1994, he stated that it was untrue. He added that on 22nd September 2001 the plaintiff wrote another letter to the District Land Adjudication Officer (DMFI 22). She referred to the letter dated 18th July 2000 wherein she stated that she had bought the parcel of land No. 60.

42. His further testimony was that the school was in occupation of the land for 30 years. It uses the land to offer learning activities. It had structures on it. It has yet to be officially registered because the ownership of the land is in issue. It had not been fully registered because of the instant suit. He wanted the school to be registered officially. As at the time of testimony the school was recognized by the Ministry of Education in line with the *Basic Education Act* of 2013. It had a Board of Management (BOM) and teachers employed by the Ministry through the Teachers Service Commission (TSC). The school had been presenting candidates for the Kenya Certificate of Primary Education (KCPE) since 1998 and was recognized by the Kenya National Examination Council, (KNEC). It was a public school.

43. He disputed the plaintiff's claim that the school vacates the land. He added she complained to the National Land Commission (NLC) to investigate the issue. In 2017 the Plaintiff wrote to the NLC (see DMFI 20) and the NLC wrote a report (DMFI 11) and ask for the ground inspection to confirm the location of the Marura Primary School and other public plots set aside in the area. Later, the NLC wrote a letter dated 1st February 2017 saying that Plot No. 60 was for Marura Primary School. The National Land Commission referred to an earlier letter which contained the history of this school and how it was developed. The Commission stated that Plot No. 60 was not for allocation to the Plaintiff as the school was on the plot long before the allocated of the land. Further, the plaintiff's claim that the school was not on the plot was contradictory and the allocation to her was irregular. The Commission asked the plaintiff to honour the allocation process of plot number 854.

44. On re-examination he stated that Plot No. 60 was a water point but the community changed it to a school because the children of Sitatunga Scheme used to walk long distances to the nearest school. They registered the school in 2009 on 16th February 2009, first as a self-help project under the Ministry of Culture and Social Services. It was a public school in which people and both governments (the County and national) and the politicians had invested millions of shillings in infrastructure. It had 13 classes on

the ground. It conserved the environment with millions of trees. Similarly, it had a Junior Secondary School (JSS) as at the time of their testimony.

45. DW2, Crecentia Atieno Nyanga, testified that she was the Land Adjudication and Settlement Officer in-charge of settlement programs in Trans Nzoia County. She adopted as evidence in-chief the written witness Statement dated 8th June 2023.

46. In the in the written statement, she stated that according to the Settlement Scheme No. 516 Accountability List, item No. 5 was in reference to Plot No. 60 which was a public utility reserved as a water point. Through a letter dated 30th November 1994 (DMFI 6) the Plaintiff applied for allocation of Plot No 60 in Sitatunga Settlement Scheme. She stated in the application that she had exhaustively Investigated and confirmed that it was free. Through a letter dated the 10th November 1994 (DMFI 7) she was allocated to the plot. The allocation was not in order because the plot was set aside as a public utility, hence not all available for allocation. When this was brought to her attention DW2 conducted an official search on the Sitatunga Settlement Scheme Plot No. 60 on 9th March 2023 and found that the current registered proprietor was the Plaintiff who was registered on 2nd December 1994 and a title deed issued to her. The plot was charged to the Barclays Bank of Kenya to the tune of Kenya shillings 200,000/ (DMFI 8).

47. According to the Defendant the residents of Sitatunga agreed to start a nursery school in 1989 on the said Plot. It grew and became the modern-day Marura Primary School which establishment was in line with the reservation of the port being a public utility.

48. In her oral testimony, she added that he had filed two (2) sets of bundles of documents to which were attached copies of documents listed as 1 - 15 in the first set and a second List dated 15th March 2023 to which were attached copies of documents listed as 16 - 30. It was dated 18th July 2023. She produced the documents as D. Exhibits 1 to 15 and 16 to 30 respectively. These included the documents produced by DW1 as D.Exhs 12, 13, 14, 18, 27 and 28.

49. On cross-examination DW2 stated that Defense Exhibit 16 was not dated, but it was an extract of the Accountability List the Office of the Land Adjudication and Settlement had. The List was prepared in the 1980s when the Scheme was created. It was done before she became an employee of the government. The evidence she gave was from the documents she found in the office. The office certified them as true copies of the original and affixed the stamp at the top and the signature of certification was hers as the County Land Adjudication and Settlement Officer. She explained to the Control Sheet meant documents which showed the original allottees of a settlement scheme. It shows the people who were originally allocated. At the bottom of the page of the List, there was no signature of the person who prepared it but they were the ones the Office had and they prepared. It was a document not available to the public except on request. If one had to carry out a search he had to write to the Ministry to request information which would be given. The document was for the Settlement Scheme No. 516 Sitatunga. At page 2 it showed that Plot No. 60 was the water point. That was why she indicated that it was so but not for a school. She had no records to show that the school had applied to be allocated to the plot. But the Water Point was a public utility.

50. DW2 added that a public utility could be changed to another public utility if the stakeholders sat down, that is the public and their leaders, together with the Provincial Administration would state that there was need to make the change. They would do so through Minutes which would be forwarded to the District Development Committee and a District Executive Committee for discussion. If the two committees passed it, then the utility would change from its previous one to the new one. The property was not available for allocation to an individual. A member of the public would know that procedure by asking the relevant office.

51. She added that Plots in a settlement scheme would be allocated the first time by a District Plot Selection Committee. The list would be passed to the District Land Adjudication Officer who would forward it to the Director of Land Adjudication and Settlement for forwarding to the Minister through the Permanent Secretary (PS). Once the Minister approved it, he would direct the Director Land Adjudication and Settlement to prepare letters of offer. Thereafter they would be ready at the District Land Adjudication Office where the beneficiaries would go and get them issued to them.

52. Upon being shown Defense Exhibit 2 which was the letter dated 3rd November 1994, she confirmed that the plaintiff applied to the Director of Settlement and Adjudication and was issued a letter of allocation on 13th November 1994 (D.Exhibit 3). She confirmed that DExh 4 was a search on the property which showed that the title belonged to the plaintiff and was charged with the Barclays bank of Kenya. Defense D.Exhibit 10 was the title deed issued to the plaintiff. She stated that although the allocation was done, it was problematic because the land was meant for the public and was set aside as a water point. He admitted that the plaintiff had been trying to take possession but the members of the public resisted it because they knew it was a Plot for the public.

53. Further, cross examination revealed that the Plaintiff was to be allocated another plot in Kitalale Scheme, following a meeting held with the District Commissioner, the Land and Adjudication and Settlement Officer and the District Commissioner, who was the chairman of the District Allocation Committee. The plaintiff agreed to do that arrangement and the plot was allocated to here. She explained that Defense Exhibit No. 30, a letter dated 16th June 1997 showed that the title would be issued to her when the Program in Kitalale Scheme was finalized. She added that the Kitalale Scheme was yet to be registered and title deeds issued because the Scheme was still incomplete. Further, if the title were to be cancelled then the bank loan had to be cleared first. She stated that the plaintiff followed the correct procedure in the allocation, but the initial point was the problem. She was not aware that the school had attempted to pay off the plaintiff.

54. In re-examination she stated that for the original allottee, which was the water point, the process was legal but the allocation to the Plaintiff was illegal. She stated that contrary to the plaintiff's evidence that the land was vacant, it was not. The Plaintiff was offered Plot 854 in Kitalale Scheme. She already took the letter of offer.

Submissions

55. The plaintiff filed her written submissions dated 10th June 2024. She gave the background of the dispute by outlining how she got registered as the owner of Trans Nzoia/Sitatunga/60. She also stated that she did not gain possession of her land, and by the year 2016 she had not done so, prompting her to make a complaint to the National Land Commission which by a letter dated 1st February 2017 informed her that it could not assist her because the land had been reserved for public use as a water point and could not have been allocated to her. She summarized both her pleadings and the defendant's. She also summarized the evidence she adduced, which this Court need not reproduce as it has summarized it above. Of importance to note was the evidence that she applied for another parcel of land in 1997 in Kitalale Settlement Scheme and was eventually allocated plot number 854 measuring 4.05 acres. She sought to explain the allocation that the indication in the letter of allocation that it superseded the previous allocation was not correct as it was not in any way connected with and was not in exchange for plot No. 60 Sitatunga. But she stated further that plot number 854 had no title yet, unlike the Sitatunga Scheme one. She also summarized the evidence of the Defendants. Then she set out a number of issues for determination by this court. These were:

    1. Whether the plaintiff was the registered owner of parcel number Trans Nzoia/Sitatunga/60.

2. Whether the defendants illegally and unlawfully occupied the suit land.

3. Whether the land was illegally and unlawfully allocated to the plaintiff.

4. Whether the land was fraudulently and irregularly acquired by the plaintiff

5. Whether the plaintiff was entitled to the orders sought in the plaint.

6. Whether the defendants were entitled to the orders prayed for in the counterclaim.

7. And which order should be made regarding the costs of the suit.

56. Regarding issues number (a) and (b) the Plaintiff submitted the answer was affirmative because it was common knowledge that she acquired title for the suite parcel of land on 2nd December 1994. Further, that the defendant admitted that they had been in occupation of the land since 1994 and had not allowed her to gain access to the possession of the suit land since then. So, they were in lawful occupation of our land. She submitted further that the acquisition of the title to the land was clear. She had been allocated the land vide a letter dated 3rd November 1994 when she applied for it to the Director of Settlement. By then land was vested in the SFT. She, the plaintiff, had indicated in the application that she was a mother of four who was landless and a squatter at Kaisagat Scheme. Therefore, by a letter dated 18th November 1994, she was allocated the land. She obtained the title thereto on 2nd December 1994. The process of acquisition of the land was through correct procedure.

57. She added that if the land had been allocated or reserved for a water point, there was no way she would have known that it was for that purpose, and it was only the allocating authority, the Director of Settlement Officer and officers under him who would have known this. She challenged the Document Control Sheet produced by the Defendant to show that Plot No. 60 was reserved as a water point because that was an internal document which was not available to the public generally.

58. She relied on the case of *Gladys Wanjiru Ngacha vs. Teresa Chepsant & others, CACA 94 of 2009* from which the summarized the holding that allegations of fraud must be proved strictly and the standard of proof though not beyond reasonable double must be higher than that of a balance of probabilities. She relied further on Article 40(1) of *the Constitution* and 40(3) which she summarized, guarantee the right to property which a party should not be deprived of, and if there has to be deprivation then she has to be prompt and just compensation. She relied on Section 26 one of the *Land Registration Act* to argue that the acquisition of the suit land was not through fraud, illegality or unprocedural in any manner or through a corrupt scheme.

59. About the counterclaim, she submitted that having acquired the land lawfully and procedurally and without any notice of any defect in the title and none existed, the defendants were not entitled to the Counterclaim.

60. She submitted that it was not her alone who was not interested in the title, but also that there was a bank, being the Barclays Bank of Kenya, who had a charge over the property. The bank was not a party to the proceedings hence canceling the title would result in depriving the bank of an interest in the property without compensation, contrary to Article 40(3) of *the Constitution*. She prayed that her suit be allowed, and the Counterclaim be dismissed.

61. On its part, the defendant submitted through a written document whose last page they did not annex. The Court is neither able to tell the date it was made nor whether it was signed. Thus, it will not rely on it as the submissions of the Defendant. Notwithstanding that, the failure to file the proper set of submissions will not prejudice the consideration, on merits, of the suit because submissions do not consist of either evidence or pleadings of the parties. They are a marketing language the parties use to try

and convince the Court to find in their favour. The court may or may not necessarily consider or agree with them for there are a number of cases that have been determined without considering submissions. All that the Court needs to bear in mind is always that submissions do not substitute the reasoned analysis of both the law and facts and arriving at the proper conclusion of an issue. This was the similar reasoning of the Court of Appeal in DANIEL TOROITICH ARAP MOI V MWANGI STEPHEN MURIITHI & ANOTHER [2014] EKLR by which authority I am guided where in stated:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

62. With that in mind, I now turn to the determination herein.

Issue, Analysis And Determination

63. This Court has considered the pleadings, the evidence (written, oral and documentary), the law and the submissions of the parties. It is of the view that the following issues lie for determination.

    a. Who the registered owner of the land is and since when

    b. Whether the registration of the land to the Plaintiff was by fraud

    c. Whether the suit land was available for allocation to a private individual

    d. Whether the Plaintiff was adequately compensated for the allocation of the suit land and why

    e. Whether the registration of the Plaintiff as owner of the suit land should be cancelled

    f. Whether the claim by the Plaintiff is time barred.

    g. Whether the Defendant's counterclaim is merited.

    h. Who to bear the costs of the suit and the counterclaim.

64. This Court will use the simple tool of legal analysis to determine the issues sequentially. It starts with the first one.

a. Who the registered owner of the land is and since when

65. The issue between the Plaintiff and the Defendant was that the Plaintiff was not the owner of the suit parcel of land. This called on the Court to inquire into whom the records kept and held by the relevant offices, namely, the lands office, show the registered owners is.

66. Under Section 26(1) of the *Land Registration Act*, No. 3 of 2012, the law regarding registration of land in the name of an individual, company or entity is given. It stipulates that:

> " (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."

67. Applying the law to the facts herein, the Plaintiff. The Plaintiff testified that she was allocated by the Settlement Fund Trustees (SFT) a parcel of land that was finally registered as Trans Nzoia/ Sitatunga/60. Immediately after she obtained the title she charged it to her then employer, Barclays Bank as security for a loan of Kenya Shillings 200,000/=. To evidence it she produced the copy of the title deed, as P.Exhibit 1. The Defendants did not deny this fact. Rather it raised the contention that the registration and ownership was obtained irregularly and fraudulently.

68. In her submissions she argued that common knowledge that she acquired title for the suite parcel of land on 2nd December 1994. Further, that her registration conferred her a right to property protected under Article 40(1) and (3) of *the constitution* and would not be defeated as stipulated under Section 26 one of the *Land Registration Act* except if it was acquired through fraud, illegality or unprocedural in any manner or through a corrupt scheme, which, to her, was not the case.

69. This Court carefully considered the evidence. The copy of the title produced as P.Exhibit 1 was a titled deed in respect of parcel No. Trans Nzoia/ Sitatunga/60 issued on 2nd December 1994 in the name of Lynette Kageha Kisiswa, the Plaintiff. It shows that it measured approximately 2.3 Ha. At the property section it showed entry No. 4 dated 9/12/1994 that there was an agreement in terms of the charge. At the encumbrances Section it showed that it was charged to the Barclays Bank on 09/12/1994 in the sum of Kshs. 200,000/= and the right under Sections 83 and 84 of the Registered *Land Act* reserved. The title conferred absolute proprietorship.

70. This Court thus finds that indeed, the Plaintiff was the registered owner of the suit land in question in terms of Section 26(1) of the *Land Registration Act*, from 02/12/1994.

b. Whether the registration of the land to the Plaintiff was by fraud

71. The next issue was that the Plaintiff acquired the land by fraud. Simply put, the Defendant claimed that the Plaintiff acquired the registration of the land in her name by fraud.

72. Fraud has its sisters: trickery, deceit, conmanship, cozen and the like. In Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR Justice Mativo (as he then was), explaining the meaning of defraud stated as follows:

> " Merriam-Webster dictionary defines the word "defraud" as to cheat, cozen, swindle, to get something by dishonesty or deception. Cheat suggests using trickery that escapes observation. Cozen implies artful persuading or flattering to attain a thing or a purpose, defraud stresses depriving one of his or her rights and usually connotes deliberate perversion of the truth. Swindle implies large-scale cheating by misrepresentation or abuse of confidence.
>
> The Free Dictionary defines defraud as "To make a Misrepresentation of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending for someone to rely on the misrepresentation and under circumstances in which such person does rely on it to his or her damage. It also means to practice Fraud;

to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice."

73. The Defendants particularized the fraud, which they listed together with specifics if illegality. In R.G. Patel vs Lalji Makanji 1957 E.A 314, the Court of Appeal stated as follows:

> " Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

74. In the case of Arthi Highway Developers Ltd vs West End Butchery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R), the Court of Appeal cited the following passage from Bullen & Leake precedents pleadings 13th edition at Page 427:

> " The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ...... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

75. The Defendant contended that the Plaintiff's title was procured irregularly and fraudulently and processed through unlawful means hence it was void and a nullity ab initio. The Plaintiff adduced evidence that she was the registered owner of the parcel of land. She produced a number of letters together with a Power of Attorney which incidentally was not registered hence could not amount to anything legally, and a copy of a Certificate of official Search. She produced them as P.Exhibit 2 dated 7th March 1995; P.Exhibit 3 dated 30th May 1996; P.Exhibit 4 a Power of Attorney dated 14th March 1996; P.Exhibit 5 dated 18th March 1996; P.Exhibit 6 dated 14th April 1996; P.Exhibit 7 dated 30th May 1996; P.Exhibit 8 dated 10th August 1996; P.Exhibit 9 dated 19th March 1996; P.Exhibit 10; P.Exhibit 11 dated 18th January 1997; P.Exhibit 12 dated 23rd July 1999; and P.Exhibit 13.

76. I have carefully considered all the documents produced by the Plaintiff, which I have listed in the preceding paragraph. In my humble view, none explains how the Plaintiff got to be registered as the owner of land was public land. Many at communications from one office to another about the complaint the Plaintiff raised. None comprise the application for and the allotment, and even payment for acceptance or processing of the land in her favour. She only produced, from the blues a copy of the title deed to show she was the owner.

77. Regarding each of the particulars of fraud, the Defendant led evidence which showed that the plaintiff applied for a location of the suit land when she knew or ought to have known that it was a public utility. DW2 produced the Accountability List which showed that the Plot No. 60 was a water point hence public land. DW2 produced in evidence a copy of Plaintiff's letter of application for allocation of the land. It was dated 3rd November, 1994. It was D.Exhibit 2. She stated that she has "exhaustively investigated and confirmed that (the land was/is) free". It was upon that description that she was allocated public land which, according to the evidence of DW1 housed a nursery school then, and according to her (PW1) she could not take up possession when she was allocated it because she found a lady and people thereon. This was only a month after she applied for the allocation. Again, she said she investigated the status of the plot exhaustively yet she admitted that she did not see the accountability list. By her application and the stated content, she misrepresented to the Director of Settlement that the plot was free. She stated this, in regard to her claim that she conducted due diligence. But she tried

to feign lack of accessibility of the same yet she did not attempt to apply for it. All these actions show a choreographed move by her to acquire public land hence fraud. While she did not forge the title deed, the did not obtain it procedurally or legally. I find that the Defendant proved some of the particulars of fraud and illegality as analysed above.

c. Whether the suit land was available for allocation to a private individual

78. The suit land was claimed by the Plaintiff, and the Court has indeed fund that she was duly registered as the owner of the suit land. The Plaintiff contended that she applied for allocation of the suit land, and was actually allocated the same by the SFT. On their part the Defendant contended that the land was not available for allocation to a private individual since it was already set aside for public use - a water point which was later converted to a school.

79. It is not disputed by the two parties that the suit land initially was unalienated land. It was finally alienated for allocation as a part of the large settlement scheme known as No. 516 Sitatunga, situate in Trans Nzoia district then but now Trans Nzoia County. The process of alienation was through the SFT. The process was actualized through the Land Adjudication and Settlement Office, which was under the Land Adjudication and Settlement Officer in charge of the area. The SFT was a body established under Section 167 of the Agriculture Act, Chapter 318 Laws of Kenya, Revised Edition 2012 [1986], now repealed by the *Agriculture and Food Authority Act*, No. 13 of 2013. It would receive monies as provided for under Section 168 of the Act. Such monies included that realized from the sale of any land acquired by the Central Land Board for purposes of any approved settlement scheme. Under the Rules - Land Utilization and Settlement Rules, 1962 - made pursuant to the Act, Rule 3 thereof gave a number of conditions an applicant was to fulfill in order to participate in a settlement scheme. It would appear that the Plaintiff followed these conditions and qualified for allocation of the suit land.

80. The question that remains is whether the land was available, in the first place, for allocation to a private individual as the Plaintiff. It was the Plaintiff's claim and evidence that she applied for the allocation of the Plot. Although she stated so, the letter of application for allotment which she alluded to but did not produce in evidence showed that she applied for a "residential plot" within Kitale town.

81. PW1, the Plaintiff, stated in evidence that she applied for the allocation of the plot in Sitatunga Scheme 516. She did not produce the application. She admitted on cross-examination that on the Accountability List, finally produced as D.Exhibit 1 by DW2, the 5th item which was the plot in issue showed that it was a Water Point hence public utility. She denied that fact. On re-examination she did not show and who prepared and even certified the Accountability List.

82. DW1 testified that in 1989 the residents of Sitatunga started Marura Nursery School on parcel number Trans Nzoia/ Sitatunga/60. The land was reserved as a public utility for a water point. Then they registered a Nursery School in 1989 and in 1992 the community, with the help of the Ministry of Education, started the Marura Primary School. By 1994, it had grown to Standard 3.

83. DW2 stated in evidence that according to the Settlement Scheme No. 516 Accountability List (D.Exh 1), item No. 5 was in reference to Plot No. 60 which was a public utility reserved as a water point. The Plaintiff applied for allocation of the Plot No 60 in Sitatunga Settlement Scheme, through a letter dated 30th November 1994, a copy produced as D.Exh 6). In it she that she had exhaustively investigated and confirmed that the plot was free. Through a letter dated 10th November 1994, D.Exh 7, she was allocated to the plot. DW2 added that the allocation was not in order because the plot was set aside as a public utility, hence not all available for allocation.

84. I have carefully looked at the Accountability List, D.Exh 1. It reads at page 2 that Plot No. 60 was a water point. The Land Adjudication and Settlement Officer stated that the plot was designated as a

waterpoint which the community changed to another public utility – the School. She stated that it was proper and permitted for the community to change the public purpose of a parcel of land. It is my finding that since the Plot was a waterpoint at first, which was a purpose, it was not available for private allocation. Thus, I agree with the Defendant that the plaintiff was unprocedurally allocated the parcel of land. It did not matter that she applied for it and paid the requisite money for that and even processed a title deed.

85. In Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) the Supreme Court held:

> " [101] The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to H. E. Daniel T Arap Moi or for further alienation."

86. That being the case, even though the Plaintiff obtained title after a long-drawn out or short process that may have followed all the steps subsequent to the allocation, that amounted to naught because the root of the title was itself questionable and untenable. However good and pure it may look, its origin was illegal and must remain so hence it is a candidate for cancellation. In Republic v. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 where Maraga J. (as he then was) stated as follows:

> " Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept."

d. Whether the Plaintiff was adequately compensated for the allocation of the suit land and why

87. It was the Defendant's claim, specifically in support of the Counterclaim that upon discovery that the Plaintiff had been allocated the suit land and gotten herself registered as such, they, with the Plaintiff engaged the administration, that to say, the District Commissioner, the Land and Adjudication and Settlement Officer and the District Commissioner.

e. Whether the claim by the Plaintiff is time barred.

88. The Plaintiff claimed the land by contending that she applied for it and was allocated in the year 1994. She subsequently, on 2nd December, 1994 became the registered owner after following all the right processes. Her evidence, both written and oral was that even though she became the owner in that year, she never took up possession at all. She gave the reason that the Defendant and the community became hostile to her and claimed that the land was public land and belonged to the nursery and primary school. Thus, to her she has not been in occupation for all that period of time running to 25 years.

89. On its part the Defendant pleaded and led evidence that it had been on the land since its inception in 1989 as a nursery school and then 1994 as a primary school, that it had never parted with possession of the land and had been using it for educational infrastructure. The Defendant's evidence is that it has been in occupation of the suit land for all those years. What does the law say in the circumstances?

90. Section 7 of the *Limitation of Actions Act* provides that:

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

91. Also, Section 17 of the Act provides that:

> "Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished."

92. The two provisions, jointly import the legal position that a party who does not move the court to recover his land within twelve (12) years from the time of another party's illegal occupation or occupation without his/her consent or permission, as is in the Plaintiff's case herein, cannot successfully move the Court for recovery thereof. The totality of the Plaintiff's claims through the pleadings herein and the evidence she adduced leads to one conclusion: her claim was more than stale. Even if there could have been ownership legally falling to the Plaintiff, which the Court has not found to have been upon the finding that the allocation to her was unprocedural, it would have been extinguished completely, under Section 17 of the Act. I needed not to even analyze the merits of this case in the first place but…! This leads the Court to make an inescapable conclusion at this point that the Plaintiff's claim is time-barred and I dismiss it entirely. On the other hand, the Defendant's counterclaim is by virtue of that legal position wholly merited regarding their entitlement to the ownership of the land. Costs of the claim to be paid by the Plaintiff to the Defendant and those of the Counterclaim to be given to the Defendant as well.

f. Whether the registration of the Plaintiff as owner of the suit land should be cancelled

93. The issue of cancellation or otherwise of the registration in the Plaintiff's name depended on the outcome of three issues above. Section 26 of the *Land Registration Act* gives reasons why a title has to be cancelled even when it appears, on the face of the registration, to be valid. They include fraud or misrepresentation, acquisition of the title illegally, unprocedurally or through a corrupt scheme. This Court must now turn to the analysis and see if there was any such a feature in regard to the Plaintiff's registration of the suit land.

94. In this case, the three issues above, as determined in sequence, were, one, whether the land was supposed to have been allocated to her in the first place. The answer to this one is already in the negative since it was not available for allocation to any private individual. In any event she misled the SFT that the same was vacant yet the school was in occupation thereof. Even if the school was not, she either did not carry out due diligence or deliberately failed to acknowledge the presence of the school on the land, or even the fact that the same was occupied by the unnamed woman or lady she found on the land when she went to take possession, who according to her informed her that the same was for the school.

95. It will also depend on whether she was adequately compensated. The Plaintiff claimed that she was not compensated for the failure to take possession, use and ownership of Plot 60. She claimed that the allocation of ten (10) acres in Kitalale Scheme was due to her application for allocation of a fresh land since she was landless. If indeed that was true of her claim, then she misled government that she was landless yet she already had the five acres being the suit land herein already registered in her name. She could not claim to be landless. Therefore, the more credible evidence is that of the defence about her compensation over the same plot.

96. The Defendant through DW1 and DW2 led evidence that upon discovery that the school land had been allocated to her, in good faith they engaged the relevant institutions with a view to, and they agreed to, allocate her land elsewhere. It was identified as being at Kitalale Scheme. This was evidenced by D.Exh 5, a letter dated 18/08/2000, which was to the effect that the Plaintiff was allocated the 10 acres in Kitalale Scheme, the allocation superseded any earlier allocation, which allocation was Plot 60 Sitatunga, since it clearly stated so at the NOTE part just above the signature of the author, and the Plaintiff accepted it by signing (same signature as on D.Exh 2) and she admitted it in cross-examination, and even took possession of the 10 acres. She tried to mislead the court that the 10 acres were of a different application and unrelated but the document itself was clear that the allocation superseded the earlier allocation. Therefore, accepting the latter offer the Plaintiff effectively gave up the rights to and the ownership if any of the Plot No. 60 by way of compensation. Furthermore, DW1 and DW1 gave evidence that the latter allocation was as a result of negotiations which followed discovery that the Plaintiff had been allocated a public land where the school already was.

97. It appears that in order to defeat the government ownership purpose the Plaintiff hurriedly, and secretly charged the property in 1994 to her employer bank then, as evidenced by P.Exh 1 (copy of the title deed) and D.Exh 4 (Certificate of Official Search), repaid the loan and deliberately failed to discharge the same so that the registration of the charge could act as a Sword of Damocles or camouflage that indeed there were other parties who had a claim there to but had not been catered for in the judgment. But alas! This Court is intelligent enough to read subtle minds. That is why it questioned the fact that the Plaintiff herself did not deliberately join the said Bank as an Interested Party in the suit, only to raise the issue as a veiled defence or estoppel against Defendant's counterclaim for cancellation of the title.

98. By an Affidavit sworn on 25th November, 2024 by one Michael Massawa, the legal Counsel of ABSA Bank Kenya Plc, the successor of Barclays Bank of Kenya Ltd, upon the Court inquiring about the status of the loan, the Bank deposed that the loan had been fully repaid and the Plaintiff required to register a discharge of the charge but she had not. At paragraph *3* d) he stated that "... from our records, the loan secured by the said charge registered against the mentioned property was already fully repaid." He stated further at paragraph *4*, "...in light of the above, I pray that the bank be discharged from further proceedings .... since the bank has no interest in the dispute..." That deposition fully reversed the Plaintiff's claim that there were other third parties who had interest on the land who would be affected if cancellation was ordered.

99. The third reason for an order of cancellation being apt is about whether, even if the title was to be found to be (legally) indefeasible in the Plaintiff's favour, it still would be subsisting as hers. This Court has found that by virtue of the fact that the Plaintiff did not sue for recovery of the land within 12 years since 2nd December, 1994 when she obtained the registration in her favour and let the school occupy the land for over that period, actually, for 25 years. Then her title to the land was, extinguished. Her claim for the title is time-barred hence it is lost. That being so, the registration cannot be let to subsist, it must be cancelled. The Court has to give a remedy that is effective.

g. Whether the Defendant's counterclaim is merited.

100. The Defendant pleaded that according to the accountability list, the plot in issue was set aside for public use. It led evidence that the allocation to the Plaintiff was irregular in the first place because the land was public land, according to the accountability List, D.Exh 1. It was for a water point and later the community agreed to change into to use for a school because there was a water point in the neighbouring farm, Siyoi. Further, it was not available for allocation to an individual. Also, that public land could only be used for public purposes and the school, Defendant, was a public one.

101. I find that the Defendant's counterclaim was merited. It succeeds. I enter judgment accordingly.

h. Who to bear the costs of the suit and the counterclaim?

102. Under Section 27 of the Act, costs follow the event and have to be awarded accordingly unless the court, for reasons to be recorded, is of the different view. I see none herein. In fact, the Plaintiff raised a needless claim against the Defendant. Costs of the Plaintiff's claim to the Defendant. Costs of the Counterclaim to be borne by the Plaintiff. In the circumstances, I enter judgment as follows:

    a. The Plaintiff's case is dismissed in entirety.

    b. The Defendant's counterclaim succeeds in fully.

    c. A declaration that the Plaintiff's title was fraudulently and unlawfully acquired and is a nullity ab initio for being created out of a public utility.

    d. An order be and is hereby issued cancelling the Plaintiff's title, being Trans Nzoia/Sitatunga/60, and all the entries made in the register thereof.

    e. An order is hereby issued directing the registration of plot number Trans Nzoia/Sitatunga/60 under the Principal Secretary, Ministry of National Treasury (reserved for Marura Primary School).

    f. An order of permanent injunction restraining the plaintiff her servants, agents and or any other person acting under her from ever laying claim, interfering with, or in any manner dealing with the suit parcel of land herein.

    g. The Plaintiff shall pay the costs of both the suit and the Counterclaim.

103. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 30TH DAY OF JANUARY, 2025.

HON. DR. *IUR* F. NYAGAKA

JUDGE

In the presence of:

Mr. S. M. Keyonzo Advocate for the Plaintiff

Ms. Jepkemei State Counsel for the Defendant