



REPUBLIC OF KENYA



**Paramount Engineering Company (2005) Limited v Khamis & 3 others (Environment & Land Case 316 of 2013) [2025] KEELC 616 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 616 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 316 OF 2013  
SO OKONG'O, J  
FEBRUARY 17, 2025**

**BETWEEN**

**PARAMOUNT ENGINEERING COMPANY (2005) LIMITED ..... PLAINTIFF**

**AND**

**SHEIKH KHALFAN KHAMIS ..... 1<sup>ST</sup> DEFENDANT**

**HAMISI BILALI ..... 2<sup>ND</sup> DEFENDANT**

**IMAM SHEIKH SHABAAN ..... 3<sup>RD</sup> DEFENDANT**

**BOARD OF MANAGEMENT ST PAUL'S KANYAKWAR PRIMARY  
SCHOOL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The pleadings**

1. The Plaintiff instituted this suit through a plaint dated 30<sup>th</sup> August 2013. The plaint was amended on 12<sup>th</sup> April 2021 to add the 4<sup>th</sup> Defendant to the suit. The Plaintiff averred that it was the registered owner of the leasehold interest from the Government of the Republic of Kenya for a term of 99 years with effect from 1<sup>st</sup> April 1992 in all that parcel of land known as L.R No.18127 measuring 3.102 hectares or thereabouts (hereinafter referred to as “the suit property”).
2. The Plaintiff averred that sometime in 2010, it discovered that unknown persons had without any right whatsoever, entered upon the suit property and purported to take possession of respective portions thereof and had both moved construction material onto the suit property, commenced and completed the construction of buildings and structures thereon. The Plaintiff averred that prolonged enquiries carried out by and for the Plaintiff revealed that some of the trespassers were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had purported to procure the acquisition of the suit property in favour of “Mosque & Muslim Schools Trust” through a forged letter of allotment.



3. The Plaintiff averred that the 4<sup>th</sup> Defendant without any right whatsoever purported to take possession of a portion of the suit property sometime in 2012 or thereabouts and moved construction materials onto the suit property and commenced and completed the construction of buildings and structures thereon. The Plaintiff averred that the actions of the Defendants amounted to trespass.
4. The Plaintiff averred that despite demand made and notice of intention to sue given, the Defendants had failed and/or refused to cease trespassing on the suit property, stop construction work thereon and remove construction material therefrom. The Plaintiff prayed for judgment against the Defendants jointly and severally for;
  - a. Possession of the suit property.
  - b. An order of injunction permanently restraining the Defendants, their employees and/or agents from entering upon, taking possession of, trespassing on, alienating or interfering by any other means howsoever with the suit property.
  - c. An order compelling the Defendants to demolish and remove immediately and at their cost all and any structures, buildings and /or material brought and/or constructed and/or left on the suit property.
  - d. Damages for trespass both general and exemplary.
  - e. The costs of the suit both party and party and advocate and client together with interest thereon at court rates from the date of filing this suit and until payment thereof in full.
  - f. Any other relief as the court may deem just and fit to grant.
5. The 1<sup>st</sup>-3<sup>rd</sup> Defendants filed a joint statement of defence on 8<sup>th</sup> January 2014 in which they denied the Plaintiff's claim in its entirety. The defence was amended on 10<sup>th</sup> November 2022 to plead a counterclaim. The amended defence although indicated as having been filed on behalf of the 1<sup>st</sup> -3<sup>rd</sup> Defendants seems to be that of the 1<sup>st</sup> Defendant only. In the amended defence, the 1<sup>st</sup> Defendant denied all the allegations made against the 1<sup>st</sup> Defendant in the plaint. The 1<sup>st</sup> Defendant averred that if the Plaintiff was registered as the owner of the suit property at all, then, Grant No. I.R 59205 in favour of the Plaintiff was fraudulently and illegally obtained and could not confer upon the Plaintiff any interest in the suit property. The 1<sup>st</sup> Defendant denied that he trespassed on the suit property, took possession thereof and developed the same on the strength of a forged letter of allotment in favour of Mosque & Muslim Schools Trust.
6. The 1<sup>st</sup> Defendant averred that the parcel of land under his occupation was known as L.R No. 18127 and that the same was allocated to Mosque & Muslim Schools Trust on 7<sup>th</sup> January 1997. The 1<sup>st</sup> Defendant averred that after Mosque & Muslim Schools Trust was allocated the property, it commenced construction of a mosque and a school on the property in 2001. The 1<sup>st</sup> Defendant averred that the construction was completed by 2011 before this suit was filed in 2013. The 1<sup>st</sup> Defendant averred that the Plaintiff's suit was time barred. The 1<sup>st</sup> Defendant prayed for the Plaintiff's suit to be dismissed with costs.
7. In the counterclaim which was also brought by the 1<sup>st</sup> Defendant only, the 1<sup>st</sup> Defendant averred that he was a trustee of the Mosque & Muslim Schools Trust (hereinafter referred to as "the Trust") which was allocated L.R No. 18127("the suit property") on 7<sup>th</sup> January 1997. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were worshippers at Jumua Mosque which normally partnered with the Trust. The 1<sup>st</sup> Defendant averred that the Trust which was allocated the suit property and subsequently



recommended by the National Land Commission for issuance of a certificate of title for the suit property was the valid owner of the property.

8. The 1<sup>st</sup> Defendant averred that the Trust's letter of allotment dated 7<sup>th</sup> January 1997 was validated by the National Land Commission and the suit property had already been surveyed and a valid Deed Plan No. 348994 issued. The 1<sup>st</sup> Defendant averred that there was already a recommendation that the Trust be issued with a certificate of title. The 1<sup>st</sup> Defendant averred that the validity of the Trust's letter of allotment having been confirmed by the National Land Commission (hereinafter referred to as "NLC"), the Plaintiff's claim over the suit property could only be fraudulent. The 1<sup>st</sup> Defendant averred that the Plaintiff had no proprietary rights over the suit property and as such could not maintain an action for trespass and eviction.
9. The 1<sup>st</sup> Defendant averred that the Trust had been in continuous uninterrupted possession of the suit property from 1997 and had invested over Kshs. 100,000,000/- on the property. The 1<sup>st</sup> Defendant averred in the alternative that the Trust had acquired the suit property by adverse possession. The 1<sup>st</sup> Defendant averred that the Plaintiff's claim was time-barred under the *Limitation of Actions Act*. The 1<sup>st</sup> Defendant averred that the Plaintiff had known of the Defendants' occupation and enjoyment of the suit property for several years. The 1<sup>st</sup> Defendant prayed for judgment against the Plaintiff for a declaration that the Trust was the lawful and bona fide owner of the suit property and the costs of the suit.
10. The Plaintiff filed a reply to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants' defence and counterclaim on 5<sup>th</sup> June 2023. The Plaintiff reiterated that it was the registered owner of the suit property. The Plaintiff denied that it acquired the suit property fraudulently and unlawfully. In its defence to the 1<sup>st</sup> Defendant's counterclaim, the Plaintiff averred that it acquired the suit property on 1<sup>st</sup> April 1992 and as such the property was not available for allocation to the Trust in 1997. The Plaintiff averred further that the purported letter of allotment that was issued to the Trust did not confer upon it any proprietary interest in the suit property. The Plaintiff averred that a letter of allotment could not defeat a registered title. The Plaintiff averred that the counterclaim did not disclose a cause of action and prayed that the same be struck out.
11. The 4<sup>th</sup> Defendant filed a statement of defence dated 7<sup>th</sup> June 2021 through the Office of the Attorney General. The 4<sup>th</sup> Defendant denied the Plaintiff's allegation that it had trespassed on the suit property. The 4<sup>th</sup> Defendant averred that its buildings and structures were on land parcel L.R No. 18125 which measured 8.013 hectares. The 4<sup>th</sup> Defendant denied that it had taken possession of the Plaintiff's land. The 4<sup>th</sup> Defendant contended that the orders sought were untenable as it had not trespassed on the suit property. The 4<sup>th</sup> Defendant prayed that the suit be dismissed with costs. The Plaintiff filed a reply to the 4<sup>th</sup> Defendant's defence on 29<sup>th</sup> June 2021. The Plaintiff reiterated that it was the registered owner of the suit property and that the 4<sup>th</sup> Defendant had trespassed thereon.

### **The evidence given by the Plaintiff**

12. The hearing of the suit commenced on 9<sup>th</sup> December 2020 before Ombwayo J. before the 4<sup>th</sup> Defendant was added to the suit. The Plaintiff's first witness was Ashvinder Singh Dhanjal (PW1). PW1 produced a resolution by the Plaintiff's board of directors authorising him to give evidence on behalf of the Plaintiff as P.EXH.1. PW1 thereafter adopted his witness dated 4<sup>th</sup> January 2019 as part of his evidence in chief. PW1 told the court that the suit property was owned by the Plaintiff. He produced a copy of Grant No. I.R 59205 for L.R No. 18127 in the name of the Plaintiff as P.EXH. 2. He stated that the Defendants had developed the Plaintiff's property. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had trespassed on a portion of the suit property measuring 1.19 hectares according to a survey report filed in court. He



stated that the 1<sup>st</sup> -3<sup>rd</sup> Defendants had built a mosque on the suit property and other buildings around the mosque. He stated that he had a letter of allotment purportedly issued in favour of Mosque & Muslim Schools Trust (the Trust) on 7<sup>th</sup> January 1997 in respect of the suit property which he produced as P.EXH.3. He stated that when the suit property was purportedly allocated to the Trust, the same was not available for allocation as a title for the suit property was issued to the Plaintiff on 1<sup>st</sup> April 1992. He stated that the 1<sup>st</sup> -3<sup>rd</sup> Defendants' trespass on the suit property was based on the said letter of allotment.

13. The Plaintiff's second witness was Geoffrey Okoto (PW2). PW2 told the court that he was a surveyor working with the County Government of Kisumu. He stated that he visited the suit property on 11<sup>th</sup> December 2019 in the absence of the parties to the suit whom he did not invite and carried out a survey. He stated that the parties were not aware that a surveyor would visit the site. He stated that his findings were that; Ummu Salamah Mosque, St. Paul's Primary School and the proprietor of L.R No. 18128 had encroached on the suit property to the extent of 1.19Ha., 0.77Ha. and 0.19 Ha. respectively. He produced his survey report as P.EXH.4.
14. The hearing of the suit continued before me on 6<sup>th</sup> March 2023 when Ashvinder Singh Dhanjal (PW1) was recalled to give further evidence. PW1 adopted his further witness statement filed on 13<sup>th</sup> December 2022 as his further evidence in chief. He stated that the 4<sup>th</sup> Defendant had trespassed on the suit property to the extent of 0.77Ha. He stated that the 4<sup>th</sup> defendant had built some classrooms and offices on the suit property. He stated that the 4<sup>th</sup> defendant did not seek permission from the Plaintiff to put up these structures on its land. He stated that the Plaintiff wanted the 4<sup>th</sup> Defendant to stop trespassing on the suit property and to demolish the structures it had put up on the property. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants' letter of allotment dated 7<sup>th</sup> January 1997 was issued on the strength of a survey plan No. N9/92/50. He stated that the plan was not attached to the letter of allotment. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants' letter of allotment did not refer to the parcel of land L.R No. 18127 which the 1<sup>st</sup> - 3<sup>rd</sup> Defendants were claiming.
15. He stated that the Plaintiff was issued with a Grant on 21<sup>st</sup> May 1993 and the same was registered on 25<sup>th</sup> May 1993. He reiterated that the suit property was not available for allocation to the 1<sup>st</sup> - 3<sup>rd</sup> Defendants in 1997. He stated that the suit property was registered as Grant No. I.R 59205 which was issued on the strength of Deed Plan No. 173001. He stated that the suit property had dimensions, abutments and boundaries. He denied that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had occupied the suit property since 1997. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants entered the property in 2010/2011. He stated that that was when they started construction on the property. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had not sought the cancellation of the Plaintiff's title.
16. On cross-examination by Ms. Nyambeki for the 1<sup>st</sup> - 3<sup>rd</sup> Defendants, PW1 stated that he came to know of the 1<sup>st</sup> - 3<sup>rd</sup> Defendants' occupation of the suit property in 2010 when the 1<sup>st</sup> - 3<sup>rd</sup> Defendants started construction on the property. He stated that they did not take action because they did not know where the 1<sup>st</sup> - 3<sup>rd</sup> Defendants were. On cross-examination by Ms. Jumma for the 4<sup>th</sup> Defendant, PW1 stated that the Plaintiff acquired the suit property in 1992/1993. He stated that when they acquired the suit property, the 4<sup>th</sup> defendant existed. He stated that the school had classrooms but not on the disputed property. He stated that when they took possession of the suit property, they did not fence it. He stated that the land was vacant. He stated that there was a school nearby but not on the property. He stated that he did not know when the 4<sup>th</sup> Defendant put up the classrooms on the suit property and did not know for how long the said classrooms had been in place. He stated that when the Plaintiff filed the suit, it did not know that the school had encroached on the suit property. He stated that it was after they conducted a survey that they learnt that the school had put up classrooms on their land. He stated



- that the Plaintiff did not involve the school in the survey. He stated that the extent of the encroachment by the school was 0.77 Ha. On re-examination, PW1 stated that the survey of the suit property was done pursuant to a court order made on 5<sup>th</sup> November 2019. He stated that the survey was not done at the Plaintiff's instance.
17. On examination by the court, PW1 stated that he had the Plaintiff's letter of allotment but had not produced it in evidence. He stated that the letter of allotment was dated April 1992. He stated that the application for allotment was made by Chosaa Estates. He stated that the Plaintiff bought the suit property from Chosaa Estates which was the original allottee. He stated that the transaction was undertaken by his father on behalf of the Plaintiff. He stated that he could not recall if he visited the suit property before it was purchased by the Plaintiff. He stated that he visited the land around the time the construction started.
  18. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants called Ali Zakariah Ahmed (DW1) as their first witness. DW1 told the court that he was the secretary of Mosque & Muslim Schools Trust (the Trust) and was also a civic educator with Uraiah Trust. He adopted his witness statement filed in court on 10<sup>th</sup> November 2022 as his evidence in chief. He produced the documents attached to the 1<sup>st</sup>-3<sup>rd</sup> Defendants' list of documents filed on 10<sup>th</sup> November 2022 as D.EXH.1 except the letters dated 14<sup>th</sup> September 2012, 2<sup>nd</sup> January 2013, 8<sup>th</sup> January 2013, 21<sup>st</sup> November 2013, 27<sup>th</sup> April 2015 and 12<sup>th</sup> February 2015.
  19. DW1 stated that the Trust was a faith-based organization and not a land grabber. He stated that the Plaintiff came to court after they had finished construction. He stated that the file for the suit property kept disappearing at the land registry and that they were still following up on their title. He stated that according to a valuation they did some years back, their investment in the suit property was about Kshs. 100,000,000/- which must have appreciated.
  20. On cross-examination by Mr. Mwesigwa for the Plaintiff, DW1 stated that when they were issued with a letter of allotment, the land was un-surveyed. He stated that they engaged a surveyor who surveyed the land and gave it a number. He stated that they applied to be allocated the land sometime in 1996/1997. He stated that they accepted the allotment within 30 days. He stated that they were yet to be issued with a lease for the suit property. He stated that they did not make the payment for the allotment within 30 days. He stated that they made the payment on 13<sup>th</sup> December 2011, 13 years after the allotment. He stated that they were in occupation of the suit property even if the offer made to them had lapsed. He stated that they occupied the land before paying for the same. He stated that the payment made by them was received without any objection and was not rejected.
  21. DW1 stated that they received a demand to vacate the suit property in 2013 through a letter from the Plaintiff's advocates dated 30<sup>th</sup> August 2013. He stated that after they were sued, they involved the National Land Commission (NLC) in the dispute but the Plaintiff ignored the letters from the NLC. He stated that they were told that the title held by the Plaintiff for the suit property was fake although the search they conducted confirmed that the Plaintiff was the owner of the suit property. He stated that they started developing the suit property on the strength of a letter of allotment. He stated that they had an unsigned title.
  22. On re-examination, DW1 stated that they took possession of the suit property in 1997 and that this suit was not brought until 2013 after they had occupied and used the suit property for 16 years.
  23. The 1<sup>st</sup> - 3<sup>rd</sup> Defendants' next witness was, Khalfan Khamis Ismael (DW2). DW2 adopted his statement filed in court on 10<sup>th</sup> November 2022 as his evidence in chief. He stated that they acquired the suit property in 1991 and thereafter developed the same. He stated that they had a mosque, classrooms, Imam's house, a dispensary and a borehole on the suit property. He stated that the developments



- were valued at about Kshs. 100,000,000/-. He stated that the Plaintiff came forward to claim the suit property after they had developed the same. He prayed that the suit be dismissed. He stated that they started developing the land in 2010.
24. On cross-examination by Mr. Kajo for the 4<sup>th</sup> Defendant, DW2 stated that he knew Kanyakwar Primary School. He stated that when they acquired the suit property in 1991, the school had some structures on their land. He stated that they had no claim against the school with which they shared a boundary.
  25. On cross-examination by Mr. Mwesigwa for the Plaintiff, DW2 stated that they applied for allotment of the suit property around 1991 and the letter of allotment issued to them was in respect of L.R. No. 18127 although the same was not indicated in the letter of allotment. He stated that they accepted the allotment immediately after they received the letter but made the payment of Kshs. 589,550/- on 27<sup>th</sup> December 2011 although the payment was to be made within 30 days from the date of the letter of allotment. He stated that it was for the Commissioner of Lands to determine whether or not the offer made to them had lapsed. He stated that their title to the suit property was being processed. On re-examination by Ms. Nyambeki, DW2 stated that they occupied the suit property in 1997 and that the Ministry of Lands had confirmed the validity of their title.
  26. The last witness for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants was Pius Okello Njage (DW3). DW3 adopted his witness statement filed in court on 10<sup>th</sup> November 2022 as his evidence in chief. DW3 told the court that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had occupied the suit property since 1997. DW3 stated that the Muslims in the area were worshipping at Kiboswa and Manyatta. He stated that the Muslims asked to be given land where they could put up a place of worship. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants built a secondary school, eye hospital and an orphanage on the suit property. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants were also supporting indigent old women and assisting the residents of the area on occasions of bereavement.
  27. On cross-examination by Ms. Jumma for the 4<sup>th</sup> Defendant, DW3 stated that he had been a member of Luo Council of Elders since 2010. He stated that he was from Kanyakwar and knew Kanyakwar Primary School. He stated that the school was established around 1986 and was given the land where it is situated by the Government. He stated that the school was also known as St. Paul Kanyakwar Primary School. He stated that the boundary of the school extended to Kakamega Road.
  28. The 4<sup>th</sup> Defendant's first witness was Joseph Oindo Nyaoke (dw4). He told the court that he was the chairman of Kanyakwar Primary School (the school). He stated that the Plaintiff was not known to him. He stated that he knew the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He adopted his witness statement as part of his evidence in chief. He stated that the school was situated on L.R. No. 18125. He stated that the school had never had a boundary dispute with its neighbours. He stated that the school started in 1967/1968. He stated that the school which was initially supported by the local community was taken over by the Government in 1979. He stated that in the same year, the school was allocated the land on which it was situated. He stated that the boundary of the school land extended to the tarmac road. He stated that the 1<sup>st</sup> -3<sup>rd</sup> Defendants put a barbed wire fence on the boundary between their premises and the school. He stated that school classrooms could not be inside the land owned by the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. He stated that the last classrooms were built in 2005 while the other classrooms were built when the school was established. He stated that it was the classes of 2005 that the Plaintiff claimed were on its land. He stated that he was in agreement with the Government surveyor that there was some encroachment but the same did not extend to the classes. He stated that the school was prepared to surrender the land if the court finds that the school had encroached on the Plaintiff's land. He stated that they were not aware of the survey which was carried out by Mr. Mbok (PW2).
  29. On cross-examination by Mr. Mwesigwa for the Plaintiff, DW4 stated that when the Plaintiff came to the scene, it found the school on its current location. He stated that the school had never had any



boundary dispute with its neighbours. He stated that the school was owned by the Government and its title for L.R No. 18125 was kept by the Treasury. He stated that the school was not fenced and that it was the school's neighbours who had fenced their parcels of land. He stated that after consulting the school surveyor, they learnt that there was a slight encroachment on L.R No. 18127. He stated that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants were occupying L.R. No. 18127.

30. On cross-examination by Ms. Nyambeki for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants, he stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants whom he referred to as the Muslims had occupied L.R No. 18127 for several years. He stated that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had fenced their land on which they had several developments. On re-examination by Ms. Jumma, DW4 stated that the corrugated iron sheet fence between the school and the 1<sup>st</sup> – 3<sup>rd</sup> Defendants' premises was put up by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants.
31. The last witness was Joshua Michael Otieno (DW5). DW5 told the court that he was working at the survey office at Kisumu as principal surveyor. He stated that he had with him a report which was prepared by the Nyanza Regional Surveyor who was his immediate supervisor. He stated that he was the one who went to the ground. He stated that L.R No. 18127 was occupied by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants, L.R. No. 18125 by the school and L.R. No. 18128 by Farm Engineering. He stated that they used the maps to identify the area which is under fixed boundary survey. He stated that on L.R. No. 18127, he found that the northern side was fenced in accordance with the survey plan. On the Southern part of the plot, he found a concrete wall. With regard to L.R. No. 18125 and LR. No. 18127, he stated that the fencing between Beacons CH2 and NI was in order while the fencing between NI and Ma3 was not in order in that on the ground, the occupants of L.R No. 18127 had left out part of their land during the fencing from Beacon NI. He stated that the fence was put on a straight line while the boundary according to the survey map was not straight. He stated that the triangular portion left out during the fencing formed part of L.R. No. 18127. He stated that there were no classrooms on the said portion of the land that formed part of L.R. No. 18127. He stated that the survey report that was prepared by Mr. Mbok (PW2) was unreliable as he did not refer to the survey map. He produced the ground survey report by Joseph Nanzala Munyendo stamped 1<sup>st</sup> October 2023 as D.EXH.2 (a) and the survey plan certified on 22<sup>nd</sup> September 2023 as D.EXH. 2 (b).
32. On cross-examination by Mr. Mwesigwa for the Plaintiff, DW5 stated that he did not find out the registered owner of L.R. No. 18125. He stated that he did not check on the ownership of L.R. No. 18127. He stated that L.R. No. 18127 had structures which could be seen in his report. He stated that the structures were within L.R. No. 18127. He stated that L.R. No. 18125 and L.R. No. 18127 had fixed boundaries. He stated that the fencing on L.R. No. 18127 was not aligned with the coordinates in the survey plan on one side. He stated the report by Mr. Mbok (PW2) did not refer to the survey plan. On cross-examination by Mr. Nyambeki, DW5 stated that on the ground, L.R. No. 18127 was occupied by the Muslim community.

### **The submissions**

33. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed its submissions on 28<sup>th</sup> March 2024, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants filed their submissions on 18<sup>th</sup> April 2024 and the 4<sup>th</sup> Defendant filed its submissions on 17<sup>th</sup> April 2024.

### **The Plaintiff's submissions**

34. The Plaintiff submitted it had discharged the burden of proof imposed upon it by law. The Plaintiff submitted that it had established that it was the lawful owner of the suit property. The Plaintiff submitted that its title to the suit property enjoyed the sanctity bestowed upon it by Section 25 (1) of the [Land Registration Act](#) 2012. The Plaintiff submitted that the Defendants had failed to prove that



it acquired the suit property fraudulently. The Plaintiff submitted that the suit property having been allocated to it and a title issued to it in 1993, the same was not available for allocation to the Trust in 1997. The Plaintiff submitted that the Trust had no title to the suit property and only held a letter of allotment which was nothing more than a letter of offer until the conditions thereunder were met. The Plaintiff submitted that there was no evidence that the offer was accepted within the timelines contained in the letter of allotment. The Plaintiff submitted that the payment for the allotment was made to the Commissioner of Lands on 13<sup>th</sup> December 2011, which was 14 years after the offer was made. The Plaintiff submitted that it was established that where a valid title has been issued to a proprietor of land, a letter of allotment cannot dislodge that title.

35. The Plaintiff submitted that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants did not produce any evidence in support of their claim that they had been in continuous and uninterrupted possession of the suit property from 1997 to be entitled to an order that they had acquired the property by adverse possession. The Plaintiff submitted that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants' counterclaim had no basis and could not be granted.
36. On the issue whether or not the Plaintiff was entitled to damages for trespass both general and exemplary, the Plaintiff submitted that it had established that the Defendants trespassed on the suit property. The Plaintiff submitted that having proved trespass by the Defendants on the suit property, the court should assess damages payable to the Plaintiff as a result thereof. The Plaintiff prayed for an award of Kshs. 5,000,000/- as exemplary damages and Kshs. 1,000,000/- for general damages. The Plaintiff also prayed for the costs of the suit. The Plaintiff cited several authorities in support of its submissions which the court has considered.

#### **The 1<sup>st</sup> - 3<sup>rd</sup> Defendants' submissions**

37. The 1<sup>st</sup>-3<sup>rd</sup> Defendants framed the following issues for determination;
  - a. Whether the 1<sup>st</sup> - 3<sup>rd</sup> Defendants (Mosque & Muslim Schools Trust) (the Trust) were the legitimate owners of L.R No. 18127.
  - b. In the alternative whether the 1<sup>st</sup> - 3<sup>rd</sup> Defendants had acquired L.R. No. 18127 through adverse possession.
  - c. Who is liable for the cost of the suit?
38. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Trust was the legitimate owner of the suit property. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that they produced in evidence a letter of allotment dated 7<sup>th</sup> January 1997 in proof of the Trust's ownership of the property. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Plaintiff did not produce its letter of allotment in evidence. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that there was nothing placed before the court showing that the suit property was allocated to the Plaintiff by the Government.
39. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted further that the Plaintiff knew of the 1<sup>st</sup>-3<sup>rd</sup> Defendants' occupation of the suit property for over 16 years and raised no objection even when the 1<sup>st</sup>-3<sup>rd</sup> Defendants were making extensive developments on the said land. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Plaintiff was prohibited by the doctrine of proprietary estoppel from seeking to recover the suit property from the 1<sup>st</sup>-3<sup>rd</sup> Defendants having led them to believe that they had a right to occupy and develop the property. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Plaintiff was estopped from denying that the 1<sup>st</sup>-3<sup>rd</sup> Defendants had proprietary rights over the suit property. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Plaintiff having not claimed the suit property for over 16 years led the 1<sup>st</sup>-3<sup>rd</sup> Defendants into believing that there was no rival claim over the land and that was what led the 1<sup>st</sup>-3<sup>rd</sup> Defendants to make extensive



developments on the property. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the Plaintiff was estopped from denying the 1<sup>st</sup>-3<sup>rd</sup> Defendants' rights over the suit property.

40. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that they had occupied the suit property continuously for over 16 years with no interruption making extensive developments on the said land which according to the valuation report produced as D.EXH.4 were valued at over Ksh. 150,000,000/- in 2014. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that they had acquired the suit property by adverse possession. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that their occupation of the suit property was open and the developments on the property were open to the public. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the suit property hosted courtyards of the 1<sup>st</sup> – 3<sup>rd</sup> Defendants, a mosque, a school, an optic clinic and an orphanage/children's home. The 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that they had met the threshold for a claim over land by adverse possession under Kenyan law. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants cited several authorities in support of their submissions which the court has considered.

#### **The 4<sup>th</sup> Defendant's submissions**

41. The 4<sup>th</sup> Defendant framed the following issues for determination;
1. Whether the Plaintiff was the owner/occupier/possessor of the suit property.
  2. Whether there was an unjustifiable intrusion on the part of the 4<sup>th</sup> Defendant on the property.
  3. Whether the survey report presented in court was credible.
  4. Whether the Plaintiff should be granted the prayers sought.
42. The 4<sup>th</sup> Defendant submitted that the Plaintiff did not prove that it was a legal entity capable of sustaining the suit. The 4<sup>th</sup> Defendant submitted that the Plaintiff did not prove that it had the capacity to bring the suit. The 4<sup>th</sup> Defendant submitted that the school existed where it was situated before the Plaintiff and the other Defendants were allegedly allocated the land in dispute. The 4<sup>th</sup> Defendant submitted that the report by J. Nanzala produced in court as D.EXH.2(a) showed that the school had slightly encroached into the suit property. The 4<sup>th</sup> Defendant submitted that the boundary marked by corrugated iron sheets was placed on the side of the suit property by the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. The 4<sup>th</sup> Defendant submitted that the school was at all material times operating within the boundaries that were put in place by the 1<sup>st</sup> -3<sup>rd</sup> Defendants who had fenced their compound. The 4<sup>th</sup> Defendant submitted that if the 1<sup>st</sup> -3<sup>rd</sup> Defendants fenced the boundary of the suit property incorrectly thereby leaving part of the property for the school, the school could not take the blame. The 4<sup>th</sup> Defendant submitted that the school had justifiable cause for occupying the portion of the suit property on which it was accused of encroachment. The 4<sup>th</sup> Defendant submitted that the Plaintiff was not even aware of the alleged encroachment by the school until it was mentioned in the survey report dated 24<sup>th</sup> December 2019. The 4<sup>th</sup> Defendant submitted that the survey report dated 24<sup>th</sup> December 2019 produced by PW2 did not give the true picture of what was actually on the ground.
43. The 4<sup>th</sup> Defendant submitted that the Plaintiff was not entitled to the damages claimed from the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant submitted that the School's occupation of a portion of the suit property was justified by the wrong placement of the boundary fence that was erected around the suit property by the 1<sup>st</sup>-3<sup>rd</sup> Defendants who were in occupation of the land. The 4<sup>th</sup> Defendant submitted that it was willing to restore the boundary to its rightful position. The 4<sup>th</sup> Defendant urged the court not to award any damages to the Plaintiff against the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant submitted that if the court found that the Plaintiff was entitled to damages against the 4<sup>th</sup> Defendant for trespass then an award of Kshs. 100,000/- would be sufficient compensation to the Plaintiff.



## Analysis and determination

44. I have considered the pleadings, the evidence tendered by the parties in support of their respective cases and the submissions by the advocates for the parties. From the pleadings, the following in my view are the issues arising for determination in this suit and the counterclaim;
1. Whether the Plaintiff is the lawful owner of the suit property;
  2. Whether the Defendants are trespassers on the suit property;
  3. Whether the Plaintiff is entitled to the reliefs sought in its amended plaint;
  4. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in his counterclaim; and
  5. Who is liable for the costs of the suit and the counterclaim?

### Whether the Plaintiff is the lawful owner of the suit property.

45. 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”.

46. 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.”



47. 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.”

48. The Plaintiff produced in evidence as P.EXH. 2 Grant No. I.R 59205 for L.R No. 18127(the suit property) which was issued by the Commissioner of Lands in its favour on 21<sup>st</sup> May 1993. The Grant was registered on 25<sup>th</sup> May 1993. I am satisfied that the Plaintiff is the registered owner of the suit property. The court is enjoined under Section 23 of the Registration of Titles Act to take the Plaintiff's Grant as conclusive evidence that the Plaintiff is the absolute and indefeasible owner of the suit property unless it is proved that the title was acquired through fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme. The Plaintiff having produced its title in evidence in proof of its ownership of the suit property, the burden shifted to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants who were challenging the title to prove the grounds for its impeachment mentioned above.



49. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

50. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation 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.”

51. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

52. In *Kampala Bottlers Ltd. v Damanico (UG) Ltd.* [1990-1994] E.A141(SCU), the Supreme Court of Uganda stated that:

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”

53. In their amended statement of defence and counter-claim, the 1<sup>st</sup> -3<sup>rd</sup> Defendants stated that “(Particulars Of Fraud And/or Illegality To Be Supplied)”. The 1<sup>st</sup> -3<sup>rd</sup> Defendants did not amend their defence and counter-claim after this pleading. This means that the 1<sup>st</sup>-3<sup>rd</sup> Defendants did not plead the particulars of the fraud and illegality that they alleged against the Plaintiff in the manner in which it acquired the title to the suit property. Since no particulars of the alleged fraud and illegality were provided in their pleadings no evidence was placed before the court in proof of the same. DW1 and DW2 claimed in their witness statements which they adopted as part of their evidence in chief that the Ministry of Lands and the National Land Commission had disowned the Plaintiff’s title. In support of this contention, the two witnesses relied on some correspondence in their bundle of documents. The 1<sup>st</sup> -3<sup>rd</sup> Defendants failed to call the Chief Land Registrar and the National Land Commission as witnesses. The said correspondence was therefore not produced in evidence by the 1<sup>st</sup> -3<sup>rd</sup> Defendants. In any event, there was nothing in the said correspondence suggesting that the Plaintiff’s title to the suit property was acquired illegally or fraudulently. In the absence of any evidence showing that the Plaintiff’s title to the suit property was obtained through fraud, misrepresentation, illegality, procedurally impropriety or corrupt scheme, the court will take Grant No. I.R 59205 for L.R No. 18127 as conclusive proof that the Plaintiff is the absolute and indefeasible owner of the suit property.



## Whether the Defendants are trespassers on the suit property

54. It is common ground that the 1<sup>st</sup>-3<sup>rd</sup> Defendants are in occupation of the suit property. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff is the lawful owner of the suit property. It is also common ground that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants are occupying the suit property without the permission of the Plaintiff. The burden was on the 1<sup>st</sup> – 3<sup>rd</sup> Defendants to show justification for their occupation of the suit property. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants claimed that they were in occupation of the suit property courtesy of Mosque & Muslim Schools Trust (Trust) which owned the property. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants claimed that the suit property was allocated to the Trust by the Commissioner of Lands on 7<sup>th</sup> January 1997 and that the Trust was pursuing a title for the same. I agree with the Plaintiff that the suit property was not available for allocation to the Trust on 7<sup>th</sup> January 1997. As of that date, the Plaintiff already had a title for the suit property that was issued on 21<sup>st</sup> May 1993.

55. Section 3(a) of the 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 (now repealed) 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”.

56. The suit property was not unalienated Government land as at 7<sup>th</sup> January 1997 when it was purportedly allocated to the Trust. The purported allotment was invalid and did not confer upon the Trust any proprietary interest in the suit property which could be enjoyed by the Trust and the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. I have also noted curiously that the Trust was incorporated on 28<sup>th</sup> July 2016 by which date the developments on the suit property had been completed and this suit had been filed and was pending hearing. How could the Trust which was incorporated on 28<sup>th</sup> July 2016 be allocated land by the Commissioner of Lands in 1997? It is my finding therefore that the purported letter of allotment could not be a valid justification for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants’ occupation of the suit property.

57. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants had also claimed that the Trust had acquired the suit property by adverse possession. This claim was inconsistent with their contention that the Trust was the lawful owner of the property. The claim however has no basis even if considered on merit. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR the court stated that:

“The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody



against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case, and the type of conduct which indicates possession varies with the type of land. That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period) has been well-established in a series of cases...”

58. In the same case the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

1. The person must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.
6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

59. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

The Plaintiffs have to prove that they have used this land which they claim as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”



60. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

61. From the evidence on record, I am not satisfied that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants have proved their adverse possession claim. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants claimed that they occupied the suit property in 1997 when the same was allocated to them by the Commissioner of Lands. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants who did not even pay for the purported allotment until 16<sup>th</sup> December 2011 did not place any evidence before the court showing that they were in occupation of the suit property before 2010 when they commenced construction on the property which was the same time that the Plaintiff learnt of their activities. I agree with the Plaintiff that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants’ adverse possession claim was not proved. This therefore would also not be a valid justification for the 1<sup>st</sup> - 3<sup>rd</sup> Defendants occupation of the suit property.
62. In the absence of any valid justification for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants occupation of the suit property the 1<sup>st</sup> – 3<sup>rd</sup> Defendants who entered and occupied the suit property without the Plaintiff’s permission are trespassers on the property.
63. With regard to the 4<sup>th</sup> Defendant, I am not satisfied that the trespass alleged against it has been proved. The trespass claim against the 4<sup>th</sup> Defendant was based on the Survey Report dated 24<sup>th</sup> December 2019 produced as P.EXH.4. The surveyor who prepared the report claimed that the school had encroached on the suit property to the extent of 0.77Ha. The drawing by the surveyor and the pictorial presentation of the alleged encroachment leave no doubt that the surveyor never considered the deed plan for the suit property and the Registry Index Map of the area. I am of the view that the survey report that was produced by the Government Surveyor(DW5) as D.EXH.2(a) gave a true reflection of the boundary between the school compound and the suit property. I also find the explanation given by DW4 for the school’s use of the portion of the suit property neighbouring the school reasonable. That portion was left out when the occupants of the suit property were fencing the same as not forming part of the suit property. DW4 stated that the school was prepared to surrender any land they are found to have encroached on. I believe that is an issue of the boundary of the school and the suit property which can be resolved by the Land Registrar. On the issue of trespass, I am not persuaded that the 4<sup>th</sup> Defendant has trespassed on the suit property.

**Whether the Plaintiff is entitled to the reliefs sought in its amended plaint;**

64. I have set out earlier the reliefs sought by the Plaintiff. From my findings above, I am satisfied that the Plaintiff has proved his claim against the 1<sup>st</sup> – 3<sup>rd</sup> Defendants on a balance of probabilities. The Plaintiff is entitled to possession of the suit property and an injunction restraining further acts of trespass by the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. The Plaintiff is also entitled to an order compelling the 1<sup>st</sup> – 3<sup>rd</sup> Defendants to demolish and remove the structures they have put up on the suit property. The Plaintiff is also entitled



to general damages for trespass. A case has not been made for an award of exemplary damages. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

65. In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:
- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
  - b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
  - c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
  - d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
  - e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”
66. The Plaintiff did not prove that it had suffered actual loss as a result of the trespass. I will award the Plaintiff nominal damages for trespass. I find an award of KShs. 1,000,000/- proposed by the Plaintiff reasonable.

#### **Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in his counterclaim**

67. The 1<sup>st</sup> Defendant failed to prove that Mosque & Muslim Schools Trust(Trust) is the owner of the suit property by virtue of the letter of allotment dated 7<sup>th</sup> January 1997. The 1<sup>st</sup> Defendant also failed to prove that the Trust has acquired the suit property by adverse possession. The 1<sup>st</sup> Defendant is in the circumstances not entitled to the reliefs sought in his counter-claim.
68. On the issue of costs, in Halsbury’s Laws of England, 4<sup>th</sup> Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows:
- The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.
69. The Plaintiff has proved his claim against the 1<sup>st</sup> – 3<sup>rd</sup> Defendants while the 1<sup>st</sup> Defendant has not proved his counterclaim. There is no reason why the Plaintiff should be denied the costs of the suit and the counterclaim. The Plaintiff shall have the costs of the suit and the counterclaim.



## **Conclusion**

70. In conclusion, I hereby dismiss the Plaintiff's case against the 4<sup>th</sup> Defendant with no order as to costs and enter judgment for the Plaintiff against the 1<sup>st</sup> – 3<sup>rd</sup> Defendants as follows;
- a. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants shall vacate and handover vacant possession of the parcel of land known as L.R No. 18127 to the Plaintiff within 180 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for a warrant for their forceful eviction from the property.
  - b. The 1<sup>st</sup> – 3<sup>rd</sup> Defendants shall demolish and remove at their cost all the structures, buildings and/or material brought and/or constructed by them from the parcel of land known as L.R No. 18127 within 180 days from the date hereof in default of which the Plaintiff shall be at liberty demolish the same at the costs of the 1<sup>st</sup> – 3<sup>rd</sup> Defendants which costs shall be taxed and certified by the taxing officer of the court and shall be recovered from the 1<sup>st</sup> – 3<sup>rd</sup> Defendants.
  - c. An order of a permanent injunction restraining the 1<sup>st</sup> – 3<sup>rd</sup> Defendants their employees and/or agents from entering upon, taking possession of, trespassing on, alienating or interfering by any other means howsoever with the parcel of land known as L.R No. 18127 once the 1<sup>st</sup> -3<sup>rd</sup> Defendants vacate or are evicted from the property pursuant to orders (a) and (b) above.
  - d. Kshs. 1,000,000/- being general damages for trespass.
  - e. The 1<sup>st</sup> Defendant's counterclaim is dismissed with costs to the Plaintiff.
  - f. Costs of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 17<sup>TH</sup> DAY OF FEBRUARY 2025**

**S. OKONG'O**

**JUDGE**

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

Mr. Mwesigwa for the Plaintiff

Ms. Nyambeki for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants

Ms. Jumma for the 4<sup>th</sup> Defendant

Ms. J. Omondi-Court Assistant

