



Ethics and Anti-Corruption Commission v Akoko & another (Environment & Land Case 56 of 2019) [2024] KEELC 6862 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 56 OF 2019
SO OKONG'O, J
OCTOBER 17, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

KENNEDY OBWARE AKOKO 1ST DEFENDANT

GINTU HOLDINGS LIMITED 2ND DEFENDANT

JUDGMENT

Pleadings

1. The Plaintiff brought this suit through a plaint dated 28th November 2019 filed on 9th December 2019. The Plaintiff averred that it is a corporate body established under the provisions of the Anti-corruption and Economics Crimes [Act No. 4 of 2003](#) (“the EACC Act”) with the mandate to among others, investigate liability for the loss of any public property and to institute appropriate civil proceedings for recovery of such property. The Plaintiff averred that at all material times, all that parcel of land known as L.R. No. East Kisumu/Dago/647 measuring approximately 3.6 hectares (hereinafter referred to only as “the suit property”) was owned by the Registered Trustees of the Victoria School Parents Association.
2. The Plaintiff averred that the suit property was at all material times intended for use by Victoria Primary School for development and furtherance of its education objectives. The Plaintiff averred that the 1st Defendant; one, Donald Meda (deceased) who was the then head teacher of Victoria Primary School; and one, Phoebe Fan (deceased) who was a member of Victoria Primary School Management Committee conspired with the 2nd Defendant to fraudulently and illegally dispose of the suit property.
3. The Plaintiff averred that the 1st Defendant created false minutes purporting the same to be a record of an alleged meeting of Victoria School Management Committee held on 11th May 2012 in which it was purportedly resolved that the suit property be sold. The Plaintiff averred that the 1st Defendant entered



into a sale agreement with the 2nd Defendant regarding the suit property in the name of and on behalf of Trustees of Victoria School Parents Association without authority or consent of the said Trustees.

4. The Plaintiff averred that the 1st Defendant failed to seek proper approval for the disposal of the suit property as required by law. The Plaintiff averred that the 1st Defendant and the said deceased persons opened an unauthorised bank account number 01224027494001 at the National Bank of Kenya for the sole purpose of diverting the proceeds of the sale of the suit property from Victoria Primary School (hereinafter referred to only as “the school”). The Plaintiff averred that the 2nd Defendant willfully or recklessly failed to make such inquiries as an honest and reasonable person would make to satisfy itself that it was not acting in furtherance of a fraud.
5. The Plaintiff averred that the sale and transfer of the suit property to the 2nd Defendant by the 1st Defendant was illegal, null, and void for all intents and purposes and conferred no estate, interest or right in or over the suit property to the 2nd Defendant. The Plaintiff averred that the illegal alienation of the suit property for private purposes was contrary to the intended public use for which the land was vested in the Registered Trustees of the Victoria School Parents Association. The Plaintiff sought judgment against the Defendants for;
 - a. A declaration that the sale of the suit property to the 2nd Defendant was null and void and ineffectual to confer a good title upon the 2nd Defendant.
 - b. An order for the rectification of the register for the suit property by the cancellation of the title and certificate of title issued to the 2nd Defendant over the suit property and restoration of the suit property to the name of Victoria Primary School.
 - c. An order for a permanent injunction against the 2nd Defendant by itself, its agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing or in any other manner howsoever dealing with the suit property.
 - d. Costs of and incidental to the suit.
 - e. Any other or further relief the court may deem fit and just to grant.
6. The Defendants entered an appearance and filed a joint statement of defence on 17th December 2019. The Defendants denied that Victoria Primary School owned the suit property and that the same was intended for use by the said school in furtherance of its educational objectives. The Defendants denied that they or any of them conspired to fraudulently and illegally acquire the suit property. The Defendants averred that the 2nd Defendant followed due process while acquiring the suit property. The Defendants averred that the suit property was private property owned by Victoria School Parents Association and that the same was free from encumbrances when it was acquired by the 2nd Defendant. The Defendants averred that the suit property was lawfully sold and transferred to the 2nd Defendant by the owners thereof. The Defendants averred that the suit property was not and had never been public land. The Defendants urged the court to dismiss the Plaintiff’s suit with costs.

The evidence

7. At the trial, the Plaintiff called a land registrar, George Nyangweso (PW1) as its first witness. PW1 adopted his witness statement dated 12th November 2019 as his evidence in chief. In his oral testimony, PW1 stated as follows: He worked in Kisumu as a land registrar between 2014 and 2021. The Certificate of Incorporation of the Registered Trustees of Kisumu European Parents Association was issued by the Minister for Lands and Settlement. There was a change of name of the registered trustees from Registered Trustees of Kisumu European Parents Association to Registered Trustees of the



Victoria School Parents Association. According to the Certificate of Incorporation, the trustees were Elizabeth Singer Adam, Rajni Somaia, Dr. Joab Gilbert Christopher Amolo, and Dr. Janet Ongili Okello. The trustees were issued with a land certificate for the suit property on 23rd June 1987. On 25th February 2013, the suit property was transferred to the 2nd Defendant. Those who sold the suit property (the vendors) to the 2nd Defendant were not the trustees of Victoria Primary School. PW1 produced several documents as exhibits among them; a copy of the extract of the register for the suit property, a copy of the certificate of title for the suit property, a copy of the agreement for sale of the suit property dated 31st August 2012, a copy of the application for Land Control Board Consent, a copy of the instrument of transfer of the suit property dated 25th January 2013, a copy of a final acknowledgment of payment dated 7th November 2012 and a copy of deed of indemnity dated 26th February 2013.

8. On cross-examination by the advocate for the Defendants, PW1 stated that the term of the last trustees who were appointed on 29th August 1988 was to last for 5 years from the date of appointment. He stated that the suit property was originally private land and was purchased by the trustees of a public primary school. In re-examination by the advocate for the Plaintiff, PW1 stated that any public land held by a school is to be registered in the name of the Principal Secretary, Treasury.
9. The Plaintiff's next witness was, Clarah Ketyenya (PW2). PW2 adopted her witness statement dated 15th March 2021 as part of her evidence in chief. PW2 testified as follows. She was a registrar in charge of public utilities at the Ministry of Lands. She had seen a search on the Registered Trustees of Kisumu European Parents Association. The initial trustees were Hilda Doris Simpson and John Louis Riddoch. The trustees were registered as a corporate body on 10th January 1963. On 14th October 1966, the name of the corporate body was changed to the Registered Trustees of the Victoria School Parents Association. On 4th October 1974, Elizabeth Singer Adam was appointed a trustee in place of Hilda Doris Simpson. On 29th August 1988, Rajni Somaia, Dr. Joab Gilbert Amolo, and Dr. Janet Ongili Okello were appointed as trustees. The agreement of sale of the suit property was between trustees of Victoria School Parents Association and Gintu Holdings Limited, the 2nd Defendant. The vendor of the property was different from the body corporate. She produced the Certificate of Incorporation of the trustees as an exhibit.
10. On cross-examination by the Defendants' advocate, PW2 stated that: The association was initially known as Kisumu European Parents Association. The name was changed to Victoria School Parents Association. The trustees of the association made the application to be registered as a body corporate. The body corporate must file returns after every five years. No returns had been filed by the Registered Trustees of Victoria School Parents Association since 1988. Registered trustees are different from trustees. The suit property was owned by the Registered Trustees of Victoria School Parents Association. The trustees were private individuals and the people registered were individuals who owned land in their individual capacities.
11. The Plaintiff's third witness was Edward Ouko Omala (PW3). PW3 adopted his witness statement dated 13th November 2019 as his evidence in chief. PW3 stated as follows in his oral evidence: He was the head teacher of Victoria Primary School (the school). He was the secretary to the Board of Management and the accounting officer of the school. He was the custodian of the physical facilities of the school. He was transferred to the school on 1st August 2013. When he came to the school, he found that the former head teacher had died. The head teacher before him was Donald Meda. There was a handing over. There were official documents that were missing such as title deeds. During the handing over, the Ministry of Education and the parents were represented. During the handing over, they were not informed about the sale of the suit property. He was informed later of the sale of the suit property. School land could only be disposed of after a resolution of the School Management Board. He had



- not operated National Bank Account No. 01224027494001 in the name of the school. The account was operated by Ken Akoko, Donald Meda and Phoebe Fan. He stated that when the Europeans were leaving, they handed the Kisumu European Parents Association to the Africans.
12. On cross-examination by the Defendants' advocate, PW3 stated that he did not know whether the school was at any time a private school. He stated that what he knew was that the school was a public school. He stated that he was not aware that the suit property had been sold. He stated that the proceeds of the sale of the suit property were deposited in the school's bank account which was not handed over to him. He stated that the said bank account was managed by the people who were allowed to manage the school. He stated that the minutes of the meeting that authorised the sale of the suit property did not exist. On re-examination by the Plaintiff's advocate, PW3 stated that the Board of Management of the school did not have the mandate to sell school land. He stated that the sale had to be approved by the Ministry of Education.
 13. The Plaintiff's fourth witness was Hezron Ogweno Diallo (PW4). PW4 was the Senior Assistant Chief of Southern Sub-location, Town-Location, Central Division, Kisumu Central Sub-County. He adopted his witness statement dated 13th November 2019 as his evidence in chief. He stated that he did not attend the meetings that were said to have been held on 12th April 2011 and 11th May 2012. On cross-examination by the Defendants' advocate, PW4 reiterated that he did not attend the said meetings. He stated that he knew Eric Okioma and that he was one of the school management committee members.
 14. The Plaintiff called Elius Oganda Aono (PW5) as its fifth witness. PW5 adopted his witness statement dated 12th November 2019 as his evidence in chief. He stated that he was the Curriculum Support Officer at the Teachers Service Commission and that he retired in 2017. He stated that he did not attend the school management committee meeting held on 11th May 2012 although it was indicated in the minutes of the said meeting that he was in attendance.
 15. On cross-examination, he stated that the sale of school land should be initiated by the Board of Management. On re-examination, he stated that the school management has to form a disposal committee to look into the value and the reasons for the disposal. He stated that the District Education Board also has a role to play. He stated that minutes play a role in the approval process.
 16. The Plaintiff's sixth witness was Gerald Ochieng Ondiek (PW6). PW6 adopted his statement filed on 11th November 2019 as his evidence in chief. He stated as follows in his oral evidence: He was the Chief Officer, Tourism, Culture, Arts and Sports in Kisumu County Government. He was also the Chairman of the Board of Management Victoria Primary School. He joined Victoria Primary School as a parent in 2011. In 2013 he was given a role as a class representative. He did not attend the Board of Management meeting held on 12th April 2011 as he was not a member of the board at the time. As parents, they did not discuss the sale of the suit property. They discussed the issue of the school land when he joined the Board of Management. He attended the meeting of the Board of Management that was held on 22nd October 2013. An Annual General Meeting was called and a resolution was passed that the whole Board of Management be disbanded. The resolution was to stop all activities on the parcels of land belonging to the school.
 17. On cross-examination by the advocate for the Defendants, PW6 confirmed that he was the chairman of the Board of Management of the school which office he took over in 2019. He stated that before that, he was not a member of the Board of Management but a member of the school management committee. He stated that the suit property was sold when he was a parent at the school. He stated that the school belonged to the Government while the land in dispute was owned by the parents at the school and held by trustees. He stated that the school management committee had no role to play in



- the sale of land that belonged to the parents at the school. He stated that he attended the meeting that passed a resolution for the disbandment of the Victoria School management committee for its role in the sale of school land. He stated that he joined the Board of Management as a representative of the parents. He stated that he was the chairman of the parents' association.
18. The Plaintiff's next witness was Erick Okioma (PW7). PW7 adopted his witness statement dated 11th November 2019 that was filed in court on 9th December 2019 as his evidence in chief. When shown the minutes of the meeting that was held on 11th May 2012, he stated that he was not present at the meeting and that he saw the minutes when he went to record a statement with the Plaintiff. When shown the minutes of the meeting held on 8th August 2013 which he admitted to having attended, he stated that changes of signatories were to be made on two (2) bank accounts National Bank of Kenya A/C No. 001224XXXXXX000 and Standard Chartered Bank A/C No. 0010152XXXXX901. He stated that no other bank account was referred to. He stated that there was also Equity Bank A/C. He stated that those were the only bank accounts that were handed over. He stated that National Bank of Kenya A/C No. 01224027494001 was not handed over.
 19. On cross-examination by the advocate for the Defendants, PW7 stated that he had never attended a meeting where the sale of the suit property and land parcel, Kisumu/Dago/644 was discussed. He admitted having attended the meeting held on 12th April 2011. He stated that the sale of the suit property was not discussed at that meeting. He stated that he never attended a meeting with the Area chief where the sale of suit property was discussed. He stated that there were meetings that he attended where the area Chief Mr. Yalo was present. He stated that he could not recall if the said chief attended the meetings that were held on 12th April 2011 and 11th May 2012. He stated that the chief was absent during the meeting held on 8th August 2013. He stated that he may have attended the meeting held on 11th May 2012. He stated that he was a parent at the school and he did not attend any meeting where the sale of the school land was discussed.
 20. The Plaintiff's next witness was John Olago Aluoch (PW8). PW8 stated as follows: He had a role in the management of Victoria Primary school. He joined the school as a parent in 1985. In 1988, he was elected as the chairman of the school Board of Management. He took over from the late Dr. Amolo. In relation to the suit property, when he was a parent, he contacted Mr. Rajni Somaia who was the owner of the parcel of land. Mr. Rajni Somaia was his colleague and a friend. His children had gone through the school. He asked him if he could donate the suit property for the purpose of setting up a secondary school. Mr. Rajni Somaia donated the land to the school but he said that he should be made a trustee of the land to safeguard it. The suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association as the owner. The sale agreement dated 31st August 2012 was between Trustees of Victoria School Parents Association as the vendor and Gintu Holdings Ltd. Trustees of Victoria School Parents Association were not the registered owners of the suit property.
 21. During his time as the chairman of the Board of Management of the school, he had access to the property documents. The then head teacher, Mr. Naaman Ondego informed him that he had received a notice from Standard Chartered Bank of its intention to auction school land on account of the default of the part of the school to service the debt. Neither the school nor he was aware of this loan facility. When they made inquiries, they learnt that the former head teacher and the chair of the board of management had obtained a loan without the knowledge of the parents. He was able to mobilise the parents to pay off the loan and get back the land. At the time, Dr. Amolo was sick and Mrs. Okech had resigned as a teacher. The parents felt that they would spend much time pursuing them. The bank released the title and the head teacher kept it. The loan was irregular and it was not used to develop the school.



22. On cross-examination by the advocate for the Defendants, PW8 stated as follows: The suit property was charged to Standard Chartered Bank Kisumu. He could not remember how much was outstanding when they paid the loan. As a parent and later as a chairman of the Board, he was not aware of the loan and there was also no documentation to the effect that a decision had been made by the Board of Management of the school to charge the property. When the property was charged, he was a parent. When he became a parent at Victoria Primary School in 1985, it was a public school because they were under the supervision of the Municipal Council of Kisumu. Victoria Primary School was initially a private school. He could not remember when the school became a public school.
23. From the Certificate of Incorporation, the registered trustees were a corporate entity and could hold land in its name. He did not know what the status of the school was in 1966. When he joined the school, the trustees held land in trust for the parents of the school. The trustees were to hold office until death, retirement or removal by a resolution of the committee of the association. The members of the association were the parents. He did not interact with the trust deed of the association. He did not know if the initial registered trustees of the association were alive. He did not meet Hilda Simpson. He however met John Riddoch. During his tenure as the chair of the Board of Management, he never came to the point that the school had to sell any of its properties. If parents decided to sell land, they could do so with the approval of the Ministry of Education.
24. The Plaintiff's last witness was Charles Kiptanui Boen (PW9). PW9 stated as follows: He was working with the Plaintiff as an investigator. He investigated the circumstances leading to the filing of the suit. He recorded a witness statement that was filed on 9th December 2019. The Plaintiff received a report that there was an allegation of fraudulent sale and transfer of public land belonging to Victoria Primary School. He got documents from the Ministry of Lands relating to the suit property. He obtained an extract of the register of the suit property. He took the court through the entries in the said register. The suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association.
25. The sale agreement dated 31st May 2012 was between Trustees of Victoria School Parents Association and the 2nd Defendant, Gintu Holdings Ltd. Trustees of Victoria School Parents Association was not the name in the Certificate of Incorporation of the Trustees. During his investigation, he obtained documents from the Ministry of Lands among them a purported resolution by the school management committee to sell the suit property. He obtained the minutes that was produced in evidence as P.Exh. 10 from the Ministry of lands and the same was certified by the Land Registrar, Mr. Nyangweso. The contents of the minutes that was produced as P.Exh.10 and the minutes that was produced as P.Exh. 11 were the same save for the date of signing. P.Exh. 11 was signed on 14th May 2012 while P.Exh. 10 was signed on 26th February 2013. During his investigations, he called Eng. Okwiri Orege who was a director of 2nd Defendant and showed him P.Exh.10. Eng. Okwiri Orege then forwarded to him P.Exh. 11 under cover of a letter dated 22nd February 2018 which was produced as P.Exh. 12. The said letter referred to the Minutes of Victoria Primary School Management Committee held on 14th May 2012 while the sale agreement was dated 31st August 2012. According to P.Exh.10 the suit property was sold before the minutes were signed while P.Exh.11 showed that the land was sold after the minutes had been signed. He also obtained P.Exh.9 from the Registrar of Lands who certified the same. Mr. K. Akoko who was class representative was present at the meeting of 12th April 2011. In P.Exh.10 Mr. K. Akoko was present as the chairman of the Board of Management. In minute 10/001/12 the meeting was informed that the Parents Association had been registered and the certificate renewed. According to the minute, the meeting authorised 3 members, Ken Akoko, Donald Meda and Phoebe Fan to act as trustees in the sale of land at Riat (the suit property). Donald Meda who was the head teacher at the time is deceased. Ms. Phoebe Fan is also deceased. P.Exh.13 is the minutes of the meeting held



on 8th August 2013. The sale agreement was signed by Kennedy Obware Akoko and Donald Meda. Kennedy Obware was indicated as the Trustee of the Association while Donald Meda was indicated as the secretary. For the purchaser, the agreement was signed by its director Samuel Okoth Okwiri. The other director was Carey Okwiri. Apart from this suit, there was a criminal complaint pending investigations.

26. On cross-examination by the Defendants' advocate, PW9 stated as follows: He was a forensic investigator. He had an MA in procurement and logistics from JKUAT. He also had a BCom accounting option. He was a trained police officer. He worked for 15 years as a police officer in criminal investigations department before joining the plaintiff. The Plaintiff received a complaint in 2017 about the sale of the suit property. The complaint was lodged by Edward Omalla the then head teacher of the school. The complaint concerned the sale of land parcels Kisumu/Dago/646 and 647. By the time the complaint was lodged, the two parcels had been sold. Kisumu/Dago/646 was the subject of another investigation. The title was cancelled. There was a demonstration in town and following the uproar, the title for Kisumu/Dago/646 was cancelled. The title for Kisumu/Dago/647 was not revoked because of the pending suit. The demonstrations took place before this suit was filed. It was the Land Registrar who gave him information about the revocation. They filed this suit because the title for the suit property was not revoked.
27. The owners of the two parcels of land were different. The suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association before it was transferred to the 2nd defendant. The land belonged to Victoria Primary School. Victoria Primary School was not indicated as the registered owner of the property. The land was registered in the name of the Registered Trustees of the Victoria School Parents Association. Victoria Primary School was started as a private school. Victoria School and Victoria Primary School are the same school. The school started as a private school and was converted to a public school after independence. The trust was established in 1963. The suit property was held by the Trustees on behalf of the school. According to the extract of the register, the Trustees held the suit property for the school parents' association. When land is owned by a public school, it is the Permanent Secretary (PS) who is supposed to hold the land. In this case, the title was not in the name of the Permanent Secretary. Victoria Primary School was the owner of the land including the land where the school is situated. All the land was in the name of the Registered Trustees of the Victoria School Parents Association. The Registered Trustees of the Victoria School Parents Association was a public association. The land was donated to a public primary school by Mr. Somaia. He was one of the registered trustees. His name did not appear in the register as having been an owner of the property and there was no document showing that he donated the land to school.
28. The land was donated to the Registered Trustees of the Victoria School Parents Association. He wanted the land to benefit the school. The land belonged to the school and was public land. He was aware that the suit property was charged to a bank to secure a loan to the Registered Trustees. The money was released to the Trustees for the school.
29. The agreed purchase price for the suit property was Kshs. 22,500,000/-. The said sum of Kshs. 22,500,000/- was paid into an account in the name of the school but operated by Mr. Akoko and others. He obtained a search warrant to investigate the account. The account was opened prior to the sale transaction. The account was at National Bank of Kenya Ltd. The account was suspicious. All the bank accounts belonging to the school were handed over to the new head teacher except this one. The account opening was regular. The account was active prior to the sale transaction. The signatories to the account at the time of the transaction in question were, Mr. Akoko chairman of the school Board of Management, Mr. Meda the school head teacher, and Ms. Phoebe Fan. The account was not handed over to the new head teacher on 8th August 2013. This was when a meeting was held to change the



- bank account signatories and for the handing over. At the time, the head teacher had died. He could not therefore hand over to the new head teacher. He was the one who was supposed to handover to the new head teacher. The deputy head teacher was supposed to step in and do the handing over.
30. When the bank account balance became minimal, the other signatories to the account passed on. The new head teacher never operated the account. He did not know that the account existed. He gave a summary of major withdrawals from the account between 4th September 2012 and 21st February 2018. The account was not closed. There was no transaction between 18th January 2013 and 21st February 2018 when he requested for a statement. The account was opened as a special purpose vehicle for fraud. The money was withdrawn from this account by people who were authorised to operate the account. There were no details of how the money was used. The funds were misappropriated. The chairman of the Board of Management informed the new school head that the suit property had been sold. The information was given on 22nd October 2013 during the handing over. The information was not given during the earlier meeting when the accounts were being handed over. Mr. Akoko was not a Trustee and as such he had no power to sell the suit property. The school management committee could not also sell the school property. They were not the Trustees in whose name the property was registered.
 31. Fraud could also be seen from the bank account which was not disclosed to the head teacher. The account was also not operated after the purchase price was depleted. The other evidence of fraud was the two (2) sets of the minutes which appeared doctored. He did not come across the minutes at which it was resolved that the purchase price be used for school infrastructure. The suit property was public land. The registered trustees should have been the ones to sell the suit property. It was not true that the purchase price was used for the school purposes.
 32. On re-examination, PW9 stated as follows: The registered Trustees of the Victoria School Parents Association was not the same as the Trustees of Victoria School Parents Association. Donald Meda signed the agreement for Victoria Primary School. In his investigations, he did not come across any development carried out in the school courtesy of the purchase price. The Registrar of companies provided them with the names of the directors of the 2nd defendant as Samuel Okoth Okwiri and Carey Okwiri Orege. The company Registry informed them that the 2nd defendant was registered on 26th July 2012. The minutes he got from the lands office showed that the same were signed on 26th February 2013 while the agreement for sale deposited at the Ministry of Lands was signed on 31st August 2012 earlier than the date when the minutes were signed.
 33. The Defendants called three witnesses. The first witness was Carey Okwiri Orege (DW1). DW1 adopted his witness statement dated 26th June 2020 filed on 2nd July 2020 as his evidence in chief and produced the documents in the Defendants' bundle of documents filed on 2nd July 2020 as D.Exh. 1 to 4 respectively. He stated that: He was a retired civil servant. The 2nd Defendant was incorporated in 2012. At the time of its incorporation, he was not a director. He became a director of the company after the purchase of the suit property. He was privy to the facts relating to the purchase of the suit property. The property was not occupied. He had interacted with the Plaintiff. The Plaintiff was inquiring on how the 2nd Defendant acquired the suit property. He was approached by an estate agent who told him that the suit property was up for sale but he told him that he could only introduce him to someone else who could be interested. He introduced the agent to a director of the 2nd Defendant a Mr. Ian.
 34. The Plaintiff showed him some minutes which were different from what he had and he was shocked. He went to the advocate who handled the transaction who gave him the minutes that they used in the transaction which he forwarded to the Plaintiff. The minutes that he had were signed on 14th May 2012. The one that the Plaintiff showed him were signed on 26th February 2013. He was a parent at Victoria Primary school until August 2001 when he transferred his children to Nairobi when his wife passed



- on. When he was a parent at the school, it was a private school. As at the time he ceased to be a parent in 2001, the school was still a private school. He did not know when the school became a public school.
35. On cross-examination by the advocate for the Plaintiff, DW1 stated as follows: He became a director of the 2nd Defendant after it had purchased the suit property. He was told by the previous director of the 2nd Defendant that due diligence was carried out. The previous directors of the 2nd Defendant were Ian Oloo and James Lwanga whom he was not calling as witnesses. They had been summoned by the Plaintiff. The minutes he was given were signed before the 2nd Defendant was incorporated. The purchase price was paid by the former directors of the 2nd Defendant. The payment was made to Victoria Primary school. The Agreement for sale dated 31st August 2012 was between Trustees of Victoria School Parents Association and the 2nd Defendant. The payment was made to Victoria Primary School because the bank account that was given to them was in that name. The land was registered in the name of Registered Trustees of the Victoria School Parents Association. He did not purchase the land from the Registered Trustees. He acquired the 2nd Defendant after it had purchased the suit property. As per the transfer of land form (PEXh6), the transferor was the Trustees of Victoria School Parents Association. There is a stamp of Victoria Primary school. The photographs on the face of the transfer were of Ian Oloo and James Lwanga, the former directors of the 2nd Defendant. They were the ones who did due diligence. The land certificate for the suit property showed that the land was owned by the Registered Trustees of the Victoria School Parents Association.
36. On examination by the court, DW1 stated that as at 25th January 2018, the directors of the 2nd Defendant were Samuel Okoth Okwiri and Carey Okwiri Orege. They acquired the 2nd Defendant from the previous directors in 2017. They paid about Kshs. 2,000,000/- for the shares as a deposit. He cannot remember the full amount that they paid for the shares. When he was initially approached to purchase the property, he was not interested because he was still working in the public service. He retired in 2013 and after he retired and got his pension, he developed interest in the property. That was when he purchased the shares in the company. At that point, he asked the directors of the 2nd Defendant whether they could sell their shares to him and they agreed.
37. On further cross-examination by the advocate for the Plaintiff, DW1 stated that he was approached to purchase the suit property by an agent around August 2012. After he retired, he requested the directors of the 2nd Defendant if they could sell their shares to him and they agreed. They acquired all the shares of the company. In further re-examination by the advocate for the Defendants, DW1 stated that the 2nd Defendant had two directors, Samuel Okoth Okwiri and he. He stated that they became directors at the same time around 2017.
38. The Defendants' next witness was Milton Obote Kwach (DW2). DW2 adopted his witness statement dated 1st July 2020 filed on 2nd July 2020 as his evidence in chief. He stated as follows in his oral testimony: He became a parent at Victoria Primary School (the school) in November 2011. He was aware of Victoria School Parents Association. This was an association of the parents who had children at the school. All parents at the school were members of the association. The school was a private entity. The role of the association was to oversee the development of the school because the school was a private school. The school ceased to be a private school in 2003. By the time he became a parent in 2011, the school was a public school. He was a member of the Victoria School Parents Association when a decision was made to sell the suit property. The sale of the suit property was approved by the parents.
39. Victoria School Parents Association owned the suit property and not Victoria Primary School. The money realised from the sale of the suit property was prudently used in the completion of the buildings at the school and the renovations of the existing buildings. A dispute arose when a new head teacher Mr. Omala came to the school. When the new teacher came in, the renovations had been done. There



was a building that had been put up but not yet completed. They did the finishing and renovated other structures at the school. He sat on the school management committee. The committee held a meeting on 11th May 2012 which he attended. The minutes of the said meeting were signed on 14th May 2012. The said minutes represented true and accurate information on who attended the meeting and what was resolved.

40. On cross-examination by the advocate for the Plaintiff, DW2 stated that: He was a member of Victoria School Parents Association. The association was registered and owned several properties. He knew four of the said properties. Two were in Dago and the other two near the school. The executive officials of Victoria School Parents Association were Ken Akoko, Donald Meda and Phoebe Fan. He was informed that the association was registered. He did not see the certificate of registration. The association owned and sold the suit property. He was involved in the sale and was in the committee which discussed and approved the sale. It was not true that they sold a property that did not belong to the association.
41. The school was renovated by the management committee. The renovation was done on a labour contract basis. They were buying materials from the shop and giving them to the labourers. He could not remember the shop where they purchased the materials. The costing was done by the head teacher. He did not know the cost of the renovations. He had no idea of what was done and the cost. He was in the school management committee but the files were being kept by the secretary who was the school head teacher. They gave the three persons they authorised to sell the land the mandate to report to them on the due diligence they conducted. They reported to them that the land was in the name of the association. They resolved that the sale proceeds be deposited in the school bank account.
42. On re-examination by the Defendants' advocate, he stated that: He heard about Mr. Somaia but never interacted with him. He did not interact with any of the Registered Trustees of the Victoria School Parents Association. The suit property did not belong to Victoria Primary school. It was owned by the association. The proceeds of sale were used for the improvement of the school. The properties were acquired when the school was still private. The property was disposed of to improve the school when it became public. Mr. Omala the new head teacher of the school was the one who complained about the sale.
43. On examination by the court, DW2 confirmed that he was a member of Victoria Primary School management committee and also a member of the Victoria School Parents Association by being a parent. He stated that during their meetings they used to hear of the Registered Trustees of the Victoria School Parents Association. He stated that he was not one of these trustees. He stated that he could not remember anything about the registration of the Victoria School Parents Association. He stated that the meeting of 11th May 2012 was of the board of management of the school and not that of the Victoria School Parents Association. He stated that they earlier had a meeting of the Victoria School Parents Association which also approved the sale. He stated that although he had not produced the minutes of the said meeting, the same were available. He stated that the former head teacher of the school during the transaction and Phoebe Fan who was a parent died from natural causes. He stated that there was nothing suspicious about their death.
44. The Defendant's last witness was the 1st Defendant, Kennedy Obware Akoko (DW3). DW3 adopted his witness statement dated 18th June 2020 filed on 2nd July 2020 as his evidence in chief. He stated as follows in his oral testimony: The suit property belonged to the parents of Victoria Primary School. Apart from the suit property, the parents of the school owned other parcels of land such as Parcel No. 646 and others within Milimani, Kisumu. There were other parcels of land next to the school whose details he could not recall. All the said parcels of land were owned by the parents through the association. The same were registered in the name of Victoria School Parents Association. He was a member of the association. He became a parent in 2003. School land was not sold. The suit



property belonged to the parents. When he became a parent, the school became a public school. The suit property was acquired by the parents in the 1980s. Victoria School Parents Association was run by elected officials. When he became the chairman of the school management committee in 2011, as was the norm, he also became the chairman of Victoria School Parents Association. Victoria School Parents Association was run by the school management committee. They first put the idea of the sale of the suit property to the parents who approved the same at the Annual General Meeting that was held in November 2011. The parents mandated the management committee to sell the suit property at the said Annual General Meeting of November 2011. The suit property was private land owned by the parents. It did not belong to the school. The sale was executed by the school management committee on behalf of the parents.

45. The proceeds of the sale of the suit property were used for the benefit of the school. The school was in a pathetic situation. They had a two-storey building which was incomplete. They completed the same and also did renovations. The proceeds of the sale were deposited in the school account at the National Bank. He became the chairman of the school management committee in 2011 and the said bank account was existing. The head teacher, the chairperson of the management committee and a representative of the parents were the signatories. They deposited the money in the school account because they wanted to use it for the school purposes. There was no fraud involved in the sale of the suit property. The money was used properly. There was no complaint about this sale. No parent complained. The only complaint was from a new head teacher who came in 2013. The suit property was not public land.
46. On cross-examination by the advocate for the Plaintiff, DW3 stated as follows: He was a member Victoria School Parents Association. According to the sale agreement, the vendor was the Trustees of Victoria School Parents Association. The land was owned by Parents through Victoria School Parents Association which was duly registered. He had no details of its registration. The suit property was private land. Victoria Primary School was a public school. He signed the agreement on behalf of the parents. The stamp of Victoria Primary School was used by the head teacher. The title deed for the suit property was in the name of Victoria School Parents Association. The suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association. Those who were in the school management committee were the same ones running Victoria School Parents Association. He was not a registered trustee of Victoria School Parents Association.
47. He signed the minutes of the meeting of 11th May 2012. They passed a resolution to sell the suit property in May 2012 and they sold the land in August 2012. On 8th August 2013 they were not handing over bank accounts. They were changing bank signatories. He did not know if the signatories were changed in respect of the bank account that held the sale proceeds. They did not change the signatories of that account. He was the chairman of the meeting held on 22nd October 2013. He made brief remarks during the handing over. He did not sign the minutes of the meeting. He was the chairman of the meeting that was held on 10th July 2014 (P.Exh. 15). In the meeting, there was a discussion about the suit property and parcel No. 644. In this meeting, he was reporting what happened in 2011. There was a school development committee which was dealing with the renovation of the school. They did the withdrawal of the funds with the approval of the Ministry of Education. He did not keep the documents relating to the works that were done but did the supervision. The property was sold by the parents. It did not belong to the school.
48. On re-examination, DW3 stated that according to the minutes of the meeting held on 10th July 2014, it was clear that the suit property had been sold. He stated that the land that was grabbed was Kisumu/Dago/644 not the suit property. He stated that according to the minutes of the meeting held on 22nd October 2013, he told the members that the suit property was sold to improve the school



infrastructure. He denied that he concealed the sale of the suit property. He stated that the persons he was addressing were the same committee members who had sanctioned the sale.

49. On examination by the court, DW3 stated that he became the chairman of school management committee in 2011 and served until 2014. He stated that the new school head teacher raised a complaint only after he had left. He stated that the management committee and the Board of Management Committee were the same.

The Plaintiff's closing submissions

50. The Plaintiff in its undated submissions raised the following issues for determination;
- a. Whether the suit property was legally transferred to the 2nd Defendant.
 - b. Whether there was fraud involved in the transfer of the suit property and whether the 2nd Defendant had a good title.
 - c. Whether the 2nd Defendant undertook due diligence before the purchase of the suit property.
 - d. Whether the Plaintiff had proved its case on a balance of probability and what relief should be granted.
 - e. Whether the plaintiff should be awarded the costs of the suit.
51. The Plaintiff submitted that the suit property was not legally transferred to the 2nd Defendant. The Plaintiff submitted that the agreement for sale was not properly executed. The Plaintiff submitted that whereas the suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association which was incorporated on 2nd January 1963, this was not the entity that sold the suit property to the 2nd Defendant. The Plaintiff submitted that the entity, Trustees of Victoria School Parents Association which sold the suit property to the 2nd Defendant was not the proprietor of the property. The Plaintiff submitted that the entity was incapable of selling and transferring what it did not own. The Plaintiff submitted that in the execution part of the agreement of sale, the parties resorted to using the name and stamp of Victoria Primary School which though the suit property was for its benefit, was not indicated in the proprietorship section of the register of the suit property as the owner thereof.
52. The Plaintiff submitted that Trustees of Victoria School Parents Association that purportedly sold the suit property to the 2nd Defendant was unregistered and was incapable of legally holding property in its name and/or engaging in any legitimate transaction. The Plaintiff submitted that according to the testimony of the investigating officer, Charles Kiptanui (PW9), two sets of minutes of the meeting purportedly held on 11th May 2012 emerged. The Plaintiff submitted that the two sets of minutes looked at separately provided two interpretations that confirm fraud in the transaction concerning the suit property. The Plaintiff submitted that if the minutes were signed on 26th February 2013, it would mean that the agreement of sale was entered into by the parties thereto before the minutes of the meeting held on 11th May 2012 were confirmed and signed.
53. The Plaintiff submitted that Victoria Primary School was and is a public school and more so at the time of the transaction relating to the suit property. The Plaintiff submitted that the school was subject to the Public Procurement and Disposal Act, 2005 in its procurement of services and goods which must undergo an elaborate and rigorous procurement process. The Plaintiff relied on Sections 59 and 60 of the *Basic Education Act* and submitted that nothing gave the 1st Defendant or any of the other members of the school management committee the power to dispose of school property other than to administer and manage the resources of the school. The Plaintiff submitted further that in any event,



- their appointment to the school management committee did not in any way make them Trustees of “the Registered Trustees of the Victoria School Parents Association”. The Plaintiff submitted that the suit property was not legally transferred to the 2nd Defendant as the vendor in the purported agreement of sale misrepresented itself as the proprietor of the suit property and/or had no capacity to enter into any agreement on behalf of the proprietor. The Plaintiff submitted that the purported vendor, the unregistered entity referred to as “Trustees of Victoria School Parents Association” had no valid title to the suit property and could therefore not transfer what it did not own. In support of this submission, the Plaintiff cited the Ugandan Court of Appeal case of *Katende v. Haridar & Company Ltd* [2008] 2 EA 173 and *Samuel Kamere v. Lands Registrar, Kajiado*, Civil Appeal No 28 of 2005 [2015] eKLR.
54. The Plaintiff submitted that fraud was involved in the transfer of the suit property to the 2nd Defendant and as such the 2nd Defendant did not acquire a good title to the suit property. In support of this submission, the Plaintiff cited *Arthi Highway Developers Limited v. West End Butchery Limited and 6 Others* [2015] eKLR and *Kenya Guards Allied Workers Union v. Security Guards Services & 38 Others*, Nairobi HC Misc. 1159 of 2003.
55. The Plaintiff submitted that the parties to the agreement of sale of the suit property especially the 2nd Defendant did not exercise due diligence. The Plaintiff cited *Samuel Kamere v. Land Registrar (supra)*, *Dina Management Limited v. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023), *Munyu maina v. Hiram Gathiha Maina* [2013] eKLR, and *Ethics and Anti-Corruption Commission v. Eunice N. Mugalla and Sammy Silas Komen Mwaita*, Kisumu Civil Appeal No. 39 of 2019 and submitted that the root of the 2nd Defendant’s title was under challenge. The Plaintiff submitted that the purported vendor of the suit property was unregistered, had no proprietary rights and interest in the suit property and was incapable of transferring any to the purchaser, the 2nd Defendant herein. The Plaintiff submitted that the 1st Defendant could not purport to represent the registered proprietor of the suit property as he was not, had never been a trustee of the proprietor of the suit property nor did he have any power of attorney to deal with the property.
56. The Plaintiff submitted that it had proved its case on a balance of probabilities and urged the court to grant the reliefs sought. The Plaintiff submitted that since it had proved its case against the Defendants, it should be awarded the costs of the suit. The Plaintiff submitted that as a general rule, costs follow the event.

The Defendants’ closing submissions

57. The Defendants filed submissions dated 11th March 2024. In the opening paragraphs of their submissions, the Defendants examined at length the pleadings by the parties and the evidence tendered at the trial by the parties’ witnesses. The Defendants submitted that this suit was a witch-hunt as the Plaintiff had been sucked into the dispute to impose itself with intimidation, manipulation, and blackmail after all the attempts at reversing a process that was legitimately undertaken failed at the National Land Commission and Directorate of Criminal Investigations. The Defendants submitted that the suit property had never been a public property the recovery of which should fall within the functions of the Plaintiff. The Plaintiff cited Section 252 of *the Constitution* of Kenya and Section 11 of the *Ethics and Anti-Corruption Commission Act* (EACC Act) in support of this submission.
58. The Defendants submitted that the *Public Procurement and Asset Disposal Act*, Chapter 412 Laws of Kenya did not apply to the disposal of the suit property considering the nature and character of the suit property. The Defendants cited Section 19 of the *Basic Education Act*, Chapter 211 Laws of Kenya and submitted that the suit property was private land in the hands of a private entity. The Defendants submitted that the Registered Trustees of the Victoria School Parents Association was not a state organ



or a public entity within the definition of Public entities in Section 4(1) of the [Public Procurement and Asset Disposal Act](#).

59. The Defendants submitted that the interest of the school in the suit property crystallised upon the funds obtained from the sale of the suit property being donated or deposited into the school account. The Defendants cited Section 22 (1) of the [Basic Education Act](#) and Section 3 (3) of the [Trustees \(Perpetual Succession\) Act](#) and submitted that the trust owned the suit property and purposed to have the same utilised for the benefit of Victoria Primary School. The Defendants submitted that the suit property was disposed of by the trustees through a resolution of the school management committee and the trustees did not lodge any complaint of impropriety in the disposal process.

Analysis and determination

60. I have considered the pleadings, the evidence tendered and the submissions by the advocates for the parties. I am of the view that the issues arising for determination in this suit are the following;

1. Whether the 2nd Defendant acquired the suit property lawfully.
2. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
3. Who is liable to for the costs of the suit?

61. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed), Sections 24, 25 and 26 of the [Land Registration Act](#) 2012, and Article 40 of [the Constitution](#) protect land ownership. Sections 27 and 28 of the Registered [Land Act](#) provide as follows:

27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

62. Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 provide as follows:



24. Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
- 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.
63. 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.

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

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”

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

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



66. In *Munyu Maina v Hiram Gathiha Maina* (supra) the court stated that:

...When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

67. Victoria Primary School is a public school. Victoria Primary School has and has always had a Parents Association. I have not come across any statutory underpinning for the Parents Association under the Education Act, Chapter 211 Laws of Kenya which was in force when the transaction the subject of this suit took place in 2012. It is in Section 55(2) of the [Basic Education Act](#), 2013 which came into effect on 25th January 2013 that expressly provides for a Parents Association. The Education Act, Chapter 211 Laws of Kenya provided for School Committees and Board of Governors only for Primary Schools. Be as it may, Victoria Primary School had a Parents Association before 2013 when the [Basic Education Act](#), 2013 was enacted. This Parents Association was initially known as Kisumu Europeans Parents Association. The name of the association was changed later to Victoria School Parents Association. Kisumu European Parents Association appointed trustees on 21st April 1960. The said trustees applied to the Minister of Lands to be registered as a corporate body under the Land (Perpetual Succession) Ordinance, Chapter 286 Laws of Kenya (as it was then called). The said trustees were registered as a corporate body under the name; Registered Trustees of Kisumu European Parents Association on 10th January 1963 and were issued with a Certificate of Incorporation. Following the change in the name of the Parents Association, the name of the corporate body was changed to Registered Trustees of the Victoria School Parents Association on 13th September 1966 through a resolution that was passed by the Trustees on 8th November 1962.

68. Clauses 3, 5 and 6 of the Certificate of Incorporation of Registered Trustees of the Victoria School Parents Association provide as follows:

3. The appointment of every new Trustee shall be certified to me in writing under the hand of the remaining Trustee; and further within one month after the expiration of five years after the date of this Certificate (or whenever required by me) a return shall be made to me by the then Trustees of the names of the Trustees at the expiration of each such period with their residences and descriptions." (emphasis added)
5. The Common Seal shall be kept in the custody of the Treasurer of the Association and shall not be affixed to any instrument except in the presence of one of the Trustees who shall sign every instrument to which the Common Seal is so affixed."
6. The Trustees may hold ALL that piece of land described in the Schedule hereto and any other land or any interest in land in Kenya that may be vested in them by way of purchase or the acquisition, donation, gift or other assurance which may hereafter be lawfully made. Any such land and any interest in any land and any building on any land shall be held, occupied, used and enjoyed only for the purposes of the Association and in the case of gifts or donations subject to any trusts imposed or wishes expressed by the donors not inconsistent with the foregoing user."



69. Section 3(3), 4 and 13(2) of the *Trustees (Perpetual Succession) Act*, Chapter 164 Laws of Kenya which was in force in 2012 when the transaction in dispute took place provided as follows:

- 3(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”(emphasis added)
4. The certificate of incorporation shall vest in the body corporate all movable and immovable property and any interest therein belonging to or held by any person or persons for the benefit of the trust concerned.” (emphasis added)
3. Any instrument to which the common seal of the corporate body has been affixed, in apparent compliance with the regulations for the use of the common seal referred to in section 3, shall be binding on the corporate body, notwithstanding any defect or circumstance affecting the execution of the instrument.” (emphasis added)

70. I have not seen *the Constitution* of the Victoria School Parents Association. None of the parties produced the same in evidence. Paragraph 6 of the Third Schedule to the *Basic Education Act*, 2013 which provides for the establishment and functions of Parents Associations provides as follows:

- (6) The functions of the Parents Association shall be to–
 - (a) promote quality care, nutritional and health status of the pupils;
 - (b) maintain good working relationship between teachers and parents;
 - (c) discuss, explore and advise the parents on ways to raise funds for the physical development and maintenance;
 - (d) explore ways to motivate the teachers and pupils to improve their performance in academic and cocurricular activities;
 - (e) discuss and recommend charges to be levied on pupils or parents;
 - (f) undertake and oversee development projects on behalf of the whole Parents Association.
 - (g) assist the school management in the monitoring, guidance, counseling and disciplining of pupils; and
 - (h) discuss and recommend measures for the welfare of staff and pupils.”

71. I believe that the Victoria School Parents Association was established with the foregoing functions/objectives in mind. It was not disputed that the properties owned by the Victoria School Parents Association belonged to the parents of the pupils in Victoria Primary School which is a public school and that the same were acquired for and could only be disposed of for the benefit of the school. The disposal of the properties of the Victoria School Parents Association had to be undertaken in



- accordance with the Constitution of the Association if any and the law. As I have mentioned, I have not seen the Constitution of the Victoria School Parents Association. I am however clear on how the Victoria School Parents Association wanted their immovable properties held and disposed of if necessary.
72. From the evidence on record, the Victoria School Parents Association (the Association) wanted all its land to be held, and disposed of if necessary, by its appointed trustees. The Association appointed trustees and had them registered as a corporate body under the Land (Perpetual Succession) Ordinance (now the Trustees (Perpetual Succession) Act). The said Trustees were registered under the corporate name; Registered Trustees of the Victoria School Parents Association (new name). The Certificate of Incorporation of the said Trustees, and the provisions of the Trustees (Perpetual Succession) Act (the Act) vested all the land that belonged to the Association on the said Registered Trustees of the Victoria School Parents Association (the Registered Trustees) and provided that it was only the said Registered Trustees who could “convey, transfer, assign, charge and demise any movable or immovable property or any interest therein” belonging to the Association.
 73. On 19th June 1987, the Victoria School Parents Association (the Association) acquired the suit property, East Kisumu/Dago/647. In accordance with the provisions of the Certificate of Incorporation of its Trustees and the Trustees (Perpetual Succession) Act (the Act), the suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association. It is not disputed that the Association could only dispose of the suit property through the Registered Trustees in whose name the property was registered and was by law vested. The question that arises is whether the suit property was sold and transferred to the 2nd Defendant by the Registered Trustees of the Victoria School Parents Association (the Registered Trustees). The answer is no.
 74. The 1st Defendant was at all material times, the Chairman of the school committee of Victoria Primary School which was established under Section 9 of the Education Act, Chapter 211 Laws of Kenya, and Education (School Committee) Regulations 1978. One, Donald Meda was Victoria Primary School Head Teacher and secretary of the committee while one, Phoebe Fan was a representative of Standard 4 in that committee. In a meeting of the school committee held on 11th May 2012 whose agenda was indicated as; school rental houses and school land, the school committee purported to have “authorized” the 1st Defendant, the said Donald Meda and Phoebe Fan “to be trustees during the process of disposing” of the suit property. From the minutes of the said meeting, this was not a meeting of the Victoria School Parents Association. The meeting could not therefore purport to pass a resolution for the sale of the suit property. The meeting could not also pass a resolution appointing trustees for the Association. Furthermore, the appointment of new trustees of the Association had to be certified by the remaining trustees, the Minister of Lands notified and the notification registered on the Certificate of Incorporation of the said trustees as a body corporate. According to the Certificate of Incorporation of Registered Trustees of the Victoria School Parents Association, the registered trustees of the Association were, Rajni Somaia, Dr. Joab Gilbert Christopher Amolo and Dr. Janet Ongili Okello. The 1st Defendant, the said Donald Meda and Phoebe Fan were not the registered trustees of the Victoria School Parents Association. They therefore had no right under the law and the Certificate of Incorporation of the Registered Trustees of the Victoria School Parents Association to sell and transfer the suit property to the 2nd Defendant.
 75. According to the agreement of sale dated 31st August 2012, the suit property was sold to the 2nd Defendant by “Trustees of Victoria School Parents Association”. The agreement was signed on behalf of the purported Trustees of Victoria School Parents Association by the 1st Defendant and Donald Meda in their capacities as chairman and secretary of the said entity. In place of the seal of the purported trustees, the agreement was stamped with the rubber stamp of Victoria Primary School. As correctly



submitted by the Plaintiff, there was no entity recognised in law going by the name Trustees of Victoria School Parents Association with the 1st Defendant and Donald Meda as trustees that was capable of entering into an agreement for the sale of land let alone the suit property. In any event, the suit property was not registered in the name of the said entity and as such it could not sell the same.

76. By reason of the foregoing, it is my finding that the purported sale and transfer of the suit property to the 2nd Defendant was illegal, null and void. The purported transfer of the suit property by persons who did not own it could not and did not convey any lawful proprietary interest in the suit property to the 2nd Defendant. In *Macfoy v. United Africa Co. Ltd.* [1961] 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

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

77. In *Dina Management Limited v. County Government of Mombasa & 5 Others*(supra)_____ the Supreme Court stated as follows at paragraphs 108 and 110:

[108] ...Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & Others v County Council of Kwale*, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR the Court of Appeal, which decision this Court affirmed, stated that:

...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

[110] Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to *Bawazir & Co. (1993) Ltd*, who in turn could pass to the appellant.”

78. The suit property was registered in the name of the Registered Trustees of the Victoria School Parents Association (the Registered Trustees). The lawful procedure for acquiring the suit property should have been for the 2nd Defendant to enter into an agreement of sale with the Registered Trustees and have the property transferred to it by the said Trustees under their common seal. That was not done. The 2nd Defendant acquired the suit property irregularly and illegally from persons who did not own it. The court would be sanctioning an illegality if it were to hold that the 2nd Defendant holds a valid title. In *Scott v. Brown, Doering, McNab & Co. Ltd.*(3) (1892)2QB724 at 728, it was held that:

...No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the court is himself implicated in the illegality...”



79. In *Nabro Properties Ltd. v. Sky Structures Ltd. & 2 others* [2002]2KLR 299 at page 312, Gicheru JA quoted from Broom, HA Selection of Legal Maxims at page 191 where the authors stated as follows:

It is a maxim of law, recognized and established, that no man shall take advantage of his own wrongs and this maxim which is based on elementary principles, is fully recognised in courts of law and of equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest ..., we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law”

80. The 2nd Defendant is not free from blame in the predicament that it has found itself. The 2nd Defendant was represented in the transaction by an advocate. If the advocate had conducted due diligence, he should have noted that the entity that purported to sell the suit property was not the registered owner of the property and that the two gentlemen who purported to sign the agreement of sale on behalf of the vendor had no power to do so. In clause 6.1 of the agreement of sale, it is provided that “The Vendor sell the property as the Registered Trustees/Board of Governors of Victoria School Parents Association.” The 2nd Defendant should have inquired whether the 1st Defendant and Donald Meda were registered as the trustees of the Victoria School Parents Association. A search on “Registered Trustees of the Victoria School Parents Association” at the Ministry of Lands would have revealed that the 1st Defendant and Donald Meda were not registered as trustees of the said Association but were masquerading as such.

81. Article 10(2) of *the Constitution* of Kenya provides for the National values and principles of governance as follows:

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

82. Article 73(2) of *the Constitution* of Kenya which is part of Chapter 6 of *the Constitution* that deals with leadership and integrity provides as follows on the principles of leadership and integrity:

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and



(e) discipline and commitment in service to the people.”

83. Articles 232 (1) of *the Constitution* provides as follows on the values and principles of public service:

- (1) The values and principles of public service include—
 - (a) high standards of professional ethics;
 - (b) efficient, effective and economic use of resources;
 - (c) responsive, prompt, effective, impartial and equitable provision of services;
 - (d) involvement of the people in the process of policy making;
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) ...
 - (h) ...
 - (i) ...”

84. The Plaintiff was established pursuant to Article 79 of *the Constitution* (which is also part of Chapter 6 of *the Constitution*) which provides as follows:

79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

85. Under Section 11(1) of the *Ethics and Anti-Corruption Commission Act*, 2011, the Plaintiff has been given among others the following additional functions in addition to the functions conferred upon it under Article 252 and Chapter Six of *the Constitution*;

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- (f) oversee the enforcement of codes of ethics prescribed for public officers;
- (g) advise, on its own initiative, any person on any matter within its functions;
- (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the *Anti-Corruption and Economic Crimes Act*, 2003 (No. 3 of 2003), as to confidentiality;
- (i) subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and



- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”
86. The Defendants had contended in their defence and submissions that the Plaintiff had no power to file the present suit as the land in question was not public land. I am of the view that the Defendants are estopped from denying that the suit property was public land. The Defendants did not deny that Victoria Primary School is a public school and that the suit property was acquired by the parents of Victoria Primary School for the benefit of the school. In paragraph 6 of his witness statement, the 1st Defendant stated as follows in part concerning the status of the suit property: “...That such property, though owned exclusively by the Parents and registered in the name of the Association, was nevertheless so held and intended for use for the benefit of the school to advance the interests and welfare of the members’ children in Victoria Primary School, a Public Institution.”
87. The meeting in which the sale of the suit property was discussed and purportedly approved was a meeting of the committee of Victoria Primary School. The 1st Defendant and Donald Meda who signed the purported agreement of sale were the chairman and secretary respectively of the said committee. The agreement was stamped with the rubber stamp of Victoria Primary School in an attempt to give it validity. The proceeds of the illegal sale were deposited in a bank account that was opened in the name of the school.
88. The Defendants cannot turn around and claim that the suit property did not belong to the school. The school although not a legal owner of the suit property was indeed its beneficial owner. In Black’s Law Dictionary, 10th Edition, a beneficial owner is defined as:
- one recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else; especially, one for whom property is held in trust.”
89. The school’s beneficial interest in the suit property rendered it public property recoverable by the Plaintiff under Section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*, 2011. It is worth noting that Donald Meda in his capacity as the Head Teacher of Victoria Primary School and secretary of its school committee was a public officer and as such was bound by the National values, principles of leadership and integrity and the principles of public service set out in Articles 10(2), 73(2) and 232(1) of *the Constitution*. The 1st Defendant as the chairman of the School Committee was also bound by the National values and principles of leadership and integrity in the performance of his duties. The enforcement of any breach of these National values, principles of leadership and integrity, and public service is within the powers of the Plaintiff. I agree with the Plaintiff that the 1st Defendant, Donald Meda and Phoebe Fan sold the suit property in a fraudulent and clandestine manner. First, they knew that they had no power to sell the property and held themselves as the owners of the property. Secondly, they knew that the property belonged to the parents with children at the school who had to be informed of the intention to sell the property and their approval sought which was never done. Thirdly, they knew that the Parents Association had trustees who were registered as the owners of the suit property who had to be consulted and their approval and involvement in the exercise secured which was never done. Fourthly, no cogent evidence was placed before the court on how the sale price of Kshs. 22,500,000/- was arrived at and how it was spent. I have noted that part of the purchase price was paid in cash (See clause 4.1 of the agreement of sale). The bank account in which the sale price was deposited was operated exclusively by the 1st Defendant, Donald Meda and Phoebe Fan and the same became dormant after the proceeds of sale were exhausted. Donald Meda and Phoebe Fan died shortly after the proceeds of the sale of the suit property were exhausted. This bank account was not



handed over to the new Head Teacher Edward Oruko Omalla during the handing over exercise on 5th August 2013 although at the time, the 1st Defendant was still the chairman of the school committee. The fact that the proceeds of the sale of the suit property were deposited in a bank account in the name of the school alone cannot make the otherwise illegal transaction legal. It is also instructive to note that although the new Head Teacher was very concerned about the sale of the suit property, the minutes of the meetings of the school management committee under the new Head Teacher of the school show that the 1st Defendant who was still the chairman of the school committee did not come forth with the necessary information about the sale of the property. I am of the view that the Plaintiff had the power to investigate and seek the recovery of a public school land sold in this manner by the school Head Teacher and the School Committee Chairman.

Conclusion

90. I am satisfied from the foregoing findings that the Plaintiff has proved its case against the Defendants on a balance of probabilities and as such it is entitled to the reliefs sought in the plaint. On the issue of costs, I will award the costs to the Plaintiff to be paid by the 1st Defendant who presided over the fraudulent and illegal sale of school land. I therefore enter judgment for the Plaintiff against the Defendants for;
- a. A declaration that the sale of the parcel of land known as East Kisumu/Dago/647 to the 2nd Defendant was illegal, null and void and ineffectual to confer a good title upon the 2nd Defendant.
 - b. An order for the Land Registrar Kisumu County to rectify the register for the parcel of land known as East Kisumu/Dago/647 by cancelling the registration of the 2nd Defendant as the owner of the property and the title deed that was issued to it and to restore the property in the name of the Registered Trustees of the Victoria School Parents' Association who shall continue to hold it for the benefit Victoria Primary School.
 - c. A permanent injunction restraining the 2nd Defendant by itself, its agents, servants or assigns from leasing, transferring, charging, entering upon, developing or in any other manner howsoever dealing with the parcel of land known as East Kisumu/Dago/647.
 - d. The costs of the suit to be paid by the 1st Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 17TH DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

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

Mr. Bii for the Plaintiff

Ms. Owiti for the Defendants

Ms. J.Omondi-Court Assistant

