



**Board of Management, Frere Town Primary School v County  
Government of Mombasa (Environment & Land Case 91 of 2021)  
[2024] KEELC 13697 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13697 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 91 OF 2021  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**THE BOARD OF MANAGMENT, FRERE TOWN PRIMARY  
SCHOOL ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that it is the owner of Plots Numbers 1, 2, 134, 135, 136, 137, 138 and 139 (Original Plot No. 175/1/MN) the same having been allocated to it by the defunct Municipal Council of Mombasa. The Plaintiff avers that Plots No. 134, 135, 136, 137, 138 and 139 are fully developed while Plots No. 1 and 2 were reserved for the school's co-curricular activities and future expansion. The Plaintiff states that considering its location, various individuals some of whom are drug addicts have been roaming around the school's fence thus putting the pupils at risk of falling into the risk of drug addiction either actively or passively. That through its secretary, the School Principal, it made requests to the Area Member of Parliament, Nyali Constituency to help the school put up a perimeter wall around the school's Plots No. 1 and 2 using the National Government Constituency Development Fund (NG-CDF). The Plaintiff states that the Board approved the request for fencing and landscaping of the football field at Frere Town Primary School and upon the approval, the Nyali Constituency Development Fund Committee advertised the tender inviting interested bidders. The successful bidder was awarded the tender and it commenced works on Plots no. 1 and 2 and which plots had been reserved by the Municipal Council of Mombasa for school's co-curricular activities and future expansion.
2. The Plaintiff avers that in a sudden turn of events, the Defendant's Inspectorate Department has moved to the suit plots and ordered the contractor out of the plots thus inhibiting the contractor from executing its work as per the contract. The Plaintiff was anticipating that by the time the school re-



opened for the new term on 12<sup>th</sup> May, 2021, the fencing and landscaping works would be complete or near completion but the same cannot be undertaken due to the Defendant's interference. The Plaintiff reasonably apprehends that the Defendant, its employees, agents, servants or other people claiming through it are likely to continue to interfere with contractor's work on the suit plots unless restraining orders are made and/or issued by the Honourable Court directed at the Defendant stopping it, its agents, employees and or servants from in any manner dealing or interfering with the ongoing works on Plots No. 1 and 2 which had been reserved for the school.

3. The Plaintiff prays for judgment against the Defendant for;
  1. An Order of Permanent Injunction do issue restraining the Defendant by itself, its servants, workmen, agents, heirs and/or successors and/or assigns or otherwise howsoever from in any way interfering with the Plaintiffs projects being undertaken on Plots No. 1 and 2 reserved for use of Frere Town Primary School.
  2. Costs of the suit.
4. The Defendant states that if at all any development was carried out by the Plaintiff, it was without the express authority of the Defendant's contrary to the *Physical and Land Use Planning Act*. The Defendant states that the Plaintiff and/or the contractor broke the law and commenced development without a development permission from the Defendant's.
5. This court has considered the evidence and the submissions therein. The defendant did not call any witnesses. PW1, the Principal of the Plaintiff's school testified that Plots No. 134, 135, 136, 137, 138 and 139 are fully developed while Plots No. 1 and 2 were reserved for the school's co-curricular activities and future expansion. That the Plots Numbers 1, 2, 134, 135, 136, 137, 138 and 139 (Original Plot No. 175/1/MN) were allocated to it by the defunct Municipal Council of Mombasa to the school which has been in existence since 1960. The school made plans to put up a perimeter wall around the school's Plots No. 1 and 2 using the National Government Constituency Development Fund (NG-CDF) to secure the same and ward off unwanted characters from the school but were stopped by the Defendant. In the statement of defence the Defendant states that any development was carried out by the Plaintiff, it was without the express authority of the Defendant's contrary to the *Physical and Land Use Planning Act*. That they had not transferred or issued a lease to the Plaintiff. I find that Plots Numbers 1, 2, 134, 135, 136, 137, 138 and 139 (Original Plot No. 175/1/MN) were allocated to it by the defunct Municipal Council of Mombasa to the school which has been in existence since 1960. This evidence has not been controverted. Indeed, the Plaintiff has produced a letter from the then Municipal Education Officer to the Town Clerk dated 11<sup>th</sup> December 2006 on the illegal annexation of school land plots nos. 1 and 2 Frere Town Primary School, Mainland North, asking him to identify the perpetrators and stop them. It is a finding of fact that this is a public school which is over 60 years old and the children have used plot 1 and 2 as their playground. Article 62(1) of *the Constitution* defines public land as:
  - (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
  - (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
  - (c) land transferred to the State by way of sale, reversion or surrender;
  - (d) land in respect of which no individual or community ownership can be established by any legal process;



- (e) land in respect of which no heir can be identified by any legal process;
  - (f) all minerals and mineral oils as defined by law;
  - (g) government forests other than forests to which Article 63 (2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
  - (h) all roads and thoroughfares provided for by an Act of Parliament;
  - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
  - (j) the territorial sea, the exclusive economic zone and the sea bed;
  - (k) the continental shelf;
  - (l) all land between the high and low water marks;
  - (m) any land not classified as private or community land under this Constitution; and
  - (n) any other land declared to be public land by an Act of Parliament—
    - (i) in force at the effective date; or
    - (ii) enacted after the effective date.
6. Private land on the other hand is defined by Article 64 as consisting of:
- (a) registered land held by any person under any freehold tenure;
  - (b) land held by any person under leasehold tenure; and
  - (c) any other land declared private land under an Act of Parliament.
7. I find that Plots Numbers 1, 2, 134, 135, 136, 137, 138 and 139 (Original Plot No. 175/1/MN) is public land reserved for the School. I find the suit land falls within land that was planned for a playing field for the Plaintiff school. The school being a public institution, the land it occupies and utilizes as a playing field is therefore public utility and is not available for allocation. The allocation if any is irregular and unlawful. If the land is registered to a third party and this has not been established, I find that, the Plaintiffs' rights and interest over the land are overriding and do not require registration in terms of section 28 (h) of the [Land Registration Act](#), 2012 which provides as follows;
28. Overriding interests
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register-
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
8. For the above reasons I find that the Plaintiff has proved its case on a balance of probabilities and I grant the following orders;
1. An Order of Permanent Injunction do issue restraining the Defendant by itself, its servants, workmen, agents, heirs and/or successors and/or assigns or otherwise howsoever from in any way interfering with the Plaintiffs projects being undertaken on Plots No. 1 and 2 reserved for use of Frere Town Primary School.



2. Each party is to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

