Mwakio & 2 others (Suing on their own behalf and on behalf of 34 other Parents and Members of the St. John's First Baptist Primary School, Shonda) v Khisa & another (Civil Appeal 9 of 2019) [2023] KEELC 16805 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 16805 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL 9 OF 2019

LL NAIKUNI, J

FEBRUARY 21, 2023

BETWEEN

AISHA MWAKIO – CHAIRPERSON ..... 1ST APPELLANT

RHODA WANDERA – SECRETARY ..... 2ND APPELLANT

MULISA KIBENDERA – TREASURER ..... 3RD APPELLANT

SUING ON THEIR OWN BEHALF AND ON BEHALF OF 34 OTHER PARENTS AND MEMBERS OF THE ST. JOHN'S FIRST BAPTIST PRIMARY SCHOOL, SHONDA

AND

WELLINGTON KHISA ..... 1ST RESPONDENT

SOROFINA NASIMIYU ..... 2ND RESPONDENT

JUDGMENT

I. Preliminaries

1. This is a Judgment which pertains to an appeal instituted vide a Memorandum of Appeal dated 5th March, 2019 by M/s. Aisha Mwakio, Rhodah Wandera and Muhisa Kibendera, the 1st, 2nd & 3rd Appellants herein suing on behalf of the 34 others (Hereinafter referred to as "The Appellants" against Wellington Khisa and Sorofina Nasimiyu, the .1st and 2nd Respondents herein (Hereinafter referred to as "The Respondents").

2. The Appellants herein were aggrieved by the Judgment delivered by the Chief Magistrate's Court sitting at Mombasa, Hon. J. M Nang'ea on 22nd January, 2019 in the Civil Case (Mombasa) No. 250 of 2007. As a result, they decided to institute this Appeal before this Honorable Court.

3. Along with the said Memorandum of Appeal, the 1st and 2nd Appellants on 4th March, 2021 filed a 472 pages Record of Appeal in support of their filed Appeal. Subsequently, upon service of the said Record of Appeal, on 12th June, 2019, the 1st & 2nd Respondents herein, filed their replies and a six (6) grounds Cross Appeal dated 12th June, 2022.

4. The main bone of contention in this appeal is the legal ownership of the suit land known as Plot No. 485 in the Settlement Scheme within Shika Adabu area (Hereinafter referred to as "The Suit Land"), an education institution school and its management and operations. While on one hand the Appellants hold that they were conferred the suit land by the Land Committee during the Land Adjudication process and hence the Shonda school (Hereinafter referred to as "The School") on it belonged to the Shonda Community (Hereinafter referred to as "The Community"), the Respondents insist that the were the legal owners of both the land, assets and the institution.

II. The Appellants' Case

5. As indicated herein, from the filed Memorandum of Appeal, the Appellant]raised the following grounds:-

   a. The Learned Trial Magistrate erred in law and fact in failing to properly evaluate, weigh and appreciate the evidence on record and delivering a Judgment that was contrary to and against the weight of evidence on record.

   b. The Learned Trial Magistrate wholly misapprehended and misapplied and/or misunderstood law applicable to the dispute and the evidence tendered thus rendering a Judgment that was in effect worthless to the issues which remain outstanding and unresolved.

   c. The Learned Trial Magistrate erred in law and in fact in failing to make finding that this was a public interest suit over community land hosting the disputed school and its assets which belong to Shonda Community and should be managed by and for the community.

   d. The Learned Trial Magistrate erred in law and in fact in failing to find that the land on which the school in set was set aside by the community for a community school and the Respondents have no proprietary interest over its user or the assets therein and cannot agitate for rights over land not existent in law.

   e. The Learned Trial Magistrate erred in law and in fact in failing to find this was community land in line with Article 63 of *the Constitution* of Kenya set aside for development of the Community school.

   f. The Learned Trial Magistrate erred in law in failing to find that the Respondents were only employees of the said school and could not therefore agitate for any other superior rights, status, capacity or role in the said school, its land or assets other than as mere employees.

   g. The Learned Trial Magistrate erred in law and in fact in failing to properly evaluate the evidence of Plaintiff Witness – 2, Mr. Shari Salim Mwebei, being the Chairman of the Shonda Land Committee that upon adjudication process being carried out under the Ujamaa/ Shonda Settlement Scheme the school was allocated land and registered as Plot No. 485 through a donation from the Community as demonstrated by Plaintiffs exhibits marked as Plaintiffs Exhibits Numbers 4 and 7 respectively.

   h. The Learned Trial Magistrate erred in law and in fact in failing to make a finding that the Plaintiffs had proved their case as per the law and that the subject needs protection of the Court by grant (sic) of all the prayers sought in the Plaint.

i. The Learned Trial Magistrate erred in law and in fact in not making a finding on the status of a lapsed Provisional Registration Certificate and whether it could confer any proprietary interest in land set aside by the community for the school.

III. The Cross Appeal filed by the 1st and 2nd Respondents in the Appeal and 1st and 2nd Appellants in the Cross Appeal.

6. On 12th June, 2019, the Learned Counsel for the 1st and 2nd Respondents herein in the main appeal and the 1st and 2nd Appellants in the Cross Appeal, the Law Firm of Messrs. Wameyo Onyango & Co. Advocates filed a Cross Appeal dated 12th June 2019. It raised the following six (6) grounds: -

a. The Learned Magistrate erred in law and in fact by failing to declare that since the school was not owned by the Plaintiffs, the Plaintiffs had no right to run and/or manage the same.

b. The Learned Magistrate erred having found that there was no evidence that the subject school belonged to the Shonda Community erred in law and in fact by holding that the Plaintiffs and the Defendants could run the school in partnership.

c. The Learned Magistrate erred in law and in fact by holding that the school was built for the benefit of "Shonda", the community was entitled to run the school in partnership with the Defendants.

d. The Learned Magistrate erred in law and in fact in holding that there existed a Partnership between the Plaintiff and the Defendants.

e. The Learned Magistrate having established that the alleged sponsors of the school did not lay any claim in the ownership of the school, erred in fact and in law by concluding that the Plaintiffs could nonetheless partner with the Defendants in the running and managing of the school.

f. The Learned Magistrate erred in law and in fact by refusing to declare that the school was owned and should be managed by the Defendants even when he had established as a matter of fact from the evidence adduced in Court that the Registration Certificate of the school was issued to the Defendants' church and the management of the school to the 2nd Defendant by the Government of Kenya through the Ministry of Education.

IV. The direction on the Appeal and Cross Appeal.

7. On 18th October, 2021, there being no objection raised by any of the parties herein regarding the filed pleadings, the Honorable Court proceeded to undertake two aspects. First, admit the said Appeal and Cross Appeal and Secondly, to provide specific directions on how to proceed with the appeal under the provisions of Sections 79B and 79G of the *Civil Procedure Act* Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules 2010. As such, the Honorable Court directed that the filed Appeal and Cross Appeal be disposed of by way of Written Submissions. On 25th May, 2022, all parties had fully complied with the directions given by this Honorable Court. Pursuant to that the Honorable Court directed that Judgment be delivered on notice.

A. The Written Submissions by the Appellants

8. On 1st April, 2022 the Learned Counsel for the Appellants herein the Law Firm of Messrs. Opulu and Co. Advocates filed their Written Submissions which this Court has taken into full account.

Mr. Opulu Advocate commenced his submissions by stating that the Appellants filed a Suit before the Chief Magistrate Court by way of Plaint dated 26th January, 2007. Later on, the Plaint was amended to include the 3rd Defendant - Mr. Francis Tsuma, the Municipal Education Officer.

The Learned Counsel argued that the Interim Provisional Registration lapsed. According to him, a lapsed certificate could not confer any proprietary interests in land which had already been set aside by the community for the school.

The contention by the Learned Counsel was that the Provisional School Registration Certificate was valid for only eighteen (18) months. Thus, this statutory period having lapsed the school remained unregistered due to these Court proceedings.

9. He argued that the Sub – ordinate Court contradicted itself on the issue of the ownership of the land. While one hand it held that the school was owned and built for the benefit of the Shonda Community but on the other hand, it held that there was no proof of the school belonging to the Shonda Community. Nonetheless, the Counsel averred that the Lower Court was correct while finding that the school was funded by a foreign sponsor and stood on public land donated by the Government of Kenya.

The Counsel opined that despite of all these facts, the trial Court erroneously made a determination that the school was issued with a Provisional Registration Certificate which under the Provision of the Education Act only lasts for eighteen (18) months.

10. The Counsel held that the 3rd Defendant frustrated the efforts by the community, taking that they had been formally granted the land by the Shonda Land Committee for the establishment of a school. He averred that this being Government land under the Land Adjudication Process, the suit land as Plot No. 485 in the Settlement Scheme was set aside for establishment of a school upon the request by the community. According to him, therefore the Respondents had neither legal nor legitimate rights over the land assets and the school as their actions were driven by selfishness and self aggrandizement.

11. The Learned Counsel averred from the contents of Paragraph six (6) of the Amended Plaint and the verbatim evidence of Plaintiff Witness – 2, Mr. Shari Salim Mweba, the Chairman of the Shonda Land Committee, during the Land Adjudication Process he held that: -

> " The Plaintiff states that Shonda Community did donate the said land and the Freehold Scheme No. GL/118 for purposes of the construction of (sic) a non-profit making institution to provide primary education to the children of the Shonda. Therefore, during the 2002 Land Survey by the Ministry of Lands and the Mombasa Municipal Council the school land was assigned No. 485".

The Counsel further relied on the provisions of Article 63 (1), (2), (3), (4) & (5) of *the Constitution* of Kenya which defined community land and the Provision of Sections 1 & 5 of the *Community Land Act* No. 67 of 2016.

He also reproduced verbatim the evidence of Plaintiff Witness – 2 Mr. Shari Salim Mwabe and the evidence from his cross- examination by the Counsel for the Respondent.

12. From the submissions by the Learned Counsel, two (2) main issues emerged from this dispute were. These were, firstly on matters related to the Provisional Registration of school and secondly, the land that was set aside for a community school. According to the Learned Counsel the issues were separate and distinct. To support his argument the Counsel extensively relied on the Provisions of the Education Act Cap 211- its preamble, types of schools- public, local authority and private schools,

Sections 8 and 60 (4) and the Education (Registration of Unaided schools Regulations 1969). Under the Regulation 3 (2), it provided: -

> " If at the end of one (1) year for the Provisional registration of an unaided school the Minister is of the opinion that the school should be registered in accordance with Section 15 (2) of the Act, he shall cause the school to be registered and issue a Certificate of Registration".

The Learned Counsel averred that the above Provisions of the law buttressed the fact that the law on the subject stated that a Provisional Certificate was valid and issued for eighteen (18) months and thereafter if the Minister for Education could register the school after one (1) year.

13. According to the Counsel, the Respondents laid claim on the school based on the Provisional Certificate of Registration that had been obtained on 8th May, 2003 which was nineteen (19) years old. Hence the Provisional Certificate was spent. It conferred nothing to the Respondents.

Further the Counsel referred Court to the contents of page 128 of the Record of Appeal. This was a copy of a letter dated 8th April, 2003 addressed to the Coast Provisional Director of Education – by the then County Secretary. It stated thus: -

> " I have considered this application and I am satisfied that the St. John's First Baptist Primary school should be provisionally registered for a period of eighteen (18) months only in accordance with Section 15 (1) of the Act at the end of the Provisional Registration you should apply for the school to be fully registered as per Section 15 (2) of the Act".

The Learned Counsel held that despite of this pre - condition laid down by the Government, the Respondents still never complied. For these reasons, his contention was that the trial Court ought have taken notice of this lapse by the Respondents – for claiming both the community land set aside by the Shonda Land Committee as Plot No. 485 for the construction of a school and the school itself.

14. Therefore, in conclusion, taking that the evidence to the effect school and land belonged to the Shonda Community was never controverted nor challenged, the Learned Counsel opined that the appeal should be allowed and the Cross Appeal by the Respondents be dismissed. That the Judgment and decree by the Lower Court should be set aside and replaced by allowing the prayers sought for in the Plaint.

B. The Written Submissions by the Respondents

15. On 7th December, 2021, the Learned Counsel for the 1st and 2nd Respondents in the main Appeal and 1st and 2nd Appellants in the Cross Appeal the Law Firm of Messrs. Wameyo Onyango & Co. Advocates filed their Written Submissions dated 1st December, 2021.

16. Mr. Wameyo Advocate started by underscoring and taking exceptional assertion from the final disposition made out by the Lower Court to the effect that: -

> " The Suit is hereby dismissed since the Plaintiffs are Parties with Defendants in the running of the school there in need to encourage a conducive atmosphere for a harmonious working relationship between them. The Court therefore makes no orders to costs".

17. He observed and with concurrence with the Lower Court that the alleged sponsors of the school never laid any claim in ownership of the school. Further, the Learned Counsel held that no evidence was adduced to show that the school belonged to the Shonda Community.

All said and done, the Learned Counsel was completely displeased by the Court's findings to the effect that the Plaintiffs (Appellants) were entitled to run the school in partnership with the Defendants (The Respondents) as there had never existed any partnership deed duly executed or implied between them that displayed such terms and conditions for the running and management of the school on joint basis.

18. Further, he held that the finding by Lower Court to the effect that the Respondents never had any legal interest on the property was grossly unjust and unfair to the 1st and 2nd Respondents in the main appeal and the Appellants in the Cross Petition.

19. The Learned Counsel emphatically argued that, during the hearing, the Defendants adduced evidence of the fact that while the Registration Certificate of the school was issued to the Defendants' Church, the management of the school was issued to the 2nd Defendant by the Government of Kenya through the Ministry of Education. He emphasized that the institution being a private school, it was erroneous for the Lower Court to have concluded that the school should be run in partnership between the Plaintiffs (the Appellants) and Defendants (The Respondents). On this issue of impugned partnership, the Learned Counsel emphasized that the Plaintiffs (The Appellants) never pleaded or sought for this relief from their Pleadings. Instead, what they pleaded for was permanent injunction restraining the Defendants (Respondents) from interfering in any manner with the running and/or management of the school.

20. Further, the Learned Counsel argued by noting that the issue of Partnership in the management and running of the school was also not canvassed in the Appeal nor from the Record of Appeal. It was a non- existent issue. To buttress his on this point, he held that parties were bound by their own pleadings. The Learned Counsel relied on a myriad of the decisions of:- "Chalicha FCS Limited – Versus- Odhiambo & 9 others (1987) eKLR 182", "Chumo Arap Sangok – Versus- David Keigo Rotich (2006) eKLR" and "Hanningtone Oloo Ogumbo -Versus- Albert Makau Kyambo & Another (2021) eKLR where the Court held: -

> " ..... a Court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings..... unless it's by the consent of the Parties which is outside the pleadings".

21. Therefore, in conclusion, the Learned Counsel averred the Lower Court found that the Plaintiffs were not entitled to any of the reliefs as prayed, it should not have dismissed the Suit but instead held that the school belonged to the Respondents.

    Hence, they prayed for the Judgment by the Lower Court to be set aside and substituted with a declaration that the school should be managed exclusively by the 1st and 2nd Respondents in the main Appeal and the 1st and 2nd Appellants in the second (Cross) Appeal herein.

C. The Issues for Determination

22. Having keenly considered all the filed pleadings being the Memorandum of Appeal dated 5th March, 2019, the 472 pages Record of Appeal dated 5th March, 2021, the Cross Appeal dated 12th June, 2019, the Written Submissions and numerous authorities cited by both the Appellants and the 1st and 2nd Respondents in the main appeal and the 1st and 2nd Appellants herein in the Cross Appeal, the relevant and appropriate provisions of *the Constitution* of Kenya 2010 and the Statutes.

    In order for this Honorable Court to reach a fair, reasonable, just and equitable decision on this filed Appeal and Cross Appeal emanating from a Judgment from the Lower Court delivered on 22nd

January, 2019, this Honorable Court has condensed all the subject matter into the following three (3) salient issues. These are: -

a. Whether the Appeal and the Cross Appeal preferred by the Appellant through the filed Memorandum of Appeal dated 5th March, 2019 and the Record of Appeal dated on even date and Cross Appeal dated 12th June, 2019 by the 1st and 2nd Appellants have any merit in accordance to the Laid down standards of law.

b. Whether the Parties herein are entitled to the relief sought from both the filed Appeal and the Cross Appeal hereof.

c. Who will bear the costs of both the filed Appeal and the Cross Appeal.

D. The Analysis & Determination

ISSUE NO. (a). Whether the Appeal and the Cross Appeal preferred by the Appellant through the filed Memorandum of Appeal dated 5th March, 2019 and the Record of Appeal dated on even date and Cross Appeal dated 12th June, 2019 by the 1st and 2nd Appellants have any merit in accordance to the Laid down standards of law.

Brief facts

23. Before embarking on a more elaborate analysis of the framed issues, the Honorable Court finds it imperative to extrapolate on the brief facts of the case. In so doing the Court is informed from the now well established decisions of "Selle & Another – Versus - Associated Motor Boat Co. Limited & others (1968) EA 123 and Ephantus Mwangi & Anor –Versus- Duncan Mwangi Wambugu 1982 – 88 ICAR 278 Uganda Breweries Ltd –Versus- Uganda Railways Corporation (2002) 2 EA 634; John Malembi –Versus- Truphosa Cheredi Muderubeu & 2 others (2019) eKLR, were it was held that the role of this Court on first appeal is to re- evaluate all the evidence availed in the Lower Court and to reach its own conclusion in respect thereof. In so doing, the Court takes into account the fact that this Court had no opportunity of hearing or seeing the Parties as they testified and therefore made an allowance in that respect.

    From the above cases, the Court held that the Appellant Court ought not to interfere with the exercise, its discretion by an inferior Court. This would only happen, unless it was satisfied that its decision was clearly wrong because it had misdirected itself or because it had acted on matters which it should not have acted or it had failed to take into consideration matters which it should have taken into consideration and while doing so, it arrived at a wrong conclusion.

24. Additionally, the provision of Section 78 (2) of *Civil Procedure Act*, Cap. 21 provides that the Appellate Court shall have the same powers and shall perform as nearly as it may be the same as are conferred and imposed by this act on Courts of the original jurisdiction in respect of the suits instituted therein.

25. However, in the re-evaluation of the trial Courts evidence there was no set format to which this ought to be conformed to; which matters in the analysis were the substance and not its length. Further what was expected of a trial Court was to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts had been proved or disliked.

26. Thus, from the filed pleadings herein, the brief facts of the Appeal are that on 26th January, 2007 the Appellants herein, close to fifteen (15) years ago instituted this suit against the Defendants/ Respondents vide a filed Plaint before the Chief Magistrate Court. The Appellants held that St. John's First Baptist Primary School, Shonda, was a private non - profit making Institution founded

in the year 1987 by the 2nd Respondent who opened a nursery school in Likoni before moving to a freehold Government land at a place known as Shonda. Accordingly, between the years 1987 and 1990 a Canadian Baptist Missionary sponsored the school and put up three (3) semi permanent rooms which operated as Church and school respectively. In the course of time, a dispute arose and the school was closed down from the years 1990 to 1991. From the pleadings by the Appellant, the Shonda Community donated land and some portion was annexed purposely for the establishment of the school. The school was allocated Plot No. 485. The school was registered on 8th May, 2003.

27. From that time onwards, there existed a protracted dispute between the Appellants and the 1st and 2nd Respondents over two (2) pronged issues – on the ownership of the land where the school was physically situated and its day today management and operations thereof. As a result, they instituted the suit and sought for the following reliefs from Court: -

    a. The Plaintiffs prayed for a Permanent Injunction restraining the Defendants by themselves, agents and /or servants and/or any other person acting in their authority from interfering in any manner whatsoever with the running and/or management of St. John's First Baptist Primary School, Shonda and further be restrained from entering into holding, resolving and/or in any way convening meetings in the school compound and closing down school and/or terminating the employment of the teaching and support staff of the said school.

    b. The Plaintiffs prayed for a declaration that St. John's First Baptist Primary School, Shonda belonged to the Shonda Community under the Management Board.

    c. The Defendants do give a full account of monies extended towards running of St. John's First Baptist Primary School, Shonda.

    d. Costs of and incidental to this Suit.

    e. Interest on (d) above at Court rates.

28. The Appellant has held that the 3rd Defendant- the Ministry Municipal Education Officer, Mombasa had been interfering with the smooth running and/or management of the school. It had been issuing notices for the closure of the school on the basis that the Certificate of Registration was never valid. The Appellants felt that all along the 3rd Defendant had been acting in collusion with the Respondents in order to defeat the filed suit.

29. The Appellants argued that the 1st Respondent started usurping the duties of the school management and represented himself being the school's exclusive proprietor of the school, with the permission of the School's Sponsor. Whole at tis point, it is instructive to note that, the 1st Respondent started a separate Secondary school which was not funded by the Sponsor. Essentially, the complaint by the Appellants was that there was misappropriation of funds by the Respondents and hence the school's condition deteriorated leading to the inability to obtain a permanent registration under the Education Act. Currently, the school had no funding due to the poor management. It had deteriorated drastically.

30. On the other hand, the 1st and 2nd Respondents were spouses. They were the only ones who initially started the school. The Chief of the area assisted them in finding land which was used to develop the school. Later on the school was registered as a private institution run by them through the church. The 1st and 2nd Respondents averred that the Appellants were only undermining the management and running of the school and frustrating the donors so they would take over it. They held that the school was privately owned and hence the Appellants lacked the legal capacity ("Locus standi") to institute the suit. That was adequate on the facts.

31. Now turning to the following specific issues that have emerged from the facts here. These are: -

a. On whose land does the school stand?

b. What is the legal status of the said land?

c. What is the legal status of the Primary school and hence under whose management should it be?

d. Is there any joint partnership in existence for the management of the school whatsoever?

Based on the guidance provided for by these few mini issues, the Provision of Section 7 of the *Land Act* No. 6 of 2012 provided that title to land may be acquired through: -

a. allocation;

b. Land Adjudication process;

c. compulsory acquisition;

d. prescription;

e. settlement program

f. transmission

g. transfer

h. long term leases exceeding twenty one (21) years created out private land; or

i. any other manner prescribed in an Act of Parliament.

32. From the above Provisions of the law, it appears that the suit land was acquired through either allocation or Land Adjudication Process under the provision of the *Land Adjudication Act*, Cap. 284 of the Laws of Kenya. Unfortunately, this is not very clear.

However, from the contents of Paragraph 6 of the Amended Plaint and the evidence by Plaintiff Witness – 2 Mr. Shari Salim Mweba the Chairman of the Shonda Land Committee in the Land Adjudication Process holds that: -

> " The Plaintiffs states that the Shonda Community did donate the said land and the Shonda Land Committee agreed to annex part of the freehold Scheme No. GL/118 for the Purposes of constructing a non-profit making institution to provide primary education to the children of Shonda".

Therefore, during the year 2002 survey by the Ministry of Lands and the Mombasa Municipal Council the school land was assigned No. 485.

33. In order to support his assertion, the Plaintiff Witness -2 produced two exhibits – Plaintiffs Exhibit No. 4 – a copy of a letter from the Land Adjudication Committee stating that the said land which according to Pastor Khisa, belonged to the Shonda community and it was called St. John's First Baptist. It had a small ground. The committee discussed and gave them more land.

The Letter was signed by the Chairman, Vice Chairman, Treasurer, Secretary and elder called Mr. Iddi Mohammed of the Shonda Committee. The Plaintiff Witness – 2 further stated that they gave the school the parcel No. 485 and the allocation was recorded in the Black Book known as Shika Adabu. It was signed by the members of the Shonda Committee. The extract of the book was produced as Plaintiffs Exhibit No. 7. Thus, undoubtedly, the community were allocated the suit land for the

purposes of establishing an educational institution. The only main issue of contention was whether they were given a title to it.

34. It is well established law that upon being granted the land as a community, according to the Provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of the 2012 the school, or whether it was community land they ought to have been granted a Certificate of title deed.

Section 24 provides: - Interest conferred by registration 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.

Section 25 provides: - Rights of a proprietor

(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.

Section 26 provide: - Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

35. Instead, it is imperative to note that the Appellant have only over relied on the two (2) exhibits- Plaintiff Nos. 4 and No. 7 and the Provisions of Article 63 of *the Constitution* of Kenya and Sections 1, 2. 3, 4 and 5 of the Community Act, No. 67 of 2016 to demonstrate that they were conferred ownership to the suit land. The Provisions of Article 63 (1) and (2) (a) of Constitution of Kenya holds that:- "..... Community Land shall be one that is lawfully registered in the name of the group representatives

under the Provisions of any law and land transferred to a specific community by any process of law". This process never took place in the instant case.

Arising from this, this Honorable Court wishes to fully concur and uphold the finding by the Lower Court that there is nothing to prove indefeasible rights, title and interest on the land to the Shonda Community. However, the Court takes cognizance based on the principles of legitimate expectations that the intention was there and just a matter of title for it to have been completed.

For the interest of just, equity and conscience the Court directs that a Certificate of title deed be processed by the office of the Director of Land Adjudication & Settlement and Land Registration, Mombasa in the name of Shonda Community exclusively for purposes of the operation of the education institution.

36. Further to this, the other two (2) impugned issues are firstly, the status of the transferred school formerly managed by church and the issue of whether it has had a sponsor. Secondly, it is the issue of registration of the unaided school. In order to deal with these issues, the Honorable Court has assessed the facts and the specific provisions of the law. For instance Section 8 (1) of the Education Act, Cap. 211 states that:-

> " Where a transferred school was managed by a church or an organization of churches, and it is the wish of the community served by the school that the religious traditions of the school should be respected, the former manager shall be appointed by the local authority to serve as the sponsor to the school"

And the provisions of Section 15 (1) on the registration of unaided school. The provision of Section 15 (1) provides:-

> " Where application is made for the registration of an unaided school, the Minister shall cause the school to be provisionally registered for a period of eighteen (18) months, if he is satisfied that:-
>
> a. The establishment of the school is consistent with the needs of Kenya and the economical and efficient provision of public education; and
>
> b. The premises and accommodation are suitable and adequate, having regard to the number, ages and sex of the pupils who are to attend the school, and fulfil the prescribed minimum requirements of health and safety and confirm with any building regulations for the time being in force under any written law; and
>
> c. The manager is suitable and proper person to be the manager of the school.
>
> 2). If, at the end of the one year from the provisional registration of a school the Minister is satisfied that efficient and suitable instruction is being provided at the school, he may cause the school to be registered.

36. There is no dispute that on 26th January, 2007 it was held that St. John's First Baptist Primary School, Shonda, was a private non - profit making Institution founded in the year 1987 by the 2nd Respondent who opened a nursery school in Likoni before moving to a freehold Government land at a place known as Shonda. Accordingly, between the years 1987 and 1990 a Canadian Baptist Missionary sponsored the school and put up three (3) semi-permanent rooms which operated as Church and school respectively. In the course of time, a dispute arose and the school was closed down from the years 1990 to 1991. From the pleadings by the Appellant, the Shonda Community donated land and some portion was annexed purposely for the establishment of the school. The school was allocated Plot

No. 485. Arising from that time, and from the dispute on the land ownership and the management of the school, the Sponsors stopped funding.

37. There is no doubt that the school was registered on 8th May, 2003. The school known as St. John's First Baptist Primary School within Shika Adabu were issued with a Provisional Certificate of Registration bearing No. PE/2011/2003. The Certificate bearing the following remarks:-

> " This Provisional Registration certificate is valid for eighteen (18) months only in accordance with Section 15 (1) of the Education Act".

Certainly, and the Court fully concurs with the submission by the Learned Counsel for the Appellant that, this period has expired and there was no empirical evidence to demonstrate that the Respondents took any action to renew the provisional certificate of registration as required under the Provisions of Section 15 (2) of the Education Act. That was extremely careless, uncalled for and reckless on the part of the 1st and 2nd Respondents taking that this was such a mundane and important matter pertaining to and/or in relation with the education of children.

It follows therefore, from the deliberate and willful failure by the Respondents, the Honorable Court will not hesitate but proceed to penalize the management of the school for that glaring lapse of their statutory obligation on their part.

Nonetheless, the above stated anomaly is one that can be cured, rectified and regularized by law whatsoever with given time. In saying so, this Honorable Court has strongly relied on the Provisions of Sections 8, 15 and 60 (4) of the Registration of Unaided schools' regulations within the Education Act Cap 211.

For these reasons, the appeal by the Appellants succeeds on this point and certain reliefs will be granted thereof to back it up.

ISSUE NO. (b) Whether the Parties herein are entitled to the relief sought from both the filed appeal and the Cross Appeal hereof.

38. From the above detailed analysis, it is rather clear that the Land Adjudication Committee had good intentions to allocate the Shonda Community some parcel of land for purposes of establishing education institution. However, the only main shortcoming was the Committee failed to complete the process as founded under the provisions of Sections 7 to 28 of the *Land Adjudication Act* Cap 284. It's incumbent that the due process gets to be completed to the point of allocating the suit land to the Shonda Community and granting them with a Certificate of title deed as a "prima facie" conclusive evidence of ownership of the suit land.

39. Once the title will have been legally acquired, should they be willing and ready, the Honorable Court proposes that then there should be entered a contractual legal agreement relationship between the Community who would have been the registered land owners and conferred the indefeasible rights, title and interest on the suit land and proprietors of the St. John's Baptist School. This may be in form of a long term lease or joint partnership of some sort with clear terms and conditions stipulated therefore.

40. Furthermore, the Honorable Court fully concurs with the Respondents to the effect that all along there had never existed any formal contractual relationship or partnership of whatever form at all between them and the Appellants being the Shonda Community. None of it was never pleaded whatsoever. The Court while disagreeing with the finding from the Lower Court, and concurring with the assertions by the Learned Counsels for the Respondents, there was never established any partnership on the management or operation of the school between the Shonda Community and

the Respondents. Indeed, the Appellants never pleaded on the contractual relationships with the Respondents in their filed pleadings not the appeal herein. The Provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010 comes in to pay where parties are bound by their own pleadings. Instead, while filing their case before the Lower Court as the Plaintiff, among other reliefs, they sought for permanent injunctions orders. On this ground, this Court finds that the Learned Magistrate having been right to have denied them that right then. This relief would only have been granted had the Appellants tendered evidence indicating they had on a balance of probability proved that the Respondents had breached the contractual relationship between them and hence a demand on specific performance. Clearly, they were not entitled to the Permanent Injunction orders as held in the case of:- "Kenya Power & Lighting Co. Limited –Versus - Sheriff Molana Habib (2018) eKLR". Where the Court held that on the aspect of Permanent (perpetual) injunction is granted by Court upon merit of case after evidence in support of and against the claim has been tendered and one which fully determines the right of the Parties before the Court. This never happened.

41. Be that as it may, taking that contracts can be express or implied, it was unfair for the Respondents to have proceeded to use, occupy and garner all the profits from the suit land without causing any of it trickling down to the Appellants for all those years. In order to balance the scale of Justice, it is then just, fair, equitable and reasonable that the Appellant receive some portion of the finances in form of rental income for the use and occupation of the land for approximate ten (10) years from 8th May, 2003 when they acquired the Certificate of registration and the Respondents started using and occupying the suit land. Thus, the Court has made an estimation of a sum of Kenya Shillings thirty thousand Kshs. 30, 000.00/=) per month and hence Kenya Shillings Three Hundred and Sixty Thousand (Kshs. 360, 000.00/=) per year as the said rental income amounting to a total of Kenya Shillings Three Million Six Hundred Thousand (Kshs. 3, 600, 000.00/=) as adequate compensation.

42. Further, I find the Certificate of Registration for the school expired along while ago. From the eighteen (18) months from 8th May, 2003 under Section 15 (1) of Education Act. From the face value, the Court is not impressed by the fact that management has continued or purported to be running the institution of 250 pupils but illegally and clandestine way and manner. I wonder why the Ministry of Education had never closed the school to-date despite of having brought in the 3rd Defendant, the Ministry of Education sounds to be so helpless like a toothless barking dog. They are hereby reprimanded.

    Suffice it to say, the said Certificate should be regularized within the next six (6) months failure to which the school will stand closed automatically.

ISSUE NO. (c) Who will bear the costs of both the filed Appeal and the Cross Appeal.

43. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

    The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "Reids Heweet & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

44. Additionally, the cases of Rosemary Wambui – Versus – Ihururu Dairy Co – operatives Societies Limited (2014), eKLR, Cecelia Karuru Ngayu – Versus – Barclays Bank of Kenya & Another (2016), eKLR and the Supreme Court fortified this position in the cases of "Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

> " so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

45. Based on these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is that the Appellants and the 2nd Respondent have partially succeeded in establishing their appeal and Cross Appeal. Nonetheless, this being a case of public interest, it is just fair, equitable and reasonable that each party bears its own costs of the Appeal and the Cross Appeal.

E. Conclusion and Disposition

46. In the long run, and upon conducting an indepth analysis of the framed issues herein, this Honorable Court on the principles of the preponderance of probability, makes the following findings on the Appeal and the Cross Appeal. Specifically: -

    a. That the Appeal filed by the Appellants herein through the Memorandum of Appeal dated 5th March, 2019 be and is hereby partially successful to the extent that there was good intention and hence legitimate expectation created to confirm all that parcel of land for the Shonda Committee land was meant for the establishment of an education institution within the area of Shika Adabu by the Land Adjudication Committee.

    b. That an order be and is hereby made directing the District Land Adjudication & Settlement Officer (DLAO) and the Land Registrar, Mombasa to issue the Shonda Community with a Certificate of Title for Plot No. 485 as per the provisions of Sections 7 to 28 of the *Land Adjudication Act* Cap 284 and Sections 24 and 25 of the *Land Registration Act*, No. 3 of 2012 within the next One hundred and twenty (120) days from the date of the delivery of this Judgment.

    c. That an order be and is hereby made for the Cross Appeal by the 1st and 2nd Respondents be and is hereby allowed to the extent that there be a declaration that the 2nd Respondent be the legal proprietor of the St. John Baptist Primary School situated on the suit land.

    d. That an order be and is hereby made for the Proprietor of the St. John Baptist School condemned to pay a sum of Kenya Shillings Three Million Six Hundred Thousand (Kshs. 3, 600, 000.00) for continuous use of the Land belonging to the Community.

    e. That an order be and is hereby made pursuant to the Provisions of Section 15 (2) of the Education Act Cap 211 and upon fulfillment of all the pre-requisite conditions by the Ministry of Education to issue the Proprietor of St. John's Baptist School with a full-fledged Certificate of Registration within the next six (6) months from the date of this Judgment.

f. That the Appellant and the Respondents to be at liberty to explore any mutual ways to create a contractual relationship in future whether leasehold or partnership deed as they may desire on the operation of the school.

g. That each Party to bear their own costs.

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2023.

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the Presence of:-

(a) M/s Yumnah, the Court Assistant.

(b) Mr. Maithya Advocate holding brief for Mr. Opulu Advocate for the Appellants;

(c) Mr. Mr. Otieno holding brief for Mr. Wameyo Advocate for the Respondents