

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. E020 OF 2023**

**ETHICS AND ANTI-CORRUPTION**

**COMMISSION-----PLAINTIFF/APPLICANT**

**VERSUS**

**EDWIN KIPCHIRCHIR TUM**

*(Administrator of the Estate of*

**NATHANIEL KIPKORIR TUM)-----1<sup>ST</sup> DEFENDANT/APPLICANT**

**WILSON GACHANJA-----2<sup>ND</sup> DEFENDANT/APPLICANT**

**AND**

**BOARD OF MANAGEMENT**

**KITALE SCHOOL PRIMARY-----1<sup>ST</sup> INTERESTED PARTY**

**HON. ATTORNEY GENERAL-----2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. What is before the court is the application dated **18/12/2023**.  
The applicant seeks a temporary injunction to bar and restrain the 1<sup>st</sup> respondent, his agents, servants, employees or assigns from alienating, selling, charging or further charging, leasing, developing, subdividing, transferring, wasting, disposing of or in any other manner dealing with **Kitale Municipality Block 12/236**, formerly **Block 12/132**, pending hearing and determination of this suit.
2. The second prayer is for the 1<sup>st</sup> respondent to be restrained from controlling and or managing the developments and businesses

on the suit property and leave be granted to the applicant to appoint a receiver for the control and management of the said developments, including rental houses, a petrol station, a car wash, a supermarket, a warehouse and any other development situated on the suit property, pending hearing and determination of the suit.

3. Thirdly, the court is asked to restrain the 1<sup>st</sup> respondent from demanding, collecting and or receiving monthly rental income, and leave be granted for the opening of a joint interest earning account in the name of the applicant and the 1<sup>st</sup> respondent to receive such deposits.
4. The application is based on the grounds of its face and in a supporting affidavit sworn by Leonard Muigai, a Senior Investigator of the applicant on **18/12/2023**. It is deposed that following investigations by a team regarding alleged illegal hiving off and allocation of public land planned and alienated for educational purposes, it has been established that the suit land had been reserved for educational purposes, public use and assigned to Kitale School but was irregularly, fraudulently and illegally hived off and allocated to Nathaniel Kipkorir Tum, as per PDP map attached as annexure **LM-1**.
5. The applicant deposes that the investigation established the following facts; that the school was established by the Christian

Missionary Society (CMS) in **1929** for the children of white settlers from Western Kenya, Eastern Uganda and after independence, the CMS, now Anglican Church of Kenya (ACK), surrendered the school to the government of Kenya but continued as a sponsor, including as holding the position of the Chairman of the Board of Governors (BoG). It is deposed that the school comprises a nursery, primary and girls' secondary school section, with a current population of **3,000** learners and has boarding facilities for both primary and secondary school students. The applicant avers that as at **1973**, the revised development plan for Kitale Municipality indicated that the school occupied the entire area between the former Kitale-Webuye Road and the Kitale Club, measuring approximately **55 Ha**.

6. With the said approved development plan and acreage, the applicant deposes that the designated and existing infrastructure of the school includes such amenities as dormitories, sewer system, boarding facilities, playing fields and the remainder being utilized as a school farm. Attached to the affidavit is a copy of a letter addressed to the school dated **14/9/1993**, town plan approved development Plan **No. 9** for Kitale Municipality, copies of the BoG minutes reporting discussions on farming activities.

7. The applicant deposes that in the period between **1983-1987**, Nathaniel K. Tum was the chairman of the PTA of the school and by his position, he was periodically invited to the school BoG meetings and on other occasion, attended joint PTA and BoG meetings, where matters regarding development and management of the school were discussed and resolutions made as per annexed copies of minutes marked as **LM-4(b)**.
8. The applicant deposes that Nathaniel K. Tum being an active member thereof, was privy to all details related to the school land, such as the due designated open space under its occupation as per the approved development plan, including the securing a title and having the school property vested in a public trustee as was required under the then existing Education Act.
9. According to the applicant, following these meetings, vide a letter dated **7/6/1983**, **7/10/1993** and **26/5/1994** to the Town Clerk, Kitale Municipality, the school applied for a letter of allotment and a title deed for the school land, a copy herein attached as **LM-5 (a)** and **(b)**. The applicant deposes that the school, being desirous to occupy and utilize the “open space” and for purposes of expansion, also made requests to the Commissioner of Lands for the allocation of the open space to itself through a letter dated **15/7/1988**, copies attached as **LM-6(a)** and **(b)**. The applicant deposes that while the school was

awaiting a response from the 2<sup>nd</sup> respondent and a title as requested vide letters of **1983, 1985 and 1993**, Nathaniel K. Tum, privy to the fact that the school was yet to secure a title for its land connived with the 2<sup>nd</sup> respondent to hive off a portion of the school land, created the requisite plans and approvals and obtained a title for the portion hived off.

10. Again, the applicant deposes that following an application by Nathaniel K. Tum, the 2<sup>nd</sup> respondent acted *ultra vires* his powers, causing the issuance of a letter of allotment for the area described as UNS. Hotel Site Kitale Municipality measuring **4 Ha** for a term of **99** years, with effect from **1/9/1994** as per a copy marked **LM-7(a)**.
11. The applicant deposes that in complete disregard of the existing alienation and public use, the 2<sup>nd</sup> respondent cause to be issued the said letter of allotment without an approved PDP, but instead went ahead to attach an unapproved PDP for a triangular shaped plot whose user was indicated as residential going by a copy annexed as **LM-7(b)**, which allotment letter Nathaniel Tum, while aware it formed part of the school proceeded to accept on **17/10/1994**, paid for the requisite charges and was issued with a receipt both attached as **LM-8(a)** and **(b)**.

12. The applicant deposes that on that basis, the 2<sup>nd</sup> second instructed the Director of Survey to survey the plot as per a letter dated **21/10/1994** attached as annexure **LM-9**. While aware of the flawed process, the applicant avers that in an attempt to sanctify the allocation, the 2<sup>nd</sup> respondent directed the District Physical Planner Kitale, vide letter dated **2/11/1994**, to prepare a PDP for the site to facilitate survey, a copy is annexed as **LM-10**, who in complete disregard of the Kitale Municipality Development Plan, which is the foundational document for planning, prepared PDP No. **KTL.10.94.111**, as if the site was unalienated, hiving off a portion of the school measuring **4 Ha** to match the acreage in the letter of allotment, a copy of the PDP attached as annexure **LM-11**.
13. The applicant deposes that the said PDP was for a different site than the one demarcated in the unapproved PDP attached to the letter of allotment, but was nevertheless forwarded to the Commissioner of Lands vide a letter dated **9/11/1994** and annexed as **LM-12**. The applicant deposes that before the 2<sup>nd</sup> respondent had approved the PDP as per the procedure, the Director of Surveys amended the Registry Index Map(RIM), as per the Survey Plan **No. F/R 268/14**, to reflect Parcel **No. 132** measuring **4000 Ha** and forwarded the amended RIM to the

Commissioner of Lands vide letter dated **10/11/1994**, attached as annexure **LM-13**.

14. The applicant deposes that soon thereafter, ensued the registration process in favour of Nathaniel K. Tum, with the preparation and execution by the 2<sup>nd</sup> respondent of the lease dated **30/11/1994**, that was forwarded to the District Land Registrar on **2/12/1994** for registration, copies annexed as **LM-14(a)** and **(b)**.
15. It is deposed that the lease was registered on **6/12/1994** and a certificate of lease was issued the same day for **Kitale Municipality Block 12/132** to Nathaniel K. Tum and a letter written to the 2<sup>nd</sup> respondent, by the District Land Registrar annexed as **LM-15 (a)** and **(b)**. The applicant deposes that in contravention of the applicable Physical Planning Act, the registration was concluded before the PDP No. **KTL 10.94.111**, for registration of the parcel was approved by the 2<sup>nd</sup> respondent, for the approval only came on **23/12/1994**, which was almost two weeks later, as per a letter forwarding the same to the District Physical Planner dated **27/1/1995**, annexed as **LM-16**.
16. The applicant deposes that the school, upon realizing that a portion of its land had been irregularly, illegally and fraudulently allocated to the 1<sup>st</sup> respondent, embarked on a



spirited effort to save the hived off portion as per unanswered correspondences to various authorities, including the 2<sup>nd</sup> respondent, attached as **LM-17**.

17. Similarly, the applicant deposes that it was until **2/7/1999** that the school was issued with an allotment letter for two sites after the construction of the Kitale Webuye Road, which cut across a tip of the school, as per annexed letter of allotment and an approved PDP No. 249 approved on **29/1/1998** for **43.33 Ha** excluding the deceased's portion, which PDP varies with the one of the **Kitale Municipality of 1974**, marked as **LM-18** and **19**. The applicant deposes that the school accepted the allotment letter and complied with its conditions as per the letter dated **21/7/1999**, annexed as **LM-20**, though it continued to pursue the hived off portion.
18. The applicant deposes that the registration process of the portion allotted to the school, however, stalled as its survey could not be concluded, since the illegally hived off portion had expanded to the school's infrastructure, including the dining hall, dormitories and the sewer system. The applicant avers that in an attempt to make it illegal, severable, palatable, or less blatant, the Department of Survey on **26/9/2007** called for the surrender and rectification of certificates of lease of Nathaniel K. Tum lease, to leave out the school's visible infrastructures, a



copy annexed as **LM-21**, which surrender only yielded approximately **0.4 Ha**, but the sewer system remained in **Block 12/132**.

19. Following the re-survey, the applicant deposes that **Kitale Municipality Block 12/132** was re-registered as **Kitale Municipality Block 12/236** and a certificate of lease issued to Nathaniel K. Tum, as per the annexed white card marked as **LM-22**. Equally, the applicant deposes that the school was subsequently issued with title **Kitale Municipality Block 12/229** on **14/6/2010** for **41.28 Ha**, as per a certificate of lease marked as **LM-23**. The applicant deposes that attempts to resolve the school's persistent complaints have been met with lopsided decisions by the same public officers that were responsible for legitimizing the illegal excision and reducing it to a mere boundary dispute as per letter dated **8/6/2011** and a report by a Land Technical Committee, attached as annexures **LM- 24** and **25**.
20. Further, the applicant deposes that the school instituted **JR Application No. 38 of 2011, Republic -vs- Commissioner of Land & Others Nathaniel K.Tum; Exparte BoG Kitale School** dated **19/7/2011**, seeking the cancellation of **Kitale Municipality Block 12/ 236**, that was dismissed on a technicality on the question of want of form, a copy is attached as **LM-26**.

21. The applicant deposes that it contends that the PDP No. 294 approved in 1998, the issuance of the letter of allotment, drawing of the PDP No.KTL.10.94.111 No. 229, allotment letter thereof, resurvey, and the re-registration were fraudulent, illegal, null and void, and *ultra vires* the powers of the 2<sup>nd</sup> respondent.
22. It is deposed that the 1<sup>st</sup> respondent has put the suit property in commercial use, though the rental houses, petrol station, car wash, supermarket, warehouse, among other income generating business activities which are incompatible with the intended user as per photographs attached as annexure LM-27, where he has been demanding, receiving and or collecting income, and was apprehensive that such continuation may frustrate any decree that may be passed by the court, hence it is in the public intent to prohibit such activities in the interim, to obviate dissipation of the assets and or rendering these proceedings nugatory altogether.
23. The application was opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn by Edwin Kipchirchir Tum, sworn on 12/1/2024. It is deposed that the claim advanced by the applicant is not only time-barred but also *res judicata*, given the decree of both the High Court and the Court of Appeal attached as annexure marked EKT-2, which affirmed the suit property as

legally acquired. The 1<sup>st</sup> respondent relies on the affidavit of his late father, sworn on **7/11/2011**, on how he had acquired the suit property.

- 24.** The 1<sup>st</sup> respondent deposes that the plaint dated **18/12/2023** attempts to relitigate all the matters which, in pages **14, 15, 16, 17, 18, 20, and 24** of the High Court ruling were affirmed by the Court of Appeal judgment; otherwise, there is an end to litigation.
- 25.** According to the 1<sup>st</sup> respondent, the applicant has not demonstrated irreparable loss, there are no plans to sell the suit property or the investments therein and the balance of convenience tilts in favour of not granting the orders sought, otherwise they would be injuries to the estate of the deceased, the orders sought are oppressive and unjustified due to the long occupation of **29** years, the suit is meritless and causing the estate to incur unnecessary legal costs. Further, the 1<sup>st</sup> respondent relied on an affidavit sworn on **12/1/2022**, in the application to strike out the suit, grounds dated **12/1/2024**, as well as a preliminary objection.
- 26.** The applicant relies on written submissions dated **24/6/2025**. It is submitted that **Section 34** of the Evidence Act should not be invoked to rely on the affidavit of Nathaniel K. Tum for its was in a previous suit and is inadmissible. The applicant submits that

because of the ruling delivered on 2/4/2025, issues of *res judicata* and time limitation are inconsequential.

27. The applicant submits that it has met the test for grant of temporary injunction as set out in *Giella -vs- Cassman Brown [1973] EA 358, Ethics & Anti-Corruption Commission -vs- Njuguna Macharia [2015] KEELC 660 (KLR), Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others [2016] eKLR, Mrao Ltd -vs- First American Bank (K) Ltd [2003] eKLR, Dina Management Ltd -vs- County Government of Mombasa & Others [2022] KESC 24 [KLR] (CIV), James Joram Nyaga & Another -vs- Attorney General & Another [2017] eKLR, Susan Waithera Kariuki & Others -vs- Town Clerk, City Council of Nairobi & Others [2013] eKLR, Ethics and Anti-Corruption Commission -vs- Stephen Kamau Githinji HC ACEC Suit No. 20 of 2016, and KCB Ltd & Another -vs- S.K. Macharia & Others [2008] eKLR.*
28. On the other hand, the 1<sup>st</sup> respondent relies on written submissions dated 26/6/2025. He submits that the applicant has not met the test in *Nguruman Ltd -vs- Nielsen Jan Bonde & Others [2014] eKLR, Mrao Ltd -vs- First American Bank of (K) Ltd (supra), Mibey -vs- Lomsor Enterprises & Others [2024] KEELC 3653 [KLR], Kwanza Estates Ltd -vs- Durban Bank (K) Ltd*

[2013] eKLR and Alice Awino Okello -vs- Trust Bank Ltd & Another LLR No. 625.

29. Further, the 1<sup>st</sup> respondent submits that Nathaniel K. Tum is the legitimate and registered owner of the suit land and would be against principles of natural justice to deprive his estate their constitutional right to property based on mere allegations. The 1<sup>st</sup> respondent also submits that the applicant will not suffer any irreparable loss since it does not claim to own the suit land.
30. Relying on **Section 63** of the Civil Procedure Act and **Order 41 Rule 1** of the Civil Procedure Rules, the 1<sup>st</sup> respondent submits that the applicant has not proved that the ends of justice will not be defeated unless a receiver is appointed. He also relies on Nasir Ibrahim Ali & Others -vs- Kamlesh M. D. Pattni & Another [1998] KECA 12 [KLR] and Unispan Ltd -vs- African Gas Oil Ltd [2014] KEHC 5863 [KLR].
31. A party seeking a temporary order of injunction has to meet the threshold set in Giella -vs- Cassman Brown (supra). The first step is to establish a *prima facie* case with a probability of success at the hearing. A *prima facie* case refers to a serious or a fair issue to be tried at the hearing. See American Cyanamid Co -vs- Ethicon Ltd [1975] UKHL 1. In Mrao Ltd -vs- First American Bank of (K) Ltd (supra), the court observed that a *prima facie* case is established if based on the material presented before court,

there is a conclusion that a right has been infringed by the opposite party, to call for an explanation or rebuttal from the opposite side.

- 32.** Irreparable damage or loss refers to one that cannot be measured in monetary terms. Speculative loss, fear, or apprehension is not enough. It must be real or apparent. Coming to the balance of convenience, it refers to the likely inconvenience to the applicant if no injunction is granted and the suit ultimately succeeds, compared to that which the respondent would suffer if an injunction is granted and the suit ultimately does not succeed. See *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai [2018] KEELC 2424 (KLR)*.
- 33.** The applicant invokes constitutional and statutory rights bestowed upon it to investigate, detect, protect and preserve public land, allegedly obtained or acquired through corrupt means. **Section 56A** of Anti-Corruption and Economic Crimes Act (ACECA), allows the appointment of a receiver for the management, control and preservation of the property for which he is appointed. The burden is on the applicant to make a case that the suit property was allegedly obtained through corrupt means and that if the orders are not granted at this stage to exercise receivership powers, there will be grave prejudice to the applicant and the outcome of the case.

34. In *Ethics and Anti-Corruption Commission -vs- Andrew Biketi Musuya t/a Mukuyu Petroleum Dealers; Salome Waleghwa & 4 others (Interested Parties) [2019] eKLR*, the court held that it is a delicate situation to draw a clear boundary at the interlocutory stage and one must act with restraint and extreme caution, not to hastily paralyze the operation of one's business in managing the impugned property, unless the defence put forth is extremely hopeless on the face of it.
35. The 1<sup>st</sup> defendant relies on a statement of defence dated 15/1/2024 denying the alleged illegal, fraudulent, unprocedural, and unlawful acquisition of the suit properties. The 1<sup>st</sup> defendant relies on the doctrine of res judicata and time limitation, terming the suit an abuse of the court process. In the replying affidavit the 1<sup>st</sup> defendant terms the reliefs sought as drastic, oppressive and out to unjustly cripple the estate of the deceased.
36. Section 63 of the Civil Procedure Act and Order 41 Rule 1 of the Civil Procedure Rules grant the court powers to appoint a receiver of any property that is equitable in nature to prevent the end of justice from being defeated, where it appears just and convenient to do so. In *Nasir Ibrahim Ali & Others -vs- Kamlesh M. D. Pattni (supra)*, the court held that to appoint a receiver for protection of the right or prevention of injury according to



the legal principles, is a discretionary power to be exercised under **Section 63(d)** of the Civil Procedure Act and **Order 40** of the Civil Procedure Rules, when circumstances so warrant.

37. In *Unispan Ltd -vs- African Gas Oil Ltd (supra)*, the court held that the decision as to whether to appoint a receiver or not depends on the circumstances of each case and more so, to avoid imminent danger and dissipation of assets. The court added that a strong case must be made out to warrant the interference of the court; otherwise, unless a clear case is made, the court will not deprive a person of his property.
38. In *Kenya Anti-Corruption Commission -vs- Stanley Mombo Amuti [2017] KEHC 1050 (KLR)*, the court observed that in a claim for civil recovery, determination is on the basis of the conduct concerning the property without the identification of any particular unlawful conduct.
39. The court also held that the burden of proof of the existence of a fact is on the person who alleges its existence. In *Ethics & Anti-Corruption Commission -vs- Fastline Freight Forwarders Limited & 3 others [2017] KEHC 2438 (KLR)*, the court cited the book *Freezing & Search Orders* by Mark of S.W. Hoyle, that the drafter's intentions were to preserve the subject of investigation by issuing restraining orders. The applicant must therefore make

and disclose reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.

40. It is not contested that the late Nathaniel K. Tum was the chairman of the PTA of Kitale School. The 1<sup>st</sup> respondent in a witness statement filed before the court admits that the suit land has a fuel station, go down, a supermarket and residential apartments, all leased out and are now in full use. The witness admits that in **2007**, his late father was notified on encroachment on the 1<sup>st</sup> interested party's land, following which he surrendered his certificate of lease for cancellation and replacement to partake in the excision of the portion under encroachment.
41. In the replying affidavit, the 1<sup>st</sup> respondent has not denied the issues raised as to the irregularities, illegalities and procedural improprieties as identified in the affidavit of the applicant, challenging the process, legality, regularity and the title held by his late father, which according to the applicant, was and remains public land.
42. The duties of the applicant as defined in **Section 11(1) (j)** of the Ethics and Anti-Corruption Commission Act **Article 252**, and Chapter **6** of the Constitution to recover and protect public property, including to apply for its freezing or confiscation, punitive or disciplinary measures, have not been disputed by the

1<sup>st</sup> respondent. In *Kenya Anti-Corruption Commission v John Joel Ria & 17 others [2012] eKLR*, the court observed that the right of the applicant to prevent and detect economic crimes must be balanced with the fundamental rights of the respondent not to be deprived of any interest in the property. Prior notice of the need for preservatory orders was served upon the 1<sup>st</sup> respondent as early as 2023.

43. A party seeking prohibitory injunction and preservatory orders has to, on a balance of probability, persuade the court that the allegations he has pleaded in his case are more likely than not to be what took place as held in *William Kabogo Gitau -vs- George Thuo & Others [2010] 1KLR 526* and in *Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & another [2015] eKLR*. The applicant has expressed fear or apprehension that the suit properties may dissipate and render the suit nugatory. Nugatory aspect depends on whether or not what is sought to be prevented from happening is reversible, whether damage may compensate the aggrieved party in the absence of an order. See *Stanley Kangethe Kinyanjui -vs- Tony Keter & Others [2013] eKLR*.
44. Order 40 Rule (1) and (2) of the Civil Procedure Rules allow a court to issue preservatory orders. In *UBD (K) Bank Ltd -vs- Sylon Mututi Magotsi [2015] eKLR*, the court said that *mareva*

injunction is a freezing order in persona, restraining a person from dissipating an asset directly or indirectly. The court cited **Goode on Commercial Law 4<sup>th</sup> Edition page 1287**, that the governing principles are distinct from those of an ordinary interim injunction and the principles are *inter alia*, if the applicant has an arguable case based on a preexisting cause of action, the respondent has such assets and that there is real risk that those assets will dissipate in absence of an order. The court said that it can order for disclosure of documents or request further information to ascertain the location of the assets.

45. In ***Central Bank of Kenya -vs- Giro Commercial Bank Limited & 3 others [2019] eKLR***, the court held that *mareva* injunctions are discretionary and only apply in limited circumstances, owing to the likely impact on businesses. In ***International Air Transport Association & another -vs- Akarim Agencies Company Limited & 2 others [2014] eKLR***, the court observed that it must be proved on a balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally, as long as there is solid or actual evidence from which an inference may be drawn by the court.
46. The court held that courts must be vigilant to ensure that parties' assets are not frozen and their business lives impeded lightly and

that a *mareva* injunction relief should not be used to give plaintiffs security for the satisfaction of their judgments.

47. Looking at the totality of the pleadings, the supporting and replying affidavits, I think the applicant has demonstrated an arguable case and a risk that if the suit land is not preserved, there is a likelihood of dissipation. See *Kenya Anti-Corruption Commission -vs- First Mercantile Securities Corporation [2010] eKLR.*

48. The upshot is that I grant the following orders:

*a) A restraining order be and is hereby issued against the 1<sup>st</sup> respondent, his agents, servants, employees or assigns from alienating, selling, charging or further charging, leasing, developing, subdividing, transferring, wasting, disposing of or in any other manner dealing with Kitale Municipality Block 12/236, formerly Block 12/132, pending hearing and determination of the suit.*

*b) The 1<sup>st</sup> respondent, his agents, servants, employees or assigns from are hereby restrained from controlling and or managing the developments and businesses on the suit land.*

*c) Leave be and is hereby granted to the applicant within one month from the date hereof, to appoint a receiver for the control and management of the developments, including rental houses, a petrol station, a car wash, a supermarket, a warehouse and any other development situated on the suit land, pending hearing and determination of the suit.*

*d) The 1<sup>st</sup> respondent, his agents, servants, employees or assigns are further restrained from demanding, collecting and or receiving monthly rental income from the businesses and or developments on the suit land, with effect from 5<sup>th</sup> August, 2025.*

*e) Leave be and is hereby granted for the opening of a joint interest earning account in the names of the applicant and the 1<sup>st</sup> respondent, to receive monthly rental income from the developments and or businesses on the suit land, within one month from the date hereof.*

49. Order accordingly.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 9<sup>th</sup> day of July 2025.

In the presence of:

Court Assistant - Dennis

Owino for the 1<sup>st</sup> defendant present

Githinji for the Applicant absent

A.G. for the interested party absent



HON. C.K. NZILI  
JUDGE, ELC KITALE.