



**Kenya Anti-Corruption Commission v Mogoba (Environment & Land  
Case 123 of 2008) [2023] KEELC 18190 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18190 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 123 OF 2008**

**M SILA, J  
JUNE 20, 2023**

**BETWEEN**  
**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**  
**AND**  
**SAMWEL ROGERS MOGOBA ..... DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint filed on 24 September 2008. The case of the plaintiff is that through the provisions of the *Constitution*, the *Trust Land Act*, and Gazette Notice No 1937 of 31 May 1996, some land measuring 215.85 acres within Kisii Township was set apart as Trust Land and vested in the County Council of Gusii. It is pleaded that on 31 January 1995, the County Council of Gusii, became registered as proprietor of a portion thereof, measuring 5.86 Ha, which portion became registered as Kisii Municipality/Block 3/332, for purposes of a Community Development Centre. On 6 February 2005, the Council was issued with a Certificate of Lease. It is pleaded that sometimes in the same year, 1995, there were attempts to change use and subdivide this land parcel Kisii/Municipality Block 3/332 and allocate it to private individuals. That the attempt was brought to the attention of the Council, which queried that attempt, and the Commissioner of Lands stopped the process. It is pleaded further that sometimes between 1998 and 2000, the Commissioner of Lands, without reference to the Council, approved change of use and subdivision into 47 different plots of this land parcel Kisii Municipality/Block 3/332. The subdivisions were numbered Kisii Municipality/Block 3/420 – 467 and the Council registered as absolute proprietor. The plaintiff pleads that one of the subdivisions, being Kisii Municipality/Block 3/423 (hereinafter referred to as ‘the suit property’) was transferred to the defendant without resolution of the Council, and the defendant was issued with a Certificate of Lease on 22 October 2022. It is pleaded that the plaintiff paid no consideration nor any premium for this land and that there was no Council resolution to alienate it nor consent of the Minister of Local Government. It is the plaintiff’s case that this title of the defendant was fraudulently



acquired with the object of improperly alienating public property. The plaintiff asserts that the title of the defendant is void *ab initio*.

2. In this suit, the plaintiff seeks the following orders (slightly paraphrased for brevity):-
  - a. A declaration that the transfer and Certificate of Lease registered and issued to the defendant on 22 October 2022 for the land described as Kisii Municipality/Block 3/423 was ultra vires and fraudulent, thus illegal, null and void.
  - b. An order for cancellation of the title of the defendant over the suit property.
  - c. An order for vacant possession of the suit property.
  - d. A permanent injunction against the defendant to restrain him from the suit property or dealing with it.
  - e. Costs of the suit and interest.
3. Despite being served, the defendant did not enter appearance nor file defence. He also did not appear during the hearing of the suit. The plaintiff's evidence is therefore uncontroverted.
4. PW-1 was Wenslaus Wekesa Wanyama. He is a Principal Physical Planning Assistant in the Ministry of Lands and Physical Planning. He produced the Part Development Plan (PDP) prepared for the community development centre. The Community Centre stands on the land parcel Kisii Municipality/Block III/332 (parcel No 332). His evidence was that a PDP is used in issuance of title and that a title was issued to the Community Development Centre as the land is public land. He testified that once land was set apart for the Centre, it was not available for re-allocation. He testified that if this land parcel No 332 was subdivided to create the plot Kisii Municipality/Block 3/423, then this was unlawful. He testified that the land has permanent structures including a nursery school.
5. PW-2 was James Cheruiyot, who was the Kisii District Surveyor between 2005 – 2017. He had a witness statement which he relied on. In it, he stated that in the year 1991-1992, the land parcel No 332 was surveyed according to Survey Plan Folio Register No 223/30 and it measured 5.868 Ha. He stated that there was no record in their custody authorizing the then District Surveyor to carry out subdivision of this parcel of land, and if any subdivision was done, it was not done by the Kisii District Survey Office.
6. PW-3 was Dedan Ochieng Okwama. He is an investigator working with the Ethics and Anti-Corruption Commission (EACC). He also had a recorded statement which he relied on. He elaborated that his investigations revealed that the parcel No 332 was reserved as a Community Development Centre, that a title was processed and a Certificate of Lease issued on 6 February 1995 to Gusii County Council. A community centre was developed and he stated that currently there is a nursery school, a community hall, a home-craft training centre and houses for Council staff. He testified that this land was subdivided into the parcels No 420 – 467 with the suit property being the plot No. 423 out of this series. The subdivisions are shown in the Registry Index Map (RIM). He testified that the procedure for subdivision of this parcel No 332 was not followed as there was no approval from the Minister nor Minutes of the Council authorizing surrender of the original title for purposes of subdivision. He further testified that through a letter dated 15 December 1998, the Permanent Secretary Local Authorities wrote to the Clerk of the Gusii County Council authorizing sale of part of the parcel No 332 measuring 4.5 acres. He testified that the sale never took place but what transpired was that in a meeting held on 24 May 1999, the Council authorized subdivision of the parcel No 332 and issued a list of 44 individuals to be allocated the land. The defendant is not in the list of these 44 individuals. He added that even then, this list of allottees was never sent to the Minister for approval and neither do the minutes of 24 May 1999 indicate the acreage that was to be allotted. He continued that the Gusii



County Council requested for change of use and subdivision on 23 July 1999 but there is no record of this being approved. For the suit property, ie Plot No 423, he never came across any allotment letter or approved PDP but a lease was issued to the defendant.

7. With the above evidence, the plaintiff closed her case.
8. Ms Kamau for the plaintiff, filed submissions which I have considered before arriving at my decision.
9. I have evaluated the pleadings and the evidence. The case of the plaintiff is that the suit property was unlawfully carved out of the parcel No 332 which had been reserved for use as a community centre. The plaintiff's case is that the reservation was within PDP No KSI/37/89/10. I am not very sure about this PDP for whatever was provided as an exhibit by the plaintiff is not legible. I need to emphasize that it is critical that parties provide legible copies for court to appreciate the evidence being tendered. Be that as it may, I am not in doubt that there existed this parcel No 332 in name of the County Council of Gusii for I have seen the Green Card for it. It shows that Gusii County Council as having become registered as proprietor on 31 January 1995 measuring 5.868 Ha. It does appear that there was authority given by the Minister for Local Government to have 4.5 acres out of this land carved out and sold for purposes of defraying the debts of the Council. This is apparent from the letter dated 15 December 1998. That same letter provides that the properties are to be valued before sale and the sale was to be carried out through a tender process. I have seen minutes of the Gusii County Council authorizing subdivision of this parcel No 332 and a list of 44 allottees to be allotted the land. PW-2 did state that there was a survey plan No 223/30 which led to subdivision of the parcel No 332 although PW-3 referred to a survey plan No 303/66. I have looked at what is on record and again, it is barely legible and difficult to comprehend. I cannot even tell the folio and register number of the survey plan. I will not belabor the point about ensuring clear legible copies for I have already pointed this out before. It is not therefore very clear to me whether the whole of the parcel No 332 was subdivided or only 4.5 acres of it. The statement of Mr Okwama does mention that what was left was only 2.755 acres but I cannot vouch for that. I appreciate that part of the case of the plaintiff is that there is no PDP sanctioning approval of subdivision of parcel No 332 and no PDP was ever prepared for the suit property. It is also her case that the defendant was not in the list of allottees prepared by the Gusii County Council.
10. There are certainly gaps in the evidence of the plaintiff, but given that the defendant is not in the list of allottees to be allotted land, and there being no evidence of any allotment letter issued to the defendant, then I am persuaded that on a balance of probabilities, the plaintiff has demonstrated that the defendant was improperly allotted the suit land. It is on that basis that I order the cancellation of the title of the defendant to the land parcel Kisii Municipality/Block III/423. I further order that the title to this land parcel Kisii Municipality/Block III/423 reverts to the County Government of Kisii, the successor of the Gusii County Council. I also order the defendant to give vacant possession within 30 days of being served with this judgment and the defendant is thereafter permanently restrained from entering, utilizing or in any other way interfering and/or dealing with the suit land. The final issue is costs. They will follow the event and therefore the defendant to shoulder the costs of this suit.
11. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 20 DAY OF JUNE 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

