



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.59 OF 2020

IN THE MATTER OF NYALENDA/PANDPIER/KISUMU PRISON FARM/BLOCK NO. 10/102 NYALENDA MEASURING 64 ACRES

BEN O. OKWENDU.....1ST PLAINTIFF

OWIRA MESHACK OCHUODHO.....2ND PLAINTIFF

SYLAS OKWENGU.....3RD PLAINTIFF

MAURI E ODHIAMBO.....4TH PLAINTIFF

AZAEAL WIGWA.....5TH PLAINTIFF

LILIAN ATIENO AOKO.....6TH PLAINTIFF

MICAH BERBERT MAGAJIA.....7TH PLAINTIFF

ONDITI DAVID OMONDI.....8TH PLAINTIFF

(Suing for themselves and on behalf of the entire Nyalenda A, B and Pandpieri Community).

VERSUS

KENYA PRISON SERVICES.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

LAND REGISTRAR – KISUMU.....3RD DEFENDANT

JUDGEMENT

1. INTRODUCTION

A. Plaintiffs Case

Ben O. Okwendu, Owira Meshack Ochuodho, Sylas Okwengu, Mauri E Odhiambo, Azael Wigwa, Lilian Atieno Aoko, Micah Berbert Magajia and Onditi David Omondi (*hereinafter referred to as the Plaintiffs*) have come to this court against Kenya Prison Services, National Land Commission and Land Registrar – Kisumu (*hereinafter referred to as the Defendants*) praying for orders that this court be pleased to issue permanent orders of injunction restraining the defendants, their agents and/or persons acting under their authority from threatening/interfering with the plaintiffs quiet possession or/otherwise evicting them from the suit parcel.

Moreover, that this court be pleased to order the 2nd respondent to complete the adjudication process initiated in 1978 in respect of the demarcated 31 unregistered parcels being the 13 parcels of NYALENDA/A/1020, 1051-1054, 1056-1061, 1084 and 1230 and the further 18 parcels in respect of PANDPIERI/632, 634-641, 646-649, 651-653, 675 and 676 which were all allegedly combined to plot NYALENDA/A/1055 by the District Commissioner on 10/09/1982 without any objection proceedings.

That this court be pleased to order the 2nd respondent to initiate and complete the adjudication process initiated in 1978 in respect of the undemarcated portion of the suit parcel. The court be pleased to order the 3rd respondent to prepare the cadastral map in respect of the entire NYALENDA/PANDPIERI registration unit measuring about 64 acres and issue respective title deeds to the plaintiffs. This court be pleased to order for compensation for any portion of the suit land that may have been duly compulsorily acquired by the government. The plaintiffs claim General Damages for trespass. The plaintiff further prayed for costs of this suit.

The plaintiffs assert that they have filed this claim as a representative suit both for themselves and on behalf of the entire Nyalenda A, B and Pandpieri communities who have a historical claim in respect of the suit parcel and are asserting their fundamental right to ownership of private property as envisaged under Article 40 of the Constitution. That they are land owners, children, grandchildren and great grandchildren of the ancestral owners of the Nyalenda/Pandpieri area in Kisumu County who have inhabited the said lands from as early as during the pre-independence and pre-colonial period which fact was confirmed by elders some who have also unfortunately passed on but have been buried therein for instance Mr. Japheth Magajia Okwengu who died in 1992 at the age of 96 years old, Mr. Elisha Adamba Nyamena who died in 1985 at 82 years old and Mrs. Turphosa Amolo Onyango who died in 2005 at 87 years old.

The Plaintiffs' contend that the Government records captured the disputed land measuring 64 acres but part of the land measuring 26 acres were demarcated during land adjudication process in the years 1978 – 1982 and plot numbers subsequently captured in the adjudication record as envisaged under Sections 23 of the adjudication Act cap 284 Laws of Kenya.

That only about 26 acres was subjected to adjudication in 1978 owing to the fact that the lower part of the said land was affected by the flooding of the Uhuru swamp, Auji Stream and Bulu River which were full to capacity at the time whereas the remaining un adjudicated 38 acres is used by the plaintiffs for farming as each family have their own home-grown demarcations which have existed for times immemorial.

The plaintiffs contend that the plots measuring about 26 acres that were subjected to adjudication were demarcated into 31 unregistered parcels being the 13 parcels of **NYALENDA/A/1020, 1051-1054, 1056-1061, 1084 and 1230 and the further 18 parcels in respect of PANDPIERI/632, 634-641, 646-649, 651-653, 675 and 676.**

That there being no objection, objection proceedings or appeals to the Minister as envisaged under sections 26 and 29 of the Land Adjudication Act the plaintiffs have for years been awaiting the issue of title deeds in respect of their adjudicated parcels measuring about 26 acres which is the natural process that should have followed the closure of the Adjudication Registrar and opening of the new register under the repealed Registered Land Act Cap 300.

Further to that the plaintiffs have been patiently awaiting the adjudication process in respect of the remaining about 38 acres which they have all along been in possession of and using for their own economic benefit.

The residents of Nyalenda/Pandpieri have for years been unable to secure their title deeds in respect of their adjudicated numbers and visits to the department of lands proved fruitless as they were always informed that they could not secure searches as the relevant parcel file was treated under secrecy and the same kept under lock and key at the Land Registry.

The residents were however patient as in any case they have always been in possession of the suit parcels wherein they have homesteads which cover about 20 acres whereas about 44 acres is utilized for farming.

That sometimes in the year 2014 the residents heard rumours that their parcels actually belonged to the Department of Prisons-Kisumu and that the titles they were waiting for were a pipedream as the adjudication process they were relying on had been rendered null and void.

The residents therefore did numerous rounds at the land registry which was also compounded with public and political pressure and as a consequence they secured the Adjudication Record in respect of the suit parcels which shows the 31 parcels that were demarcated and numbers issued before the same was allegedly cancelled by the District Commissioner in 1982 and combined to G.K. PRISON FARM plot No. 1055 in NYALENDA 'A'

The location and ownership of this plot No. 1055 is questionable as the initial adjudication record acquired by the residents showed the same as registered in the names of a person unknown in the community by the names Martha Ayieko Ayoo but when they went for a certified copy of the register the same was now indicated as Gk-Reserved for Prison Farm (Government of Kenya).

Whereas the adjudicated suit parcels are freehold and are captured within the map Nyalenda 'B' Sheet 3, the so called Prisons Land Bblock 10/102 is over two kilometres away and falls within Milimani Estate so it is not practical to combine the plaintiff's parcels with the said property. A keen look at the map indicates an impractical scenario that attempts to create 44 acres in the narrow stretch of land that exists between plot numbers NYALENDA B/767, 768 on the one side and plot numbers NYALENDA B/757, 759, 760, 761, 762 AND 765 on the other hand.

That the plaintiffs took up the matter with the National Land Commission for purposes of investigating and addressing the historical injustice claim by registering a complaint dated 3/06/2014 on 12/06/14 for which they got an invitation dated 30/07/2018 to appear before the National Land Commission for a session on the 16/08/2018 at the Kisumu Social Hall.

In an interesting turn of events, the plaintiffs were advised during the NLC session of 16/08/2018 that was headed by one Commissioner Mr. Samwel Tororei to file a claim relating to ancestral land injustice and they complied by filing the complaint HLC/HLI/297/2018 dated 5/09/2018 and field on 6/09/2018.

That based on the follow up by the plaintiffs, the National Land Commission did a letter dated 4/10/2018 wherein it informed the plaintiffs that investigations in respect of their claim was still on going after which they were to be granted audience which right to be heard is yet to

transpire to date.

However, in a twist of fate, as they were awaiting the outcome of the complaint that they lodged at the NLC, they were shocked to receive an eviction notice from the Kenya Prison Services on the 1/09/2020 which is already being effected gradually on the un-adjudicated portions of the suit parcel and with a threat that the process will extend to the entire farm as it were.

That the prison department has in fact initiated action on the eviction notice dated 6/01/2017 by destroying their farms, cutting down plants and trees and utilizing their already ploughed lands for purposes of planting and warning them that they shall proceed piecemeal until they forcefully get hold of the entire about 64 acres and destroy their properties already constructed in the parcel.

Entering into, evicting and destroying their properties in portions of the suit parcel while aware that the question of ownership is still pending determination by the National Land Commission is against the principle of fair administrative action.

The plaintiffs allege that the 1st defendant is colluding with the 2nd defendant to have ownership documents in respect of the suit property prepared in its favour notwithstanding the fact that both parties were aware of the pendency of a complaint lodged by the plaintiffs at the National Land Commission.

The plaintiffs contend that the 1st defendant is purporting to exert proprietary rights over the suit property while aware that they neither acquired the same or/otherwise paid the requisite compensation attendant to the acquisition of private property for public use.

That the National Land Commission has committed breaches by granting the 1st defendant the letter of allotment dated 9/03/2017 in respect of the suit parcel notwithstanding the pendency of two historical injustice complaints lodged by the plaintiffs on 12/06/2014 and 6/09/2018 which are still awaiting determination, and carrying out a biased investigation contrary to the rule of law as captured in its report dated 2/08/2017 and acting on the same to issue the 1st defendant with a letter of allotment without subjecting the same to cross examination from the plaintiffs during an open hearing. The plaintiffs claim further that the 1st defendant is in breach of the law by: -

1. Encouraging the 1st defendant by the letter dated 28/09/2017 to secure and use the suit parcel notwithstanding the pendency of the historical injustice claims lodged by the plaintiffs hence depriving them of their fundamental human rights to ownership of property.
2. Failing in its obligation as a state organ established under Article 67 (1) of the constitution and which pursuant to Article 10 (2) (a) and (b) of the constitution must inculcate the national values and principles of governance including the rule of law, human dignity, social justice and human rights.
3. Unlawfully sanctioning the purported cancellation of the Adjudication Register by the District Commissioner in 1982 which was done without an objection determined by an Adjudication Officer under section 26 or a subsequent appeal to the Minister under Section 29 of the adjudication Act cap 284 Laws of Kenya.
4. Failing to ensure the closure of the Adjudication Register in respect of the Nyalenda/Pandpieri Adjudication section as envisaged under section 29 (3) of the repealed Adjudication Act with the net effect that the residents are deprived of the opportunity to secure title deeds thereby depriving them of their right to private property as envisaged under article 40 of the constitution.
5. Failing to constitute the Nyalenda/Pandpieri area as a land registration unit with the various parcels therein numbered consecutively as envisaged under section 6 of the Land Registration Act Cap 300 of 2012.
6. Unlawfully sanctioning the creation of the property GK PRISON FARM (BLOCK NO. 10/102 KISUMU) measuring about 64 acres from what is essentially freehold property that had been subjected to adjudication between 1978-1982 in appreciation of the fact that the same is ancestral land.
7. Failing to give a responsive, prompt and effective determination of the plaintiff's complaint contrary to Article 232 (1) (c) of the constitution which imposes the said values and principles of public service upon all state organs.
8. Failing to properly exercise its powers under Section 6 (2) (a) of the NLC Act No. 5 of 2012 to gather relevant information including requisition of reports, records, documents or any information from any source or to compel their production to demonstrate acquisition of the suit parcel for public use and payments of compensation as envisaged under the repealed Land Acquisition Act.
9. Purporting to sanction the compulsory acquisition of the suit land (private property) without any demonstration of a gazette notice for acquisition of these parcels, no notification to the residents to secure their consent to the entry into the land by the prisons department to carry out a survey in May 2017, no gazette notice by the Commissioner of Lands of intention to compulsorily acquire the suit parcels, no gazette notice for enquiry on the affected persons before compensation was done or otherwise compensation to the affected one thousand families as envisaged under sections 3, 4, 6, 8 and 9 of the repealed Land Acquisition Act Cap 295 of the Laws of Kenya.
10. Failing in effectively carrying out its obligations under section 5(3) of the NLC Act No. 5 of 2012 which obliges it to ensure that all unregistered land within the Nyalenda/Pandpieri area is registered within ten years from the commencement of the said legislation.

When the matter came for hearing, Mr. Ben Odhiambo Okwengu prayed that the court adopts his statement, which prayer was allowed and further he testified that legal notices number 721 of 1961 and 751 of 1963 did not show the acreage of the land. The original owners were not

compensated. The plaintiffs are in possession of part of the of land. The plaintiffs are in possession of 26 acres whereas 36 acres is used or utilised by the prisons department.

On cross examination by M/s Orege, counsel for the 1st and 3rd defendants, the plaintiff stated that the lower part of land is fenced by the prisons department whereas the plaintiffs are in possession of the upper part. They are claiming the whole land. The land is theirs having been given by their grandfathers. They do not have documents.

PW2, Okeyo Luke Madondi relied on a valuation map prepared by himself. He is a registered valuer and an immediate former chairman of ASK Western Branch. He is also a registered estate agent. He refers to the suit parcel as Kisumu Municipality Block 10./102. He valued the property as Kshs 448,000,000. On cross examination by the Attorney general, he states that he valued the whole land measuring 64 acres.

(B) Defendants Case

The 1st Defendant's case is that Kisumu Municipality/Block 10/102 suit property herein measures 25.1730Ha and not 26 Acres as stated by the Plaintiff in its plaint. The 1st defendant denies the allegation that the suit property is owned by the plaintiffs.

The 1st Defendant states that if indeed the plaintiffs were allocated parcels as pleaded in their plaint, the same was done irregularly and/or illegally. That it is true that the suit property as per the register at the lands office is the property of Kenya prison. The defendants admit that the plaintiffs lodged a complaint with the 2nd defendant herein. That the complaint was adjudicated on by the 2nd defendant herein and dismissed the claim as the land was reserved as prisons land and therefore not available for allocation.

That the issue of Historical Injustices raised by the plaintiff has already been adjudicated on by the National Land Commission, the 2nd defendant. The 2nd Defendant is a quasi-judicial with the equal status of a High Court and its decisions are binding. That the plaintiffs ought to file a Judicial Review or file an Appeal.

The Defendants called Leonard Ogutu Odhiambo who stated that he is currently employed at the state Department of Correctional Services as a Surveyor. He has been working for the 1st Defendant for the last fourteen (14) years. That his responsibilities include in-charge of survey of all prison land. Keeping and retrieving all the land records for all prison land in the Republic of Kenya. That he is a registered surveyor with the Institute of Surveyors of Kenya (ISK) and he is familiar with the matter subject of the dispute herein. He stated that public land is normally set aside through Gazette and Legal Notices. The suit property herein was surveyed back in 1976 and registered as KISUMU BLOCK 10 parcel No. 102 (GL). That the land was set aside as government land through Legal Notice No. 721 of 1961 and Legal Notice No. 751 of 1963 under the utilization of Kenya Prisons Service for cultivation of food products for the inmates.

Further, Kenya prisons was allocated the suit land vide allotment letter reference No. 209163xxxA/69 of an area measuring approximately 25.173 hectares which letter is part of their documents and Registry Index map (RIM) which was developed in 1976 with the land clearly marked as Government Land (G.L).

The irregular/illegal alienation of public land became rampant in the 1990's. The Government subsequently issued a directive through a Ministerial Circular No. 16/2005 which directed all Government Institutions and Departments to identify and recover illegally allocated public land. The Prisons Department is implementing this directive with notable achievements in revoking illegal titles, recovering lost land, surveying and processing titles.

KISUMU BLOCK 10 parcel no. 102 (G.L) is also registered at the Registrar of Lands as Government Land as it has never been deregistered nor degazetted for it to be allocated to any individuals or community.

On cross examination by Mr. Amondi, learned counsel for the plaintiffs, he states that the determination by the National Land Commission was made on 7/2/2019 and the decision had not been gazetted. That he is not aware if the decision has been gazetted nor the plaintiffs not been served with the decision. He states that the subject land measures 64 acres and that the plaintiffs occupy 10 acres and not 34 acres. He did not have a survey report. That the documents filed by plaintiffs especially the adjudication record do not tally. The land in dispute is marked and has a fixed boundary. The Government fixed its land in 1930. There is no degazetment. The land is government land.

2. ANALYSIS AND DETERMINATION

I have carefully considered the rival submissions filed the advocates for the plaintiff and the honourable Attorney General of the republic of Kenya and do appreciate their able research especially on the historical background to our land laws.

To begin with, the first issue for determination is whether the land in dispute is public land, private land or community land.

Article 61(1) of The constitution of Kenya 2010 provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Sub Article (2) provides that Land in Kenya is classified as public, community or private. Article 62 of the constitution of Kenya provides for public Land as follows: - 1) Public land is--

(a) land which at the effective date was un-alienated 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.

On the other hand Article 64 of the constitution of Kenya provide for the private land thus

Private land consists 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.

I do find that the land in dispute was demarcated in 1930 as the prison shamba as shown in the survey of the proposed Kisumu boundaries and airport reserve plan completed on the 2nd April 1930. The plan showed the prison shamba under the co- ordinates **P.S.1, P.S.2, P.S.3, P.S.4 and P.S.5** and was to be included in the township reserve. I have looked at the rough demarcation plan of the proposed revised boundary of the Kisumu Township reserve of the portion of LR NO 1148 when Kisumu Township reserve was in the administrative district of Kisumu –Londiani and do find that the land in dispute was reserved for the prisons department in 1930. The plan is registered as office copy no 29659. Currently, the land is registered under the regime of leasehold.

The historical facts herein are that on 13/12/1961, the Permanent Secretary for defence in exercise of the powers conferred upon him by Section 3 of the Prisons ordinance and delegated to the Permanent Secretary for defence, the P.S defence declared the buildings specified in the first column and situated in the respective districts specified in the second column to be prisons under the provisions of the ordinance. The declaration referred to the prison building at Kisumu and the remand prisons buildings at Kisumu.

In the legal notice No. 751 and Kenya order in council of 1965 (LN 245 of 1963), In the exercise of the powers conferred by Section 11 of the Kenya order in council 1963, and all the provisions thereunto enabling him, the Governor of Kenya made regulations cited as the Kenya (Designated land) Regulations 1963 that came into operation on 1/6/1963, the land disclosed as the Prisons building at Kisumu in Central Nyanza and the Remand Prisons buildings at Kisumu was designated as land that vested in the Governor on behalf of her majesty in the right of the Government of Kenya under the provision of section 195 (2) of the constitution. The evidence by DW1 was clear that the land disclosed in the gazette notice is to the land occupied by the plaintiffs. This court finds that the suit property having vested in Government was not available for adjudication. The property having vested in the Government became Government land that could not have been alienated for private use. I have looked at the survey plan of 2nd April 1930 which clearly shows the Parcel No. 102 being the Prison Shamba that was to be included in the Township reserve. In conclusion, I do find that the land in dispute belongs to the Government of Kenya, Department of Prisons and not available for allocation to the plaintiffs.

In **James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] eKLR**, though the facts are not similar to this case

but the ratio decidendi was that public land could not be allocated for private purposes and to an individual, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.

The land in dispute is already alienated for public utilities and has prison farm and therefore nobody has authority in law to convert it to private land and allocate through adjudication to individuals.

The second issue for determination is whether the parcel of land was subject to adjudication process. Having found that the parcel of land in dispute was reserved for the prisons department in the 1930's and gazetted as prisons land after independence the same was not available for adjudication. Land adjudication is a process of ascertaining land rights to benefit an individual and the same cannot be ascertained in respect of land reserved for the government. The plaintiffs did not have any rights in the land to be ascertained and therefore any purported process of adjudication was unlawful.

Though the defendant has demonstrated the mode of alienation of the suit property through maps and gazette notices, the defendant went further and obtained a lease for the suit property. Though the same appears irregular, it does not affect the rights of the 1st defendant over the property in dispute.

Plaintiffs are not entitled to compensation as the property was not compulsorily acquired but was vested in Government of Kenya by legal notice No. 751 and Kenya order in council of 1965 (LN 245 of 1963) and pursuant to an allocation in the 1930's. In conclusion, I do find the plaintiffs' suit has no merit and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE