



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 40 OF 2012**

LEAH MAGOMA ONGAI ..... PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL ..... DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 6<sup>th</sup> February 2012 seeking the following reliefs:
  - i. **A declaration that the plaintiff is the legitimate and/or lawful owner of LR No. Kisii Municipality/Block III/294.**
  - ii. **An order for the eviction of the defendant more particularly Forest Department from LR No. Kisii Municipality/Block III/294.**
  - iii. **A permanent injunction restraining the defendant more particularly the Forest Department from entering, trespassing on, building on, interfering with and/ or in any other manner whatsoever dealing with LR No. Kisii Municipality/Block III/294.**
  - iv. **General damages for trespass.**
  - v. **Costs of the suit.**
  - vi. **Such further and/or other relief the court may deem fit and expedient to grant.**

The defendant was sued in a representative capacity on behalf of the Government of Kenya more particularly, the District Forest Officer, Central Kisii District. I must say at the outset that it is not clear to me why the Attorney General was sued on behalf of the District Forest Officer, Central Kisii District. The District Forest Officer is an employee of Kenya Forest Service which is a State Corporation established under the Forests Act, 2005. Section 3 of the Forests Act, 2005 provides that Kenya Forest Service is a body corporate with perpetual succession and common seal and is capable of suing and being sued. It was not in order therefore to sue the Attorney General on behalf of the District Forest Officer, Central Kisii District. I will revert to this issue later in this judgment. In her plaint dated 6<sup>th</sup> February 2012, the plaintiff averred that she is and was at all material times the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block III/294** (hereinafter referred to as “**the suit property**”).

2. The plaintiff averred that the suit property was allocated to her by the Commissioner of Lands through a letter of allotment dated 19<sup>th</sup> September 1986. The plaintiff averred that following the said allotment, the suit property was leased to her for a period of 99 years with effect from 1<sup>st</sup> October 1986 and a certificate of lease issued to her on 25<sup>th</sup> October, 2001. The plaintiff averred that, sometimes in the years 2010/2011, the department of forestry without the permission of the plaintiff or lawful cause entered the suit property, established thereon a tree nursery and/or

seedling multiplication centre and also put up temporary structures thereon. The plaintiff averred that despite her protest, the department of forestry has continued defiantly and forcibly to establish extensive developments on the suit property which action is bound to deny the plaintiff her proprietary rights over the suit property. The plaintiff's claim against the defendant was defended. In its statement of defence dated 26<sup>th</sup> April 2012 and filed in court on 2<sup>nd</sup> May 2012, the defendant denied that the plaintiff is the registered proprietor of the suit property and that the department of forestry has trespassed thereon. The defendant contended that the suit property is owned by the Government of Kenya and that the department of forestry is lawfully in occupation thereof. The defendant denied further that the plaintiff has suffered any loss or damage.

3. When the suit came up for hearing, the plaintiff gave evidence and called no witness. In her evidence, the plaintiff told the court that she is the registered proprietor of the suit property the same having been allocated to her by the Commissioner of Lands in the year 1986. The plaintiff testified that after the suit property was allocated to her, the same was surveyed and she was shown the beacons marking the boundaries thereof. She was thereafter issued with a lease and a certificate of lease. The plaintiff produced in evidence as exhibits, a copy of a letter of allotment dated 19<sup>th</sup> September, 1986, a copy of the Part Development Plan (PDP) pursuant to which the said allotment was done, a copy of a lease in respect of the suit property dated 5<sup>th</sup> June, 2001 between the plaintiff and the Gusii County Council, a certificate of lease in her favour dated 25<sup>th</sup> October, 2001 and a certificate of official search on the title of the suit property dated 26<sup>th</sup> October, 2011. The plaintiff testified further that since she was issued with a title to the suit property, she has been paying land rent and rates to the Municipal Council of Kisii. She produced in evidence as exhibits copies of receipts issued to her by Kisii Municipal Council for the payments that she had made on account of the said rates and land rent. The plaintiff told the court that she has not developed the suit property and that a fence that she had put up around the property was demolished by the department of forestry.
4. The plaintiff testified that following the destruction of her fence as aforesaid, she lodged a complaint against the department of forestry with Kisii Municipal Council but nothing positive came out of the said complaint as the department of forestry continued with their occupation of the suit property. The plaintiff testified that the department of forestry declined to vacate the suit property even after a notice of intention to sue was served upon them and the Attorney General. The plaintiff denied that she acquired the suit property irregularly as claimed by the defendant. The plaintiff also denied that the suit property was reserved for the department of forestry. The plaintiff told the court that as a result of the said activities by the department of forestry on the suit property, she has suffered loss and damage for which she holds the defendant liable.
5. In cross-examination, the plaintiff told the court that she visited the suit property for the first time in the year 1987 and at the time, there was no building thereon. She told the court further that, when she put up a fence around the suit property, the same was brought down by people who had tree nurseries on the suit property. She denied that the suit property was occupied when the same was allocated to her. She could not however remember when she learnt for the first time that there were tree nurseries on the suit property. She told the court further that the suit property is now wholly occupied by the Kenya Forest Service. The defendant called one witness, Gilbert Imwaga Moge (DW1). DW1 is the Ecosystem Conservator of Forests, Kisii County. DW1 told the court that the department of forestry is using the suit property for tree nurseries. He testified that the department of forestry acquired the suit property through the District Commissioner, Kisii District who was then the chairman of the local land allocation committee. He told the court that; the department made an application to the District Commissioner, Kisii District to be allocated land. The said District Commissioner passed their application to the department of physical planning which confirmed that the land that is now comprised in the suit property was available. The department of forestry was thereafter given the go ahead to occupy and use the said parcel of land for tree nurseries and staff quarters. DW1 testified that they had applied to be allocated the suit property because it was situated at a location that was ideal for setting up tree nurseries due to its proximity to a river.
6. DW1 told the court that the suit property is a riparian land and that it is classified as such in the Kisii long term master plan. He told the court that it is from the tree nurseries on the suit property that they supply tree seedlings to the public within Kisii region. He told the court that when the suit property was allocated to the department of forestry, the same was not occupied and that it

was a public open space. He testified that the department of forestry has occupied the suit property since 1978 and that no claim has ever been made against the said department in respect thereof. DW1 produced in evidence as exhibits, a copy of a letter to the District Commissioner, Kisii District dated 26<sup>th</sup> October 1978 by the Forester Extension Services, Migori, a copy of a letter dated 24<sup>th</sup> November 1978 to the Clerk to the council, Kisii Town Council by the Divisional Forest Officer, Kisumu, a copy of a letter dated 29<sup>th</sup> November 1978 by the District Commissioner, Kisii District to the Forester Extension Services, Migori, a copy of a letter dated 22<sup>nd</sup> November 1978 by the physical planning officer, Nyanza province to the District Commissioner, Kisii District and a copy of Kisii Development Plan, 1971.

7. After the close of the defendant's case, the advocates for the parties agreed to make closing submissions in writing. The plaintiff's advocates filed their submissions on 23<sup>rd</sup> October 2014 while the defendant's advocates did so on 22<sup>nd</sup> October 2014. In their submission, the plaintiff's advocates submitted that the suit property was allocated to the plaintiff by the Commissioner of Lands which had the statutory and constitutional mandate to allocate public land to deserving persons. The plaintiff's advocates submitted that the plaintiff having met the conditions for the allotment and had the title for the suit property processed and issued in her name, she acquired exclusive rights and interest in the suit property which could only be defeated through a lawful and legitimate process.
8. The plaintiff's advocates submitted that the plaintiff's rights over the suit property are protected under Article 40 of the Constitution of Kenya, 2010 and sections 24, 25 and 26 of the Land Registration Act, 2012. The plaintiff submitted further that if at all the defendant had any interest in the land now comprised in the suit property; such right was negated and/or vitiated by the allocation of the property and the issuance of title in respect thereof to the plaintiff. The plaintiff's advocates submitted that in any event, the entity that purportedly alienated or allowed the defendant to occupy the suit property was not mandated by law to alienate public land. In the circumstances, the defendant could not acquire a valid title to the property. The plaintiff's advocates submitted that since the suit property is registered in the name of the plaintiff, the activities which are being carried thereon by the defendant without the permission of the plaintiff amount to trespass. The plaintiff's advocates submitted that the suit property ceased to be public land after it was alienated to the plaintiff.
9. In their submission in reply, the defendant's advocates submitted that the plaintiff has failed to prove her case on a balance of probability. The defendant's advocates submitted that the suit property was alienated to the department of forestry before the same was purportedly allocated to the plaintiff and the plaintiff issued with a title in respect thereof. The defendant's advocates submitted that the department of forestry is in occupation of the suit property lawfully having acquired the same through the laid down procedure. The defendant's advocates submitted that the department of forestry had peaceful occupation and use of the suit property after acquiring the same until the year 2011 when the plaintiff raised objection to their activities thereon. The defendant's advocates submitted that the suit property was reserved for public use. The defendant's advocates submitted further that the department of forestry has not trespassed on the suit property as claimed by the plaintiff.
10. I have considered the pleadings filed herein by the parties and the evidence tendered in support of the parties' respective cases. The advocates for the parties did not agree on the issues for determination by the court. In their written submissions, the plaintiff's advocates framed a total of five (5) issues while the defendant's advocates did not come up with any. From the pleadings and the evidence tendered by the parties, the following in my view are the issues that arise for determination in this suit:-
  - i. Whether the plaintiff is registered as the proprietor of the suit property?
  - ii. Whether the allocation and/or alienation of the suit property to the plaintiff was lawful?
  - iii. Whether the department of forestry on whose behalf the defendant herein has been sued has any rights and/or interest over the suit property?
  - iv. Whether the plaintiff is entitled to the reliefs sought against the defendant?

## 11. Issue No. I;

The plaintiff produced in evidence a copy of a certificate of lease for the suit property (P.exh.1) in her name and a certificate of official search (P.exh.2) on the title of the suit property. The two documents show that the suit property was registered in the name of the plaintiff on 25<sup>th</sup> October 2001 and that as at 26<sup>th</sup> October 2011 the property was still registered in the name of the plaintiff. Although the defendant denied that the plaintiff is the registered proprietor of the suit property, the defendant did not place any material or evidence before the court to challenge the evidence that was adduced by the plaintiff in proof of her registration as the proprietor of the suit property. It is my finding therefore that the plaintiff is registered as the owner of the suit property.

## 12. Issue No. II;

Before the enactment of the Constitution of Kenya 2010, the Kenyan legal regime classified land as, Government land, Trust land and Private land. Government land was regulated by the Government Lands Act, Cap. 280 Laws of Kenya (now repealed) while Trust Land was regulated under the Trust Land Act Cap. 288, Laws of Kenya. Under the Government Lands Act aforesaid, the President had power or authority to make grants or dispositions of any interests or estates in unalienated Government land. See, section 3 (a) of the Government Lands Act, Cap. 280 Laws of Kenya (now repealed). The power of the President to alienate Government land as aforesaid was delegated to the Commissioner of Lands in certain specific cases. The alienation of Government land by the President or the Commissioner of Lands was subject to the provisions of the Government Lands Act aforesaid. With regard to Trust land, Section 115 (1) of the repealed Constitution of Kenya vested all Trust land in County Councils in whose jurisdiction such land was situated.

13. Section 117 of the repealed Constitution of Kenya empowered the County Councils to set apart an area of Trust land within their jurisdiction for use and occupation by any person for a purpose which in the opinion of the County Council is likely to benefit the residents of the area. Section 13 of the Trust Land Act Cap. 288 Laws of Kenya provides for the setting apart of Trust land by County Councils for private use pursuant to the provisions of section 117 of the repealed Constitution of Kenya aforesaid. Section 53 of the Trust Land Act gave the Commissioner of Lands power to administer Trust land as an agent of the County Councils and in that regard, the Commissioner of Lands had power among others to execute on behalf of the County Councils, grants, leases, licences and other documents relating to Trust land. Section 13 (2) of the Trust Land Act provides that the setting apart of land by a county council must be approved by a resolution passed by a majority of the members of the council. Although the Commissioner of Lands had power to administer Trust land on behalf of the County Councils, section 53 (a) of the Trust Land Act denied it power to approve the setting apart of Trust land on behalf of the County Councils. In discharge of its duties under the Trust Land Act, the Commissioner of Lands was enjoined to act in accordance with the directions of the County Councils.

14. I have highlighted at length the procedure for alienating Government land and Trust land under the old legal regime so as to make it easy to analyze the arguments that were put forward herein by the plaintiff and the defendant in support of their respective claims over the suit property. Whereas the plaintiff claimed that the suit property was alienated to it by the Commissioner of Lands, the defendant has contended that the property was alienated to the department of forestry by the District Commissioner, Kisii District. It is not clear to me from the evidence and material on record whether the suit property was Government land or Trust land. The letter of allotment dated 19<sup>th</sup> September 1986 that was produced by the plaintiff in evidence as P.exh.1 was signed by the Commissioner of Lands. The letter leaves no doubt that the *un-surveyed plot E-Kisii town* that was allotted to the plaintiff was Government land. The opening paragraph of the letter states as follows:-

**“I have the honour to inform you that the Government (emphasis mine) hereby offers you a grant of the above plot shown edged in red on the attached plan .....**”

The said letter of allotment continued as follows:-

**“This letter of allotment is subject to and the grant will be made under the provisions**

**of the Government Lands Act (Cap 280 of the revised edition of the laws of Kenya) and title will be issued under the Registration of Titles Act, (Cap 281).”**

15. There is no evidence before me as to when the plaintiff accepted the terms and conditions of the said letter of allotment. The allotment was to be accepted within 30 days from the date of the letter of allotment. There is also no evidence before me that the plaintiff paid the charges that were set out in the said letter of allotment, the payment of which was a condition precedent to the grant of the suit property being perfected. However, it seems that after a lapse of 15 years from the date of the said letter of allotment, the plaintiff was issued with a lease dated 5<sup>th</sup> June 2001 over the suit property (P.exh.2) under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The lessor under this lease is County Council of Gusii while the lessee is the plaintiff. The plaintiff in her evidence did not make any attempt to lay any basis for this lease. There is no evidence of whatsoever nature linking the letter of allotment (P.exh. 1) and the lease dated 5<sup>th</sup> June 2001 (P.exh.2) in favour of the plaintiff.
16. As I have stated above, the plaintiff was allotted Government land under the Government Lands Act, Cap 280 Laws of Kenya (now repealed) and was to be issued with a title in the form of a grant under the Registration of Titles Act, Cap 281 of Laws of Kenya (now repealed). How a Government grant that was offered by the Government and presumably accepted by the plaintiff under the Government Lands Act pursuant to which the Government was to be the lessor changed to be a lease under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) under which Gusii County Council became the lessor is a mystery. As I have stated above, Government land was vested in the Government and the President and the Commissioner of Lands had power to alienate the same. Trust land on the other hand was vested in County Councils and the Commissioner of Lands had no power to alienate the same save as directed by the County Councils through a resolution. In the circumstances, I don't see how the letter of allotment dated 19<sup>th</sup> September 1986 under which the Commissioner of Lands offered to the plaintiff a grant of Government land could have given rise to the lease dated 5<sup>th</sup> June 2001 of Trust land that was vested in Gusii County Council.
17. The lease in favour of the plaintiff was executed by the Commissioner of Lands on behalf of County Council of Gusii. Whereas the Commissioner of Lands had power to execute a lease on behalf of the County Council of Gusii under section 53 of the Trust Land Act, Cap 288 Laws of Kenya, it could only do so after the land had been set apart by the County Council of Gusii for alienation to the plaintiff through a resolution by the said council. The Commissioner of Lands had no power to set apart Trust land and to purport to alienate the same on behalf of a County Council. I have no evidence before me that County Council of Gusii passed a resolution to set apart the suit property and to alienate the same to the plaintiff. I also have no evidence before me that all the procedures relating to such setting apart and alienation were followed. Section 13 (2) (b) of the Trust Land Act, Cap. 288 Laws of Kenya provides that where a county council intended to set apart land for alienation, the proposal for such setting apart had to be brought to the attention of the people of the area where the land sought to be set apart was situated and they had to be given a hearing and their representations taken into account during the consideration of the proposal.
18. In the case before me, there is evidence that the department of forestry was in occupation of the suit property as at the date when it was purportedly allotted to the plaintiff. If the suit property was Trust Land, before it was set apart by County Council of Gusii for allotment to the plaintiff assuming that the setting apart of the same was done by the said council, the department of forestry that was in occupation thereof ought to have been consulted and the views of its officers taken into account before the allotment was done pursuant to the provisions of section 13 (2) of the Trust Land Act aforesaid.
19. In view of what I have set out hereinabove, I am not satisfied on the evidence before me that the allocation of the suit property to the plaintiff by the Commissioner of Lands and the subsequent issuance of a lease to the plaintiff by County Council of Gusii were lawful. I am unable to connect the letter of allotment that was issued to the plaintiff by the Commissioner of Lands with the lease that was issued to the plaintiff by the County Council of Gusii. The lease to the plaintiff is also not backed by the necessary resolutions required under the Trust Land Act, Cap 288 Laws of Kenya. The three cases that have been cited by the plaintiff's advocates are all distinguishable

and as such are not supportive of the plaintiff's case. It is my finding therefore that the allocation of the suit property to the plaintiff and the subsequent issuance to her of a lease and certificate of lease over the same were irregular and unlawful.

**20. Issue No. III;**

As I have stated above, it is not clear to me from the evidence on record whether the suit property was Government land or Trust land before it was allocated to the plaintiff. The letter of allotment to the plaintiff indicated that the property was Government land while the lease issued to the plaintiff by Gusii County Council suggests that the suit property was Trust land. According to the evidence tendered by the defendant the department of forestry was granted permission by the Senior District Commissioner, Kisii District and the Provincial Physical Planning Officer, Nyanza Province to use the suit property as a site for tree nursery. The letter by the Provincial Physical Planning Officer Nyanza Province dated 22<sup>nd</sup> November 1978 (D.exh.4) that authorized the department of forestry through the District Commissioner, Kisii District to take over the land that is now comprised in the title of the suit property was copied to the town clerk, Kisii Town Council. The letter by the Senior District Commissioner, Kisii District dated 29<sup>th</sup> November 1978 (D.exh.3) by which the department of forestry was asked to move to the suit property and start using it as a tree nursery site was also copied to the Town Clerk, Kisii Town Council.

21. Following the exchanges of the foregoing correspondence, the department of forestry took possession of the suit property and has used it as a tree nursery site to date. The department of forestry's application for the suit property was made through a letter dated 24<sup>th</sup> November 1978 (D.exh.2) that was addressed to the clerk to the council, Kisii Town Council. This explains why the letters by the District Commissioner and Provincial Physical Planning Officer that authorized the department of forestry to use the suit property was copied to the Town Clerk, Kisii Town Council. There is no doubt from what I have stated above regarding the procedure of alienating Government Land and Trust land that the correspondence allowing the department of forestry to use the suit property as a tree nursery site did not confer a title over the suit property to the department of forestry. It cannot be said however that the department of forestry has not right or interest at all in the suit property. The suit property is being used for public purposes. The defendant produced in evidence an approved Development Plan for Kisii town that was published in 1971 (D.exh.5) in which the area where the suit property is situated was reserved for recreation and public purposes. The use for which the suit property has been put by the forestry department is therefore in line with the said development plan. DW1 told the court that he is not aware of any changes in the user of the area where the suit property is situated from public purposes and recreation to something else. When the department of forestry was given the permission to occupy the suit property, the department was under the Ministry of Environment and Natural Resources. It is now under Kenya Forest Service which is a State Corporation falling under the Ministry of Environment, Water and Natural Resources. As I have stated above, the department of forestry was given the go ahead to occupy the suit property by the District Commissioner, Kisii District, and the Physical Planning Officer Nyanza Province in the year 1978.

22. According to the evidence before me, the land was vacant when the department of forestry was given the permission to use it as tree nursery site. If the suit property was Government land then I am of the view that the two officers mentioned above being agents and/or servants of the Government of Kenya could lawfully give the department of forestry a temporary occupation license over the parcel of land now comprised in the suit property for use in accordance with the Kisii Town Development plan aforesaid. If the land was Trust land then I am of the view on the evidence before me that the department of forestry's occupation of the same was with the consent of Kisii Town Council. As I have stated above, the department of forestry's application to be allocated the land was made to Kisii Town Council and the letters that authorized the department of forestry to occupy the property was copied to the same council. There is no evidence that Kisii Town Council objected to the department of forestry's occupation of the suit property when it was given the go ahead to enter and occupy the same by the District Commissioner, Kisii District and the Provincial Physical Planning Officer, Nyanza Province in the year 1978. The letter dated 5<sup>th</sup> February, 2003 by the Town Clerk, Municipal Council of Kisii (P.exh.8) that was written following a complaint by the plaintiff cannot be termed as such objection.

23. From what I have set out hereinabove, I am of the opinion that the department of forestry has a

right of occupation over the suit property. This right could be determined by the Government of Kenya if the land was owned by the Government of Kenya or by the Kisii Town Council/County Council of Gusii if the land was trust land in the event that the land was required for another purpose. I have no evidence before me that the license that was given to the department of forestry to occupy the suit property was determined either by the Government of Kenya or the County Council of Gusii before the suit property was allocated to the plaintiff. I am not in agreement with the submission by the plaintiff's advocates that whatever right the department of forestry had on the suit property was rendered void upon the allocation of the suit property to the plaintiff. Even if it is assumed that the title that was acquired by the plaintiff over the suit property is valid, the same was issued under the Registered Land Act, Cap.300, Laws of Kenya. When the said title was issued to the plaintiff, the department of forestry from the evidence before me was in possession of the suit property. As I have stated above, there is no evidence that before the alienation of the suit property to the plaintiff was carried out, inquiries were made as regards the occupants of the said parcel of land and the use for which the land had been put. I am of the opinion that the department of forestry had an overriding interest over the suit property pursuant to the provisions of section 30 (g) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) to which the plaintiff's title was subject.

#### 24. Issue No. IV;

In view of the findings that I have made above, I am of the opinion that the plaintiff is not entitled to the reliefs sought in this suit. I am not satisfied that the procedure leading to the plaintiff's acquisition of title over the suit property was lawful and that the department of forestry is a trespasser on the suit property. I am unable therefore to make a declaration that the plaintiff is the legitimate and/or lawful owner of the suit property. The plaintiff has put reliance on the provisions of sections 24, 25 and 26 of the Land Registration Act, 2012 in support of her title over the suit property. The plaintiff has submitted that her registration as the leasehold proprietor of the suit property conferred upon her absolute ownership over the suit property together with all the rights and privileges associated with such ownership and that such rights and privileges can only be defeated on the ground of fraud or misrepresentation to which the plaintiff is proved to be a party or where the plaintiff's title is proved to have been acquired illegally, unprocedurally or through corrupt scheme. The plaintiff has contended that none of the factors set out above that would defeat her title to the suit property has been proved. In the case of **Millankumar Shah & 2 Others –vs- City Council of Nairobi & Another, Nairobi HCCC No. 1024 of 2005 (O.S) (unreported)**, Justices J. G Nyamu, R. V. P Wendo and M. J Anyara Emukule stated as follows with regard to section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) which provided that a certificate of title issued by the registrar to a proprietor shall not be subject to challenge except on the ground of fraud or misinterpretation to which he is proved to be a party;

**“It would be nigh impossible and an arduous task to prove with accuracy of mathematics that the first applicant or the representatives of the second and third applicants were parties to any fraud or misrepresentation under the said section 23. However the circumstances of consolidation of the road reserve with the third applicant's title No. LR No. 209/10543 are so clear as to show, with the accuracy of quick Silver in an altimeter, the climb from the shores of the Indian ocean to the peak of Mt. Kenya that either the first applicant or the representatives of the second and third applicants had everything to do with the illegal acquisition and consolidation of the road reserve with the title LR No. 209/10543, the property of the third applicant.”**

25. I would say that having regard to the circumstances under which the plaintiff acquired title to the suit property which was being used for public purposes, it cannot be ruled out that the plaintiff was privy to the irregular and illegal manner in which the Commissioner of Lands allotted the suit property which was in use by the department of forestry as a tree nursery site to her. I would add that even if fraud and misrepresentation were not pleaded and proved, having held that the plaintiff's title was acquired unprocedurally and illegally, the same is caught by section 26(1)(b) of the Land Registration Act, 2012 and as such cannot enjoy the sanctity of title guaranteed under sections 24, 25, and 26 of the Land Registration Act, 2012 that have been cited by the plaintiff in

- support of her indefeasibility argument.
26. Apart from seeking a declaration that she is the legitimate and/or lawful owner of the suit property, the plaintiff has also sought an order for the eviction of the department of forestry from the suit property and the demolition of the structures that they have put up thereon. The said structures are houses for the workers who tend the tree nurseries. The plaintiff has also sought a permanent injunction to restrain the forestry department from entering or in any other manner interfering with the suit property. In addition, the plaintiff has claimed general damages. As I have stated above, the department of forestry had occupied the suit property lawfully for several years before the same was allocated to the plaintiff. The suit property was allocated to the plaintiff when the department of forestry was in possession and was carrying out there on the activities complained of. The department of forestry's right to occupy the suit property was not terminated before the suit property was allocated to the plaintiff. It cannot be said therefore that the department of forestry is a trespasser on the suit property. It is not true as pleaded in the plaint that the department of forestry entered into the suit property in the year 2010/2011 after the plaintiff had acquired title to the same.
27. Letters that were produced by the plaintiff as P.exh.7 and P.exh.8 show that the department of forestry was in occupation of the suit property in the year 1986 when the same was allocated to the plaintiff. In P.exh.7, the plaintiff had stated that when the suit property was allocated to her in the year 1986, she fenced the same and the department of forestry knocked down her fence. She did the fencing for the second time in the year 2003, and once again her fence was knocked down. The department of forestry could not have knocked down the plaintiff's fence in the year 1986 and again in the year 2003 if they were not in possession of the property. Having held that the department of forestry is not a trespasser on the suit property, the plaintiff's prayers for an order of eviction and a permanent injunction cannot be granted. These orders are also not available to the plaintiff for other reasons. First, having held that the plaintiff's title to the suit property was not acquired lawfully, there is no basis upon which I can grant to the plaintiff the eviction order and a permanent injunction sought against the defendant.
28. Secondly, section 16 of the Government Proceedings Act, Cap 40 Laws of Kenya bars this court in civil proceedings from making orders of injunction and for delivery of land against the Government. The much I can do is to declare the plaintiff's rights over the suit property which declaration I have for the reasons given above declined to make. On the plaintiff's claim for general damages, no basis was laid for the same and as such the same cannot be granted. To conclude on this issue, I am of the view that even if the plaintiff's claim was proved, I would not have granted the reliefs sought against the department of forestry. As I have stated at the beginning of this judgment, the suit herein should have been brought against the Kenya Forest Service which is a body corporate with power to sue and to be sued. A suit could not lie against the Kenya Forest Service through the Attorney General. Being a state corporation, the Attorney General could appear on its behalf in the proceedings. Appearing for a party is however not the same thing as being a party to the proceedings.

## 29. Conclusion;

I am not satisfied that the plaintiff has proved her claim against the defendant to the required standard. The plaintiff's suit is therefore dismissed. Each party shall bear its own costs of the suit.

**Delivered, signed and dated at KISII this 19<sup>th</sup> day of December, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Ochwang'i                      for the plaintiff

N/A                                      for the defendant

Mr. Mobisa

Court Clerk

**S. OKONG'O**

**JUDGE**