



Mugenyu & another v County Government of Nyeri & 2 others (Environment & Land Case 30 of 2014) [2022] KEELC 4921 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEELC 4921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 30 OF 2014
L WAITHAKA, J
JUNE 28, 2022
(CONSOLIDATED WITH NYERI ELC NO.26 OF 2014)**

BETWEEN

**PHELIS NDATA MUGENYU 1ST PLAINTIFF
NAOMI WANJIKU MUTURI 2ND PLAINTIFF**

AND

**COUNTY GOVERNMENT OF NYERI 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT**

JUDGMENT

Introduction

1. By a plaint dated February 25, 2014 and amended on April 17, 2014, the 1st plaintiff seeks a permanent injunction to restrain the 1st defendant from interfering with her quiet enjoyment of LR No.1246/7-Naromoru (formerly LR No 1246/1/3/R-Naromoru, Nyeri District hereinafter referred to as the suit property); a declaration that the 1st defendant's acts and threats to forcefully invade and evict the plaintiffs from the suit property are unlawful; costs of the suit and any other or better relief the court may deem fit.
2. The 1st plaintiff's claim is premised on the grounds that she is the bona fide owner of the suit property; that in disregard of her rights in the suit property, the 1st defendant through its employees, servants and/or agents threatened to forcefully take over the suit property from her and to demolish the structures she has erected thereon.



3. Through its statement of defence filed on March 31, 2014, the 1st defendant denied the allegations levelled against it and contended that the suit land is public land that had been offered to the 1st plaintiff's husband and later the plaintiff on Temporary Occupation Licence (TOL).
4. Like the 1st defendant, the 2nd defendant filed a statement of defence through which it contends that the suit land is public land that it had been allocated to the 1st plaintiff on TOL basis.
5. In a rejoinder, the 1st plaintiff maintains that she was allocated the suit property and that all what remained was issuance of a lease in her favour.

Evidence

The Plaintiff's case.

6. When the case came up for hearing, the 1st Plaintiff Phelis Nduta Mugenyu (P W 1), relied on her witness statement signed (thumb printed) on January 30, 2014. She also relied on her list of documents filed on April 17, 2014, after they were admitted in evidence as PEXBT 1-25.
7. Pexbt 1 is an agreement for sale of a portion of the suit property (6 acres) by the 1st plaintiff to the 2nd plaintiff; Pexbt 2 is an extract of Kenya Gazette, No 1666 dated May 11, 1965. The Gazette shows that the Commissioner of Lands issued a notice for applications for alienation of agricultural land referred to as L R No.7836 measuring about 174 acres or thereabout (this document is not relevant as the land mentioned in the gazette notice is different from the suit property). Pexbt 3 is an agreement dated January 1, 1968 between the Commissioner of Lands and the 1st Plaintiff. It shows that the Commissioner of Lands gave the 1st Plaintiff a TOL, to occupy the suit property for a period of 9 months. The purpose for the licence was grazing livestock. Pexbt 4 is a letter from the Commissioner of Lands to the 1st Plaintiff dated April 30, 1979. The letter shows that the TOL issued to the 1st Plaintiff had been terminated but was, through that letter reinstated. Pexbt 5 is a letter of allotment of the suit property to the 1st Plaintiff dated July 7, 1981. It shows that the 1st Plaintiff was given a TOL over the suit property. The TOL was for a term of three years effective from August 1, 1981. There was an option of converting the TOL to freehold grant upon fulfilment of the conditions in the letter of offer. Pexbt 6 is a Department of Lands receipt dated August 18, 1981. It shows that the 1st Plaintiff paid Kshs 410 in respect of the TOL. Pexbt 7 is a letter dated October 17, 1984 from the Commissioner of Lands to a Mr D Ndegwa informing him that the decision that had been taken by the Government in respect of the suit property should not be reversed. Though it is not clear what decision the letter refers to, from the correspondences exchanged between various government offices, it is discernable that the decision referred to in the letter was the 'Government's' decision to alienate the suit property in favour of the 1st Plaintiff. Pexbt 8 is Registry Index Map (RIM) dated July 8, 1992. Pexbt 9 is a letter from the Commissioner of Lands to the Director of Survey, dated June 5, 1996. Through the letter, the Commissioner of Lands was requesting for deed plan in respect of the suit property in order to issue a new grant. Pexbt 10 is a letter from the District Lands Officer Nyeri to the Commissioner of Lands. The letter shows that the suit property had been subdivided into three portions namely LR No 1246/4; 1246/5 and 1246/6. The portions were occupied by the 1st Plaintiff, a Mr. Muchiri and the Ministry of Lands. It is indicated that the 1st Plaintiff claimed ownership of the entire suit property. Pexbt 11 is an official government receipt No BV039952 dated August 13, 2001. It shows that the 1st Plaintiff paid Kshs 12,200/- as survey fees in respect of the suit property.



8. Pexbt 12 is an internal Memo from Land Officer, J M Gitau to the Commissioner of Lands, dated November 24, 2000. It gives the history of the suit property. The contents of the memo are as follows:-

“RE: L R No 1246/1/3/R-Naromoru-nyeri

The above mentioned plot was allocated to Phelis Nduta Mugenyu at (26)a. The area was 285 acres. A copy of the receipt for the payment is at (78). The file copy is missing. The acceptance letter is at (3). Mr Wanjau occupied the land and applied for a TOL which was later cancelled as per the information at 66(c).

The Commissioner of Lands ordered the allocation to remain at (27). The Ministry of Agriculture wanted the land to be reverted back to them as per (32) but since the allotment had already been issued; the Commissioner of Lands was of the opinion that the land remains allocated unless the Ministry would like to acquire it back desperately (39).

There was a decision a decision at (41)a to have the plot subdivided into three portions. A copy of the Survey Plan is at (45)a. Valuation was done at (50). The land was applied at (54)a but a letter from the Ministry of Agriculture was demanded at (54). The District Lands Office’s ground report at (55) reports that the land is vacant. The letter from the Ministry of Agriculture cited at (59) having no objection to the allocation is not at (58). I suggest that the letter be produced. A scheme plan was so omitted at (61). A copy of the ground report is at (64). A letter at (64).

There is a letter from the Ministry of Agriculture at (66)c recommends a number of people to be allocated the land. The S L O (CE) acted on your instruction at (76) with a letter at (72). However, the letter from Director of Surveys at (79) reveals that the original allocation of 285 acres to Mrs Mugenyu is still valid and deed plan for the whole is being prepared to effect that. The District Surveyor surveying the land into three had no authority from the Director himself. There seems to be a lot of unresolved issues concerning this matter. Please give further instructions.”

9. Pexbt 13 is a letter from Department of Lands (by Karogo R W) to the Director of Survey dated August 10, 2001 requesting for deed plan for new grant. Pexbt 14 is a deed plan dated August 21, 2001. Pexbt 15 is land rent demand note dated May 16, 2003. Pexbt 16 is a letter from the Office of Commissioner of Lands (by G. Ireri) to the District Lands Officer, Nyeri. The contents of the letter are as follows:-

“L R No 1246/7-Naromoru-nyeri District

Reference is made to your letters ref NYI/ALIE/NYI-MUN/6/VII of May 28, 1996 and Ref NYI/LND/1246/8170/16 dated July 9, 1997 (copies attached for ease of reference), in connection with the above.

The above parcel of land was allocated to George Mugenyu Kariuki on T O L basis and was later transferred to his wife Phylis Nduta upon death.

The allocation by Government of the above to Mrs. Mugenju for an initial 3 years term after which a freehold title would be granted elicited a lot of interest, from various sources including the Ministry of Agriculture which had already relinquished its interest. This in essence, caused a lot of confusion due to vested interests, in the allocation process regarding the above hence resulting in several letters of allotment being issued. Nevertheless, Mrs. Mugenyu has now submitted a deed plan for the whole parcel with intention of being allocated the same as was initially intended.



My purpose of writing to you, therefore, is to request that you liaise with the Provincial Administration, district surveyor to investigate the matter a fresh and forward your recommendations/comments to this office so that I may arrive at an early conclusion on the same.

Your early action will oblige.”

10. Pexbt 17 is a letter from Senior Lands Officer (S L O) to the Commissioner of Lands, dated July 14, 2005. Its contents are as follows:-

RE: L R No 1246/7 (Formerly L R-No 1246/1/3/R-Naromoru-nyeri District

Please note that investigations have revealed that the above property was allocated to Phelis Nduta Mugenyu and a letter of allotment dated July 7, 1981 issued for L R 1246/1/3/R measuring 285 acres.

The subsequent subdivision of the initial land allocated to Mrs. Mugenyu i.e LR No.1246/1/3/R into three portions is ironical. The subdivision was not initiated by the bona fide legal allottee thereby rendering it unprocedural. The allocation of the resultant subplots to third parties without regard to the initial allottee Mrs. Mugenyu are suspect. The initial letter of allotment for Phelis Nduta Mugenyu has not been cancelled and any allocation to other person(s) is creating double allocation.

Site inspection of the above property has revealed that the Ministry of Agriculture has fenced off a portion of the land.

Within this fenced-off area there is a semi permanent office block, foundation for construction of permanent office block, several semi permanent buildings and grounded machinery. Below the site fenced by the Ministry of Agriculture is a small earth dam and two small temporary structures/sheds.

Mrs. Phelis Nduta Mugenyu has put up her homestead on the land LR. (1246/7) and she is living there with her family. The land adjacent to the homestead is extensively cultivated and the remainder is used for grazing purposes. Near the river the land is used for growing of vegetables. There are three graves on the land near the family homestead.

In view of the foregoing, I recommend that the land in question i.e LR. No. 1246/7 be documented in favour of Phelis Nduta Mugenyu as was initially allocated back in 1981.

Given that the Director of Surveys has prepared a deed plan for the same and Ministry of Agriculture had already relinquished its interests.”

11. Pexbt 18 is letter Ref No CR/130/VOL 7/304 from Director of Surveys. The contents of the letter are as follows:-

“LR No 1246/1/3/R

Please refer to the copy of letter dated May 19, 1997 and May 20, 1997 addressed to you and Pemanent Secretary, Ministry of Lands and Settlement respectively by Mrs Phelis Nduta Mugenyu and have the following comments: -

- i. In your letter dated July 7, 1981, you issued a letter of allotment to Mrs Mugenyu allocating her the above plot measuring 285 acres.
- ii. In your letter Ref No 3435/11/53 dated June 5, 1996, you indented for a deed plan in respect of the above plot. This indicated that Mrs Mugenyu had complied with the special conditions attached to the letter of allotment and you were prepared to issue her with a title deed.



- iii. In your letter ref 3435/11/51 dated September 1, 1992; you approved the subdivision scheme plan in respect of this property into three plots and my District Surveyor carried out the survey. I have only approved the subdivision survey for data only since i do not have a copy of your letter and plan showing the sub-division and my District Surveyor, Nyeri carried out the survey without my authority.
- iv. The sub-division survey is shown on my plan FR 267/78 and the three plots are registered as LR No 1246/4-6. I hope these plots have not been allocated to other persons as this would create double allocation.
- v. Since you have already indented for the deed plan for LR No 1246/1/3/R I am making arrangements to have plots 1246/4-6 together with the road reserve L R No 1246/1/3/1 consolidated and given a new L R number so that I can issue you with a deed plan showing the plot allocated to Mrs Mugenyu; and thus end her complaint.”

- 12. Pexbt 19 is cancelled survey plans of Land Reference Numbers 1246/6, 1246/4 and 1246/5.
- 13. Pexbt 20 is a letter from the office of the Commissioner of Lands (by G Ireri) to the Permanent Secretary Ministry of Livestock Development. The contents of the letter are as follows:-

“Veterinary Outspan LR No 1246/1/3/R at Naromoru-nyeri District

The above parcel of land was allocated on temporary occupation basis to one George Mugenyu Kariuki after recommendations by the Department of Veterinary Services. Unfortunately Mr Kariuki passed on before any document was issued and it was therefore agreed that the same be issued to his wife Mrs Nduta Mugenyu.

Later on it was decided that the land be allocated on a long term lease basis and a letter of allotment was issued (find a copy for easy of reference), for an initial term of three years after which a freehold title would be granted. Due to long period taken in processing the title the land has been subjected to a lot of controversy with numerous people claiming part of it.

However, much of the problems have now been resolved and Mrs. Nduta Mugenyu has been able to acquire a deed plan from the Director of Surveys, which is now in my custody.

In view of the above and putting into consideration the conclusion arrived by the Ndungu Commission on irregular/illegal allocation of public land, I hereby request you to give me your recommendations/comments on the above to enable me process title in favour of the allottee.”

- 14. Pexbt 21 is internal memo from the office of the Commissioner of Lands to the Permanent Secretary for Lands dated February 1, 2006. Its contents are as follows:-

“RE: Mrs Phelis Nduta Mugenyu-L R No 1246/1/3/R-Naromoru-nyeri

From my records the above land is apparently allocated as follows:-

- i. Mrs Phelis Nduta Mugenyu-43.51 hectares (not paid);
- ii. Ernest M Macharia- 2.0 Hectares (Not paid);
- iii. Judy W Mukoma- 2.0 hectares (Not paid)



- iv. Peter Maina Kahuthia-2.0 ha (paid).

However, earlier on, the whole piece (285 acres) had been allocated to the complainant in 1981.

For the moment and before we determine who the rightful allottee should be, the Ministry of Livestock and also Ministry of Agriculture need to give us final word on their plans for this land.”

15. Pexbt 22 is land rent invoice dated March 1, 2008. Pexbt 23 is a letter from Phelis Nduta Mugenyu (1st Plaintiff) to the Commissioner of Lands, dated July 15, 2013 requesting the Commissioner of lands to issue her with a title deed over the suit property. Pexbt No 24 is another letter from the 1st Plaintiff to the Commissioner of Lands, dated September 17, 2013 reminding the Commissioner of Lands about her plea to be issued with a title deed in respect of the suit property. Pexbt 25, on the other hand, is a letter from the District Commissioner, Nyeri to the District Officer, Kieni East, dated June 9, 1997. Through the letter, the D C was informing the D O of a complaint by the 1st Plaintiff to the effect that some people were harrasing her by resurveying the suit property. The letter required the D O to investigate the complaint.
16. The evidence in support of the plaintiffs’ case is basically as contained in the contents of the documents reproduced herein above and reiterated in the oral testimony of the 1st plaintiff’s evidence, which I need not reproduce as it is in pari materia to what is contained in the documents she produced in evidence.

The Defendant’s case.

17. D W 1, Silas King’ori Mburugu, a Land Administration Officer working with National Land Commission (NLC) relied on his witness statement recorded and filed on July 7, 2015 and the documents filed on an even date. The documents were produced as Pexbt 1-15.
18. Dexbt 1 is a letter dated January 16, 1914 signed for Lands Officer. The letter is in respect of Outspan Farm No 1246, West Kenia. Through the letter, the writer informed the addressee that the whole of the farm under reference-Outspan No 1246, West Kenia, was reserved to the Government for possible future requirements. D.W.1 was unable to confirm whether the subject matter of that letter is the same as the subject matter of this suit to wit L R No.1246/1/3/R.
19. Dexbt 2 is a letter from the 1st plaintiff’s deceased husband G Mugenyu to the Commissioner of Lands, dated May 4, 1966. Through the letter the 1st plaintiff’s husband requested the Commissioner of Lands to issue him with a T O L in respect of the suit property for grazing purposes. In the letter, the 1st plaintiff’s husband acknowledged that the suit property constituted government land vested in the Ministry of Agriculture, Directorate of Veterinary Services.
20. Dexbt 3 is a T O L granted to the 1st plaintiff’s husband pursuant to the request referred to in paragraph 19 above. Dexbt 4 is a T O L granted to the 1st plaintiff by the Commissioner of Lands in 1968, after her husband passed on.
21. Dexbt 5 is a letter from the Senior Lands Officer to the 1st plaintiff, dated April 6, 1970, informing the 1st plaintiff that he had received complaints that she had not initiated developments in the suit land and warning her that unless she develops the land it would be repossessed and allocated to other people willing to develop it.
22. Dexbt 6 is a letter from the Provincial Director of Agriculture, Central Province to the D C, Nyeri dated October 23, 1973 informing the DC that the allottee of the suit property, the 1st plaintiff herein,



had not improved her development in the suit property and advising that the suit property should be re-allocated.

23. Dexbt 7 is a letter from the Director of Veterinary Services to the Commissioner of Lands, dated April 12, 1976 to the Commissioner of Lands recommending that the TOL issued to the 1st plaintiff herein be cancelled on the ground that the land was not being utilized well.
24. Dexbt 8 is a letter from the Commissioner of Lands to the 1st plaintiff, dated November 4, 1976, informing her that the T O L issued to her would determine after expiration of three months from November 1, 1976.
25. Pexbt 9 is a letter from the 1st plaintiff to the Commissioner of Lands dated May 28, 1977 requesting the Commissioner of Lands to reconsider his decision to determine her T O L.
26. Dexbt 10 is a letter from the Commissioner of Lands to the DC, Nyeri dated August 26, 1977 directing that the suit property be divided between the 1st plaintiff herein and Mr Wanjau.
27. Dexbt 11 is a letter from the Provincial Commissioner, Central, to the Commissioner of Lands, dated July 1, 1982. The contents of the letter are as follows:-

“Nyeri-district-L R NO 1246/1/3/R

Please refer to my letter No D 67/E/I (208) of December 11, 1981, on the above subject.

I have had time to discuss and consult on allocation of the above piece of land. I wish therefore to recommend that this matter which has been outstanding for a long time now be resolved in the following manner:

- a. Mrs Phelis Ndeta Mugenyu has occupied the land in question for a long time. She is a widow whose husband was the first allottee of the parcel. In view of this, she should be allocated 110 acres.
- b. Mr Wanjau came in much later after Mugenyu had defaulted payment, which defaulting could be attributed to the poverty in the family, especially after the death of Mr. Mugenyu. Mr Wanjau should therefore be allocated slightly less acreage than Mrs. Mugenyu. I recommend 80 acres.
- c. The remaining 66 acres be reserved for public purpose where by some land would go for the dam construction unit another to be reserved for the construction of the school.

If you agree with my above proposal, i would request that surveyors be requested to carry out survey in order to reduce the tension that exists between the families of Mrs Mugenyu and Mr Wanjau.”

28. Dexbt 12 is a letter from the Permanent Secretary Ministry of Agriculture to Mr Simon Muchiri Wanjau dated May 23, 1984. The contents of the letter are as follows:-

“Veterinary Outspan LR no 1246/1/3/R at Naro Moru-nyeri District

Reference is hereby made to your letter dated March 12, 1984, in respect of the above government land.



It is regretted that the subdivision of the plot of the plot between you and Mrs Mugenyu cannot be effected. This land is the property of the Kenya Government and specifically belongs to the Ministry of Agriculture and Livestock Development.

Mrs Mugenyu who is temporarily occupying the said land will also have to vacate it for government use as recommended by the Nyeri DCC and DAC.

Please treat my letter No MLD/AH/39/1 of July 13, 1981, as cancelled.”

29. Dexbt 13 is a letter from the Deputy Director of Livestock Development to the Commissioner of Lands, dated June 3, 1983. Through the letter, the Ministry of Agriculture protested the allocation of the suit property. The contents of the letter are as follows:-

“Ministry of Livestock Development Outspan-lr No 1246-285 Acres-naromoru

I have been informed by provincial officer-Nyeri that the above quoted livestock outspan under the Ministry has been allocated to individual and other purpose.

From my record, I have not surrendered this land to you as it is still very important to the ministry when trekking cattle and also for fodder production.

I would be grateful if you could let me know the circumstances which led to the allocation of the land to individuals and also for other purposes.”

30. Dexbt 14 is a letter from the Permanent Secretary (PS) Ministry of Agriculture to the Commissioner of Lands dated January 3, 1996. Through the letter, the P/S addressed the Commissioner of Lands as follows:-

“LR No 1246/1/R-Naro Moru

This has reference to your letter No 3435/11/30 dated October 8, 1985 concerning the allocation of the above land on T O L basis and the subsequent conversion of the T O L to long term leases in favour of Mrs P N Mugenyu and Mr S M Wanjau.

The sequence of events on this issue is as follows:-

- i. The Department of Veterinary Services originally agreed to grant temporary occupation of this land to Mr Mugenyu Kariuki. Unfortunately, Mr Kariuki died before finalization of TOL document. Therefore, it was agreed that the TOL, should be given to his wife Mrs Nduta Mugenyu.
- ii. Mrs Mugenyu mismanaged the farm and the TOL was cancelled in 1977.
- iii. It was agreed that the TOL should be given to Mr. S. M. Wanjau on 29th March, 1977.
- iv. In the meantime, Mrs Nduta Mugenyu lodged a complaint through the Provincial Administration resulting in Mr Wanjau’s TOL being terminated on December 13, 1978. Mrs Nduta Mugenyu’s TOL was reinstated on May 1, 1979.
- v. Mr Wanjau appealed against the decision to reinstate Mrs Mugenyu TOL. This appeal was lodged with the Provincial Administration who, without reference to the Ministry of Agriculture and Livestock Development (Department of Veterinary Services), ordered the Commissioner of lands to subdivide the land.



Arising from the sequence of events as outlined above, it should be clear to all concerned that:-

- a. The Department of Veterinary Services has never relinquished ownership of this parcel of land. The Department merely recommended the allocation of the land on TOL basis to an individual.
- b. The decision by the Provincial Administration to subdivide the land between the parties was done without consultation and assessing the needs of this Ministry and the Department of Veterinary Services in particular.
- c. Regarding your assertion that it is common practice to convert T.O.L to long term lease, we are concerned that you should have seen it fit to take this line of action without consulting us or the Director of Veterinary Services. The Director of Veterinary Services had set the condition of the T O L. and logically he should have been involved in the decision on whether or not to grant long term lease to Mrs Mugenyu and Mr Wanjau.

As you are well aware, this outspan is one of the parcels of land used by livestock moving from Northern Kenya and supports operations that facilitate the passing of immature to the farmers after they have been screened for disease at Isiolo Holding Ground. Therefore, The Ministry of Agriculture and Livestock Development badly needs this parcel of land for the purpose of controlling livestock disease which if allowed to spread will result in the total destruction of the livestock and dairy industry in Kenya. It is in the public interest that you take appropriate action to have it revert to the Ministry Accordingly”

31. Dexbt 15 is a letter from the Permanent Secretary Ministry of Livestock and Fisheries Development to the Permanent Secretary Ministry of Lands. The contents of the letter are as follows:-

“Re: Veterinary Outspan Lr No 124/3r At Naromoru-nyeri District

Reference is made to a letter originating from the Commissioner of Lands Ref 3435/11/88 of November 15, 2005, on the above issue refers.

After perusing through the letters and the attached documents, it is not exactly clear how a lease agreement dated January 1, 1968 between the Commissioner of Lands and one Phelis Nduta Mugenyu on the above piece of land belonging to the Ministry changed to allotment and now the Commissioner of Lands requests the Ministry to recommend for the issuance of a Title deed to the leasor-Mr Phelis Nduta Mugenyu.

According to our records, this Ministry was never involved in these transactions, as land in question is still required for construction of office for our Veterinary officers, who are currently housed with the Provincial Administration. The same land will also be used as a holding ground for disease surveillance and screening purposes by the Ministry officials.



I would therefore appreciate if you could look into this matter and advise on the way forward.”

32. The defence case is premised on the contents of those documents and the oral testimony of D W.1 who merely reiterated the contents of those documents in support of the defendants’ contention that the suit property constituted public land hence was not available for alienation in favour of the 1st plaintiff or any other person.
33. It is noteworthy that the above documents were not the only documents relied on by the parties in support of their case, but were the documents admitted in evidence.

Analysis and Determination

34. At close of hearing, parties filed submissions which I have read and considered. I find the issues arising from the pleadings, the evidence and the submissions to be:-
 - i. Whether the suit property constituted alienated public land hence unavailable for alienation in favour of the 1st plaintiff or any other person.
 - ii. Whether the plaintiffs has made up a case for being granted the orders sought; and
 - iii. What orders should the court make?
35. On whether the suit property constituted alienated public land hence unavailable for alienation in favour of the 1st plaintiff, it is not in dispute that on May 4, 1966 the 1st plaintiff’s husband, George Mugenyu Kariuki (deceased), applied to the Commissioner of Lands for a Temporary Occupation Licence (TOL) in respect of the suit property. Through the letter, which was produced as Dexbt 2, the 1st plaintiff’s husband addressed the Commissioner of Lands as follows:-

“Application for Tol On Lr 1246/1/3 Outspan For Grazing Land

I come to know that the Veterinary Department is not using the above mentioned land and they have reported this fact recently to the Director of Veterinary Service, Nairobi.

I shall, therefore, be grateful if you will issue me the Temporary Occupation Licence in order to use this land for grazing purpose which will be very useful to me and to the country.”
36. From that letter (Dexbt 2), it is clear that as at 1966 when the 1st plaintiff’s husband first applied for the suit land, it constituted alienated public land vested in the Ministry of Agriculture, Veterinary Department. A fact acknowledged by the 1st plaintiff’s husband who was the initial allottee of the suit property.
37. After the 1st plaintiff’s husband died, the 1st plaintiff was allowed to continue living in the suit land by the District Commissioner Nyeri. In that regard, see the letter dated October 23, 1973 (Dexbt 6) from the Provincial Director of Agriculture, Nyeri Province to the District Commissioner contained in the 2nd defendant’s list of documents filed on July 7, 2014. The Letter, in part, reads as follows:-

“...Veterinary Outspan L R No 1246/1/3/R

This outspan is currently being used by Mrs Peris Nduta Mugenyu, on T O L. She is a widow and was recommended to continue using this outspan by the D C. Nyeri in 1967 after the death of her husband, George Mugenyu Kariuki...”



38. On or about July 7, 1981, the Commissioner of Lands offered the suit property to the 1st plaintiff. The terms of the offer were as follows:-

“Area-approximately 285 acres

Term 3 years from 1-8-1981.

Capital value Sh 5700-payable after three years.

Annual Rent: Sh 570.....”

39. The circumstances upon which the 1st plaintiff was issued with the TOL over the suit property are laid bear by the letter referred to in paragraph 3 above (Pexbt 6).

40. On June 3, 1983, the Deputy Director of Livestock Development (Administration) wrote to the Commissioner of Lands protesting allocation of the suit land. The letter (Dexbt 13) reads as follows:-

“ministry of livestock development outspans-lr no 1246-285 acres naromoro

I have been informed by the Provincial Officer-Nyeri that the above quoted Livestock Outspan under this Ministry has been allocated to individuals and other purposes.

From my record, I have not surrendered this land to you as it is still very important to the Ministry when trekking cattle and also for fodder production.

I would be grateful if you could let me know the circumstances which led to the allocation of the land to individuals and also for other purposes.”

41. From the documentary evidence adduced in this case, I entertain no doubt that by the time the Commissioner of Lands allocated the suit land to the 1st plaintiff’s husband and subsequently to the 1st plaintiff, the suit land constituted alienated public land vested in the Ministry of Agriculture and Livestock Development, particularly the Veterinary Department.

42. Whilst in their submissions’ the plaintiffs have submitted that under Section 3 of the Government Lands Act, Cap 280 Laws of Kenya (now repealed), the President through the Commissioner of Lands could alienate land irrespective of any Government department’s interest in the land; That submission is not a proper interpretation of the law as the President’s power under the said provision of the law was limited to alienating unalienated Government land. In the circumstances of this case, the suit land comprised alienated land vested in the Ministry of Land, with a known user. That being the case, it was not available for allocation to the plaintiff or any other person. In that regard see the case of *Henry Muthee Kathurima vs Commissioner of Lands & Another* (2015) eKLR where the Court of Appeal stated:-

“A further argument by the Appellant is that the Commissioner of Lands issued him the Certificate of Lease which is indefeasible. On the part of the respondents, it was submitted that the Commissioner of Lands had no authority to alienate the suit property and issue the certificate of lease. We have examined the evidence on record; there is nothing on record to show that the President Authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of Sections, 3, 7, 9 and 12 of the Government *Land Act* and we are satisfied that the Commissioner of Lands had no power to alienate the suit property and issue Certificate of Lease.

We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings of the trial court. The Commissioner of Lands



had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v Shariff Mohamed Shatry*, (1940) 19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.”

43. In the decision appealed from, the trial judges, J G Nyamu (as he then was) and R Wendo J, *inter alia* stated:-

“At this juncture we pose the question, did the Commissioner of Lands have the power to alienate the disputed land to the Applicants”

Section 3 of the Government Lands Act Cap 280 vests the power to alienate unalienated land in the President. Section 3 of Government Lands Act reads as follows:-

“3. The president in addition to but without limiting any other right, power, or authority vested in him under this Act, may-

- a. Subject to any other written law, make grants, dispositions of any estates, interests or rights in or over unalienated Government Land...

Section 7 of the same Act, stipulates what the powers of the Commissioner of Lands and officers in that office are. It reads:-

“The Commissioner or an officer at the lands department may subject to special directions from the president, execute for and on behalf of the president any Conveyance, Lease or Licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order direction and sign any document, which may be done, exercised, given, signed by the president under this Act;

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the president by sections 3, 12, 20 and 128”.

The above section clearly limits the power of the Commissioner of Lands 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 letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap 281 Laws of Kenya.”

44. The above legal position has been restated in many cases including but not limited to the case of *Kenya Anti-Corruption Commission vs. Lima Limited & 2 others* (2019)eKLR where it was stated:-

“....The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and administration police Camp and therefore it could not be deemed unalienated. The 2nd defendant therefore had no authority



in law to make the alienation and therefore no interest could be conferred upon the 1st defendant....

45. In the case of *Adan Abdirahani Hassan & 2 others v. Registrar of Titles*, Ministry of Lands & 2 others (2013)eKLR it was held:-

“Any alienation of land reserved for public purpose and issuance of title for the same, whether under the Registration of Titles Act, Cap 281 or the Registered 2012/6 Land Act, Cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the public and was not available for alienation. The cancellation of such a “title” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.”

46. On whether the plaintiffs’ have made up a case for being granted the orders sought, having found that the suit property constituted alienated public land, vested in the Ministry of Agriculture, Department of Veterinary Services when the Commissioner of Lands purported to allocate it to the 1st plaintiff and that the Commissioner of Lands had no power to alienate or offer for alienation the suit property to the 1st plaintiff; I find and hold that contract entered into between the plaintiff and the Commissioner did not confer on the plaintiff any legally protectable interest in the suit land or any legitimate expectation that the TOL given to her would be converted into a long term lease and that she would be issued with a title deed in respect of the suit property. In that regard see the case of Henry Muthee Kathurima (*supra*) where the Court of Appeal stated:-

“We cite the case of *Said Bin Seif v Shariff Mohamed Shatry*, (1940) 19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.”

47. In view of the foregoing the submission by the plaintiffs that the Government is bound by the commitment it made to the 1st plaintiff that it would register her and issue her with a title deed in respect of the suit property has no leg on which it can stand. In the circumstances of this case, even if the plaintiffs’ had been issued with a title deed in respect of the suit property, the lease would not afford them legal protection as at the time the land was purportedly allocated to the 1st plaintiff, it constituted alienated public land for which the Commissioner of Lands lacked power to alienate in favour of the 1st plaintiff or any other person.

48. Despite having found that the suit property is public land that was irregularly alienated in favour of the 1st plaintiff and that the irregular alienation did not confer any legally protectable interest in the suit property to the 1st plaintiff; I hasten to point out that as occupiers of the suit property, the plaintiffs may not be removed from the suit property without due process of the Law. In that regard see Section 152C of the *Land Laws (Amendment) Act*, 2016 (herein after referred to as the Act) which provides as follows:-

“The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before eviction.”



49. Section 152F of the Act provides that any person served with a notice in terms of Sections 152C or Sections 152 D and E of the Act, may apply to court for relief against the notice.
50. A court seized with an application made under Section 152F of the Act, may confirm the notice and order the person to vacate, cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just; suspend the operation of the notice for any period which the court shall determine; or order for compensation.
51. In the circumstances of this case, the plaintiffs have pleaded that that during the month of January 2014, the 1st defendant through its agents, representatives and/or employees visited the suit property and threatened to forcefully take over the suit property and demolish her property; that on February 24, 2014 the 1st defendant sent persons to the suit property who menacingly threatened the plaintiffs with eviction from the suit property.
52. Through its statement of defence, the 1st defendant denied having threatened to forcefully evict the plaintiffs from the suit property but contended that the plaintiffs should vacate the suit property as it constitutes public land vested in it.
53. Have carefully reviewed the evidence adduced in this case, the plaintiffs did not adduce any evidence capable of proving the alleged threat of eviction by the 1st defendant or the 1st defendant's agents.
54. Having determined that the suit property constitutes public land that was irregularly alienated in favour of the plaintiffs, I find and hold that they have not made a case for being granted the orders sought. The land being public land vested in the 1st defendant and managed by the 2nd defendant on behalf of the people of Nyeri County, the 2nd defendant may, upon strict compliance with the law on eviction of persons in unlawful occupation of the suit property evict the plaintiffs from the suit property.
55. The upshot of the foregoing is that the plaintiffs' suit is found to be lacking in merits and dismissed.
56. In the peculiar circumstances of this case, where the plaintiff was put in possession of the suit property by the Government through its agents and even promised to be given the land, it is only fair that parties bear their costs of the suit.
57. The upshot of the foregoing the plaintiffs' suit is dismissed with no order as to costs.
58. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 2ND JUNE, 2022.

L N WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF JUNE, 2022.

JO OLOLA

JUDGE

