



Ethics and Anti-Corruption Commission v Ongeri & another (Environment & Land Case 133 of 2010) [2025] KEELC 4103 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 133 OF 2010**

**M SILA, J
MAY 29, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

SAMSON KEGENGO ONGERI 1ST DEFENDANT

JAMES RAYMOND NJENGA 2ND DEFENDANT

JUDGMENT

(Plaintiff filing suit seeking nullification of leasehold title of the 1st defendant; plaintiff claiming that the title was excised off land that belongs to the municipal market pursuant to the approved Development Plan; 2nd defendant sued as the Commissioner of Lands who issued the title; no evidence in the Development Plan of the land having been reserved for a municipal market; no law cited that would support the allegation that the grant of lease was unlawful; reference made to Section 13 of the Trust *Land Act*, on setting apart trust land, which in the circumstance of the case cannot be applicable; plaintiff's suit dismissed)

A. Introduction

1. This suit is closely related to another suit, i.e Kisii ELC No. 135 of 2010. This case relates to the land parcel Kisii Municipality/Block III/258 whereas in the case Kisii ELC No. 133 of 2010, the land in dispute is the land parcel Kisii Municipality/Block III/259. The two parcels of land lie side by side and were created through the same survey exercise. In both cases, the plaintiff contends that the two parcels of land cover what the plaintiff alleges to be land set aside for the Kisii Municipal Market. In the course of the trial of the plaintiff's case, I ordered consolidation of this case with the case Kisii ELC No. 135 of 2010, as the plaintiff was availing the same witnesses for more or less the same evidence. I did not see the need of calling the same witnesses twice to say the same thing thus my order of consolidation. However, separate judgments for the two suits will be delivered particularly given the differences in



the line of defences of the title holders sued as 1st defendants in the two suits. Much of the evidence of the plaintiff will however be common to both suits and there will therefore be some similarity in the manner of drafting of the judgments. They however remain distinct judgments for two different cases.

B. Pleadings

2. This suit was commenced through a plaint dated 10 May 2010 and filed on 11 May 2010. The plaintiff sued Samson Kegengo Ongeru as the 1st defendant and James Raymond Njenga as the 2nd defendant.
3. The subject matter of the case is the land parcel Kisii Municipality/Block III/258 (sometimes referred to as Block 3/258 of simply plot No.258). In question is the leasehold title registered in favour of the 1st defendant on 12 July 1982. The leasehold title shows that it was issued by the Gusii County Council for a term of 99 years from 1 March 1982. The plaintiff alleges that this title of the deceased is a bad title.
4. It is pleaded that by virtue of the Constitution, the Trust Land Act, and Gazette Notice No. 1937 of 31/5/1966, 215.85 acres of land within Kisii Township was set apart as Trust Land and vested in the County Council of Gusii (the Council). It is averred that vide Development Plan No. 51 of 1971, the suit land was reserved for a municipal market. It is pleaded that this land reserved for a municipal market was fraudulently and unlawfully surveyed to bring forth seven parcels of land being the parcels Kisii Municipality/Block 3/258, 259, 260, 261, 334, 376 and 418. In respect of the suit land i.e the parcel No. 258, it is pleaded that on 8 August 1979, the Council was entered as absolute owner thereof. It is pleaded that on unknown dates, the 2nd defendant, without reference to the Council, unlawfully approved a change of user of the land reserved for a municipal market and the suit land was changed from being a municipal market to shops, offices and flats. It is pleaded that through a Lease instrument dated 9 June 1982 and registered on 12 July 1982, the 2nd defendant purportedly acting on behalf of the Council caused the 1st defendant to be registered as lessee.
5. It is the contention of the plaintiff that the issuance of the lease was fraudulent and the following particulars of fraud are pleaded :
 - i. The 1st defendant knowingly and dishonestly took a lease from the Council without following the requisite statutory processes, thereby facilitating illegal acquisition of trust/public property;
 - ii. The 2nd defendant knowingly and dishonestly issued a lease or caused a lease to be issued to the 1st defendant without any special or general directions of the Council;
 - iii. The 2nd defendant alienated the suit property to the 1st defendant with knowledge that it was trust/public land, that had been reserved for a municipal market;
 - iv. The 1st and the 2nd defendant alienated the suit property without the requisite Council resolution and in flagrant contravention of the provisions of the Trust Land Act, Government Lands Act, the Physical Planning Act and the Local Government Act.
 - v. The 1st defendant accepted a lease of the suit property, with knowledge that he had not made any application for allotment of the same nor participated in a public auction.
 - vi. The 1st defendant accepted a lease over the suit property without paying any consideration at all.
 - vii. The 1st defendant accepted a lease over the suit property, with notice that it was part of trust/public land serving as municipal market and regulated by specific legal requirements.



- viii. The 1st defendant shut his eyes to the fact that the land allocated to him was trust/public land incapable of alienation by the Commissioner of Lands;
 - ix. The 1st defendant knowingly accepted a lease in respect of the suit property despite the lack of the requisite Council/Ministerial consents.
 - x. The 1st defendant was arbitrarily selected and favoured in contravention of the law.
6. In the alternative it was pleaded that the suit land was leased to the 1st defendant without authority or consent of the Council and in breach of the express provisions of the applicable statutes. The following are pleaded as constituting the breach of statutes :
- a. The suit property was leased to the 1st defendant without a valid resolution of the Council;
 - b. The suit property was leased to the 1st defendant without the consent of the Council nor of the Minister for Local Authorities;
 - c. The lease to the 1st defendant was not sealed and if sealed did not have a valid resolution or authority of the Council;
 - d. There was no valid approval/consent from the Council to subdivide and change the user of the land vested in the Council and reserved for a municipal market into 7 different parcels as required by the Physical Planning Act;
 - e. The 1st defendant never applied to purchase the leasehold interest in the suit property;
 - f. The 1st defendant paid no consideration for the suit property.
7. It is pleaded that the 1st defendant knowingly and willingly participated in the fraudulent scheme and cannot legally claim proper title. In the plaint the plaintiff seeks the following orders :
- a. A declaration that the Lease (Certificate of Lease) issued and registered on 12 July 1982 in favour of the 1st defendant over the land described as Kisii Municipality/Block 3/258 was issued ultra vires and fraudulently and is thus illegal, null and void ab initio.
 - b. An order directed to the Land Registrar, Kisii District Registry, to rectify the register by cancellation of the entries relating to the registration of the lease on 12 July 1982 in favour of the 1st defendant over Kisii Municipality/Block 3/259 and all subsequent entries made therein.
 - c. An order for vacant possession.
 - d. An order of permanent injunction to restrain the 1st defendant from dealing with the suit land other than by way of a surrender to the County Council of Gusii.
 - e. Costs with interest.
8. The 1st defendant filed a Defence. He averred that he was lawfully allocated the suit land i.e Kisii Municipality/Block III/258. He denied all other pleadings in the plaint.
9. The 2nd defendant also filed defence. He admitted that he was Commissioner of Lands up to the year 1989. In his view the proper party to be sued would be the Commissioner of Lands and the Honourable Attorney General on behalf of the Government and not himself. He otherwise denied that the suit land was reserved for a public utility or an open space that was not available for alienation. He further pleaded that he has no recollection about the suit land or the facts of its alienation or to whom it was alienated. He pleaded that all records would be available in the office of the Commissioner of Lands and that he retired from that office many years ago and has no access to the records, thus



unable to answer to the facts of the alleged alienation. He pleaded that all land alienated during his tenure was alienated under the direction and sanction of the President and he denied the particulars of fraud and illegality. He asked that the suit against him be dismissed with costs.

C. Evidence of The Parties

10. PW – 1 was Dedan Ochieng Okwama, an investigator with the plaintiff. He had a pre-recorded witness statement dated 28 April 2017, which he adopted as his evidence in chief. In it he stated that their investigations showed that vide Development Plan No. 51 of 1971, a portion of land was reserved for a municipal market. Their investigations further revealed that though the land had been reserved and approved for a municipal market no title document was issued to the Council or any other public authority. He stated that the land was subdivided into portions out of which 7 titles emanated i.e Kisii Municipality/Block 3/258, 259, 260, 261, 334, 376, and 418. On 8 August 1979, the Land Registrar, Kisii, opened a register in respect of the suit land excised from land reserved for the municipal market. The register indicated the County Council of Gusii as the absolute owner and that on 12 July 1982, the Council issued a lease in favour of the 1st defendant, and further that the 1st defendant was issued with a Certificate of Lease on 13 July 1982. He stated that the Council held the land in trust and the dealings thereof had to be in accordance with the Constitution, the Trust Land Act, the Physical Planning Act, and the Local Government Act. He stated that the Commissioner of Lands appeared to be dealing with the land without any general or specific directions of the Council. He stated that in 1973 there was an agreement between the Gusii County Council and the Town Council of Kisii over handover of some assets and staff part of which included the Municipal Market. He stated that at the time the suit land was allegedly leased to the deceased the same had already been set aside for use by the council and was not available for allocation for business cum residential purposes. He averred that the allocation was done fraudulently without following the provisions of the Constitution, the Local Government Act, the Trust Land Act, Land Planning Act, Town Planning Act, and the Government Land Act as the consent was given by the Municipal Council of Kisii yet the register indicates the County Council of Gusii as lessor and absolute owner. He added that in any event allocation should have been through an auction unless otherwise directed by the President.
11. In court, he added that the area was meant for public use and not for allocation to private entities. As exhibits, he produced the Development Plan No. 37/71/1 of 1971 for Kisii Town, and the various documents leading to registration of the 1st defendant as lessee.
12. PW-1 was recalled later to produce a letter dated 14 September 2006. It is a letter written by one Kennedy Nyamumbo Sese who is deceased. He was duly cross-examined on this letter particularly in comparison with other minutes of the council. I will get to this in my analysis.
13. The second of the plaintiff's witnesses was Wilson Kibichii. He works with the Ministry of Lands in the Survey Department. He is the Head of Survey Records. He joined the Ministry in 1996 as a Cartographer. He subsequently did a degree in Geospatial Information Science and graduated in 2015. Thus, prior to 2015, he worked as a cartographer. In 2019, he was appointed a Principal Geospatial Data Manager.
14. He elaborated that the process of making new grants starts with allocation of the land. The Commissioner of Lands would issue an Allotment Letter accompanied by a Part Development Plan (PDP). The allottee engaged a surveyor, either private or a Government surveyor. The survey work would be submitted to the Headquarters for approval. If the survey was found sound, it would be approved, and a letter written to the Commissioner of Lands giving notification of approval. The Commissioner of Lands would then write to the Director of Surveys to amend the Registry Index Map



- (RIM) to reflect the new parcel and once amended a copy would be sent to the Commissioner of Lands to prepare the Lease. The survey works would end there.
15. For the suit land he testified that there is a survey plan (an F/R) indicating the land. There is also a Computations File which carries the calculations of the survey works in the field, a card used to issue the parcel numbers, and the RIM. After the survey plan the RIM is amended. He stated that the allotment letter and the PDP would be in the computations file though before 1990, letters of allotment would be in a general file. He had the computation file for the parcels Block III/No. 258-261 as the survey for these parcels was done at the same time. He produced the computations file, the card used to issue the parcel numbers, and the survey plan, F/R No. 143/81. He also exhibited the RIM. He added that a survey process does not legitimize a fraudulent allocation. For survey a PDP would be used to identify the land on the ground. He was questioned on the Development Plan in relation to survey and he testified that there is no formula for tracing what is in the PDP with the Development Plan. He stated that one makes comparison with features such as a road or river, and if there are coordinates they can be used, though Development Plans rarely have coordinates. He testified that a Local Development Plan (LDP) would not give rise to a survey plan.
 16. Cross-examined, he reiterated that he joined the survey office in 1996 and all that time he has been stationed at the Survey Office in Nairobi. He did not have the particulars of the case being presented here by the plaintiff, and he did not know when the Lease herein was issued. This, he explained, was not his domain. He did not know if the plaintiff had been issued with an allotment letter and was not aware if a PDP had issued, as previously these were not being filed in their office. He testified that everything that was required to be done in the Survey Office was done and the survey is technically sound. The survey was done by one W. Omondi who was a Government surveyor. He could see that the registration cards in his file shows the Plots No. 255 and 256 as cancelled. He did not have any evidence that the suit land was set aside for a municipal market. He did not know of minutes of the Council. He did not have the General File for correspondence as it could not be traced. He elaborated that allocation documents were not previously put in the computations file until around 1991-1992. The subject plot was prepared before this time.
 17. He had nothing to show that the Plot No. 258 was meant for the public and had not come across anything to show that this plot was wrongly allocated. He had not come across any letter complaining about its allocation. He was not aware of how the plot was allocated. On the part of survey of Kenya they had nothing against this allocation.
 18. I questioned him on the cancellation of the Plots No. 255 and 256 done through the same survey plan. He stated that they were crossed out as they appeared to be part of the road reserve and should not have been processed. The Plots No. 258 and 259 have no cancellation in their registration cards.
 19. PW – 3 was Elias Muthomi Kaburu. He is an Assistant Director, Land Administration. He had a statement dated 10 November 2023 which he relied on as his evidence. In it he stated that the EACC wrote to his department requesting for some documents and he responded by availing to them the original file. In his statement he gave an elaboration of the process of allocation of land. He stated that the Government would advertise land notifying the public of its availability for alienation. The public would be invited to apply within a stipulated time frame. After balloting, the successful applicant would be issued with a letter of allotment which would be accompanied by a PDP. The PDP would show the location of the land, its size, user and the payments to be made. The allottee would be required to accept the offer in writing and make the necessary payments within 30 days of issuance of the allotment letter. He would then engage a licenced surveyor to carry out survey works. On completion of survey, the surveyor would submit his work to the Director of Survey for approval and issuance of the necessary survey instruments such as a Registry Index Map and a Deed Plan. The Lease preparation



process would then commence and once prepared it would be forwarded for registration. He stated that there was also an alternative way of allocating land. Here one would make a formal application to the Commissioner of Lands accompanied by a plan or map showing the locality of the land applied for. The Commissioner of Lands would then check the status of the land to confirm whether it is available for allocation. If so i.e if it is unalienated Government Land, the Commissioner would request the Director of Physical Planning to prepare the PDP if the land was not planned. This PDP would be submitted to the Commissioner of Lands for approval. Once approved, valuation would be done to determine the stand premium and annual rent and an allotment letter would issue.

20. In respect of the suit land, he stated that from his records, the 1st defendant was initially allocated a land parcel Kisii Municipality/Block III/174 but the Commissioner of Lands through a Memo from the SLO (Senior Lands Officer), was informed that this land is already committed. It was proposed that as an alternative, the 1st defendant takes up the plot No. 258 which was zoned for BCR purposes (Business Cum Residential). A valuation request was done vide Valuation Report dated 3 February 1982. Subsequently a letter of allotment dated 17 February 1982 was issued to the 1st defendant. The user was for shops, offices and flats excluding sale of petrol and other motor oils and the buildings were not to cover 75% of the land. The 1st defendant paid the money and the Commissioner of Lands, through a letter dated 30 March 1982, wrote to the Director of Surveys informing him that the terms had been accepted. Through a letter dated 30 March 1982, the Commissioner of Lands informed the Town Clerk, Kisii, of the issue leading to the allocation of the land to the 1st defendant. Instructions were then issued for preparation of a lease to him vide a form dated 21 May 1982 and 24 May 1982. The lease was then forwarded to the Land Registrar for execution vide a letter dated 9 June 1982. The registered lease was forwarded to the Commissioner of Lands on 19 July 1982 by the Land Registrar, Kisii. Through a letter dated 23 May 1990 the Commissioner of Lands informed the 1st defendant that payment of rates and rents was to be made to Kisii Municipal Council and not the Commissioner of Lands. On 21 May 2012, the PS in the office of the Deputy Prime Minister and Minister for Local Government wrote to the Commissioner of Lands regarding this Plot No. 258 as among Plots that the Kisii Municipal Council wished to repossess and attached Council minutes of 22 November 2011. Among the comments in the letter of 21 May 2012 was that the plots were part of a bus park and market before allocation. He states that this is contrary to the Memo by the SLO of 1 February 1982 that the land had been zoned for BCR purposes. He stated that the Correspondence File had no PDP or extract of the Development Plan and neither was any plan attached to the allotment letter of 17 February 1982.
21. In his oral evidence in court, he testified that there were gaps in the allocation process. His elaboration was that there was no advertisement of the plot for allocation. He added that where an application for land is made, one is expected to do a written acceptance. In our case he stated that there was no written acceptance but an oral one. He added that the land was not available for alienation as the land was reserved for a bus park which he got from the letter dated 21 May 2012. He thought that the letter dated 1 February 1982 was misleading.
22. Cross-examined, he testified that it was the Commissioner of Lands who allocated the land to the 1st defendant. From the handwritten endorsement in the letter of 21 May 2012, he deduced that the land was reserved for a bus park. There was no formal letter to this effect (i.e that the land is reserved for a bus park) save for that handwritten endorsement. He had no letter from the Municipal Council of Kisii stating that this plot is a bus park. He referred to some minutes of the Municipal Council of Kisii, dated 22 November 2011, particularly a minute 4/11/011, where it was suggested that plots No. 258, 259, 260 and 333 be amalgamated into one title Kisii Municipal Market (and the amalgamation be in line with the proposed extension and improvement of the old market). He acknowledged that the



- SLO (in the memo of 1982) proposed the 1st defendant to be given the disputed plot. He confirmed that the Lease was prepared, forwarded and registered.
23. Re-examined, he did not dispute that the 1st defendant was allocated the suit land and a lease registered in his favour. In his opinion, the issue was whether the land was available for allocation. The outcome of his investigation was that the land was planned as a bus park.
 24. With the above evidence the plaintiff closed her case.
 25. The 1st defendant testified as the sole witness in respect of his case. He testified that he has been a doctor, a lecturer at the University of Nairobi, a Minister, an Ambassador, and a Senator. He is now retired into farming. His evidence was that in the 1980s, he applied to the Gusii County Council for land and he was allocated the plot Kisii Municipality/Block III/174. Afterwards, the Gusii County Council wrote to the Commissioner of Lands, and the Commissioner of Lands reverted with information that the plot was already allotted to somebody else. They then gave him an alternative plot which is the suit land vide letter dated 1 February 1982. He was subsequently issued with a letter of allotment dated 17 February 1982. The same indicates that it is an alternative to the parcel Block III/174. He paid the monies indicated in the allotment letter and he produced the receipt for the said payment. He produced documents which indicate the instructions to prepare a Lease in his favour. He also produced a letter dated 9 June 1982 which is a letter from the Commissioner of Lands to the Land Registrar, Kisii, forwarding a lease for registration. He paid stamp duty and he exhibited the receipt for the said payment dated 9 June 1982. He also exhibited a letter from the Commissioner of Lands dated 23 May 1990 advising him to be paying land rent and land rates to the Municipal Council of Kisii as he had previously forwarded a cheque for such payment to the Commissioner of Lands. He produced some demand for rent and rates from the Municipal Council of Kisii and some minutes of the Kisii Municipal Council where the issue of his plot was discussed.
 26. Cross-examined, he testified that what he applied for was the Plot Kisii Municipality/Block III/174. He did not have documents in relation to this application as he said it has now been a long time ago. It turned out that the plot No. 174 had already been allocated and so he was given the suit land as an alternative plot. He was questioned whether he has documents from Gusii County Council on allocation of the alternative plot. He did not have a document showing the discussion but he pointed at the various letters he produced as indicative of the process having been followed. He stated that he paid all requisite fees though he did not have some receipts. His explanation was that this was a long time ago and he had no idea that the plaintiff would drag him to court more than 30 years later. He was aware of the discussion of the Council of 29 March 2007 but no idea of his plot being in the Ndungu Report (as partly indicated in the said minutes). He thought that the EACC coming after him after such a long period of time was politically motivated and aimed to destroy his character. He stated that he could not have used his influence to get the plot. He elaborated that he became a Member of Parliament in 1988 and prior to that he was a doctor and lecturer. He stated that this was the only plot he owns in Kisii and if he wanted to misuse his influence he could have done so as he was Minister of Local Government between 1997 and 1999.
 27. With the above evidence the 1st defendant closed his case.
 28. Counsel were invited to file submissions and I have taken note of the submissions filed.

D. Analysis and Disposition

29. The plaintiff has of course come to court seeking the cancellation of the title of the 1st defendant. From the Lease, Certificate of Lease, and the absolute and leasehold registers (green card and white card respectively) it is discernible that the interest of the 1st defendant is a leasehold interest for a term of 99



years from 1 March 1982. The green card shows that the absolute proprietorship is with the County Council of Gusii who got registered on 8 August 1979. The Lease to the 1st defendant shows that the grant is for building shops, offices and flats (excluding sale of petrol and motor oils). It is the contention of the plaintiff that the 1st defendant acquired this interest fraudulently and illegally for the principal reason that this land is public property set apart for a municipal market.

30. The burden of proof is of course vested upon the plaintiff as outlined in Section 107 the [Evidence Act](#) which provides as follows :

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

31. It should also be remembered that Section 26 of the [Land Registration Act](#) gives a presumption on title i.e that courts should take it prima facie that the interest is good. Section 26 provides as follows :

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

32. We have a lease here and the presumption of course has to be that it is a good lease unless it is proved otherwise. In essence to succeed, the plaintiff needs to prove its allegation that this land was public land set apart for a municipal market as it claims and that it was irregularly allocated. The plaintiff also needs to prove fraud, and/or misrepresentation on the part of the title holder, and/or demonstrate that the title was acquired illegally, unprocedurally, or through a corrupt scheme. So has it been proved that the suit land is public land set apart for a municipal market as pleaded ?

33. There is an elaborate paper trail on the manner in which the 1st defendant obtained registration as lessee. Indeed, the documentation exhibited by both the plaintiff and the 1st defendant is similar regarding the manner of allocation of the plot. It is apparent that through a meeting of the P.A.C (Plot Allocation Committee) held on 11 December 1981, it was approved that the 1st defendant be allotted the plot Kisii Municipality/Block III/174. It turned out that this plot had already been allotted to somebody else. The 1st defendant was then offered an alternative plot, and that alternative plot is the suit land i.e Kisii Municipality/Block III/258. This is clear in the letter dated 1 February 1982 written by the Senior Land Officer (SLO). In that letter he states that the 1st defendant has ‘verbally accepted’ the alternative plot. In the same letter, the SLO states that the suit land is zoned for B.C.R purposes (i.e



Business cum Residential) and a file thereof is already opened. In essence he was saying that this plot is readily available for allocation. A letter dated 30 March 1982 was thereafter written to the Town Clerk, Kisii Municipal Council, explaining this situation and the same letter was copied to The Clerk Gusii County Council. There is indication in the allotment letter that this allocation was approved by 'Heads P.A.C' on 11 December 1981. There is a more or less similar letter dated 14 July 1982. I have not seen any letter of objection from the Gusii County Council or the Municipal Council of Kisii. The terms in the allotment letter were met and there is a letter dated 30 March 1982 confirming that the offer in the letter of allotment has been formally accepted.

34. A Lease was drawn by the Commissioner of Lands on behalf of the County Council of Gusii and executed. It was forwarded for registration and duly registered on 19 July 1982. A copy of the lease was forwarded to the Town Clerk Kisii Municipal Council for their records. The 1st defendant thereafter paid the rents and rates for the suit land. It is apparent that no issue was ever raised regarding this allocation and lease issued to the 1st defendant. Issues appear to have arisen around about the year 2006. There is a letter written by the Town Clerk dated 14 September 2006 addressed to the Director, Kenya Anti-Corruption Commission, inter alia stating that there is no resolution of the Council sanctioning this lease nor giving authority to its signing. In 2007, there was discussion regarding the suit plot (and others) in the meeting held on 29 March 2007 of the Town Planning Works and Housing Committee of the Municipal Council of Kisii. The discussion centred on the suit plot and the Plots Block III/ No. 259, 260 and 333. It was raised that these plots are privately owned but are occupied by vegetable vendors and that there had been a previous meeting (under MIN/TPW/&H/26/07) which discussed the vendors' relocation to pave way for the plot owners to develop the said plots. The Committee unanimously resolved 'that the hawkers and the vegetable vendors be relocated to some other place and give way to the owners to develop their properties as discussed under the above minute No. TWW&H/26/07.' There were reservations by the Town Clerk who said that the plots appear in the Ndungu Report and he also raised that there had been no application to develop the said plots. Despite the reservations of the Town Clerk, the meeting insisted that the hawkers and vegetable vendors be relocated.
35. Another meeting that discussed the plots was the Town Planning Committee meeting held on 22 November 2011. That meeting resolved that the plots be planned for the existing market, and a further proposal was tabled and seconded, to have the plots amalgamated into one title for the Kisii Municipal Market. By that time this litigation was already in court.
36. At this juncture, I wish to go a little back to the period prior to the allocation. There was a survey of the area where the suit land falls that was done on around about 1978. This survey culminated in the survey plan F/R No. 143/81.
37. As explained by PW-2, the survey was done according to instructions and he could find nothing untoward with the survey. It is this survey that brought forth the parcel No. 258, in issue here, together with three other plots i.e No. 259, 260 and 261. When the matter was proceeding, I was curious as to whether the other two parcels noted in the survey, No. 260 and 261 were also challenged by the plaintiff. The information I got from the bar was that there had been filed the suit (Kisii HCCC) No. 134 of 2010 and 136 of 2010. It was said that the suit No. 134 of 2010 was dismissed and the suit No. 136 of 2010 withdrawn. I was not however given the pleadings nor the final orders.
38. Be that as it may it would appear to me that this survey was in accordance with an LDP attached to the allotment letter of the 1st defendant in the case No. 135 of 2010. But even if it was not this LDP that led to the survey, the authority to survey is right there in the survey plan. The survey plan indicates that it is done pursuant to letter of authority No. CT/82/Vol 27/2749 of 23 September 1978 and CT/82/27/2770 of 22 November 1978. The plaintiff did not avail these letters nor was there any



mention of them. I think it is the duty of a body such as the plaintiff to be fully transparent and to produce the whole evidence rather than be selective on what to provide to court.

39. The plaintiff relied on the Development Plan dated to support its case. It was said that pursuant to this development plan the suit land is in an area reserved for the municipal market. That is not what I see when I look at the Development Plan. There is no indication of a Municipal Market in this Development Plan. The general area where the suit land falls is split into two. One area is indicated 'parking' with a legend 73. The second portion has a legend 514 and legend 5 in the development plan connotes a 'commercial' zone. There is no planning in this development plan for a municipal market in this general area. Whatever the case, it is apparent to me that there was replanning of this area where the suit land is located (comprising of the four plots in the survey plan). This replanning is depicted in the other PDPs produced, being PDPs KSI/37/87/5, KSI/37/2002/02 and KSI/37/2003/01. The first of these three PDPs, one of 1987, is for a proposed commercial development which is actually next to the Plot No. 258. I see the four plots No. 258-261 recognized in this PDP though their numbering is not endorsed; but they are clearly visible and separated from what would be the market area by a road. The second of the PDP is of 2002 and it appears to be plan for 'Municipal Butchery Stalls, Enclosed Market and a Loading/Unloading Bay and Parking'. It is what was referred to at the hearing as PDP No. 130. This PDP would clearly be one prepared by the Municipal Council and it respects the four plots No. 258-261. The plan shows this market area separated from the four plots by a road in between. I would assume that if the Municipal Council was of opinion that the four plots, including the suit plot, was part of the market, then they would have included them in the PDP but they did not. The third PDP is of 2006 for an extension of Redeemed Gospel Church Block 2/42. It is of course not for the disputed parcels but from this PDP you can see the disputed parcels of land clearly marked No. 258 and 259, together with the other surveyed plots No. 260 and 261, again separated from the market and a car park by the road. It would therefore appear to me that there was actually replanning of the area, so that the four plots are created, and the market area together with its parking also created. In fact, now the parking area is even moved to the south whereas in the original development plan it is more to the north.
40. The above is supported by the letter dated 1 February 1982 by the SLO. Inter alia that letter states that where the suit land is located is an area zoned for BCR purposes and is ready for allocation.
41. I am aware that PW-1 in his evidence asserted that the plots were public utility. I cannot take this too seriously. First, PW-1 is an investigator. The role of an investigator is to put together bits and pieces of evidence and form an opinion. He is not a primary witness nor the primary source of the evidence i.e not the person who may have authored a document, or made a decision on it, or personally witnessed a particular act. That is how I construe his evidence. His opinion was that the land was reserved for a Municipal Market, but as I have pointed out, I have not seen any reservation for a Municipal Market either in the Development Plan or subsequent PDPs. He did mention that the land was excised from land reserved for the Municipal Market but I have seen no such excision from land reserved for a municipal market. As I have taken quite some trouble to explain, there is nothing in the development plan indicating 'market plot.' He did add that the land was set aside for use by the Council and not available for allocation but I have seen no such setting apart. I reiterate that there is nothing in the Development Plan depicting the suit land as public utility land or land reserved for any public purpose.
42. I have said above that PW-1 is an investigator and cannot be taken to be a primary source of evidence. I would have thought that primary evidence in a case such as this would come from an official of the County Government of Kisii, the successor to the County Council of Gusii and the Municipal Council of Kisii. It is them who would have allotted the plots. It is them who would have planned and/or replanned the area. It is them who would say whether or not they have minutes of allocation of



the plots. It is in fact them to complain that their market as planned has been illegally taken over. No person from the County Government of Kisii was called to testify to shed light on the above. To me it remains mere allegation by the plaintiff that the suit lands are public plots set aside for the market, since the very entity that is in charge of the market and in charge of planning has not been called to testify, and appears to have planned the market in a manner quite contrary to what is being put across by the plaintiff.

43. In his evidence, Mr. Kaburu testified inter alia that part of the problem of the allocation is that there was only 'verbal' acceptance. To me, the acceptance would be confirmed by payment of what is depicted in the allotment letter which was duly done. Once there is payment we cannot split hairs to say that because there is no letter saying 'acceptance' then there is no acceptance of the conditions laid down in the allotment letter. The act of complying with the terms in the allotment letter is sufficient to demonstrate acceptance, and once a Lease is issued and registered, pursuant to compliance with the terms of allotment, I see no basis for going back to now say that this is all wrong because there is no letter titled 'acceptance.'
44. The other part of the plaintiff's evidence was that this plot was not properly allocated. It was said that there was no advertisement nor an application letter, nor minutes of allocation. I have already pointed out that some of these would need confirmation from a witness from the County Government of Kisii who now hold the records of the former Councils. This is especially so on the allegation of lack of allocation minutes. This ought to have come from somebody from the County offices.
45. In his submissions, Mr. Kyeli, learned counsel for the plaintiff, pointed me to Section 13 of the Trust Land Act as applicable. That Section provides as follows :

13. Setting apart by council

- (1) In pursuance of section 117(1) of the Constitution, a council may set apart an area of Trust land vested in it for use and occupation—
- (a) by any public body or authority for public purposes; or
 - (b) for the purpose of the extraction of minerals or mineral oils; or
 - (c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.
- (2) The following procedure shall be followed before land is set apart under subsection (1) of this section—
- (a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;
 - (b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;



- (c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;
- (d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

- (3) Where the council approves a proposal to set apart land in accordance with subsection (2)(d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.
- (4) Subject to this section, sections 7(3) and (4), 8(1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this section, mutatis mutandis, and subject to the modification that the compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person).

46. There is reference in the above section to Section 117 of the *Constitution* and it may be useful to also set it down for full context. It provides as follows :

117 (1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation -

- (a) by a public body or authority for public purposes; or
- (b) for the purpose of the prospecting for or the extraction of minerals or mineral oils; or
- (c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

(3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

(4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who -

- (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or



- (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.
- (5) No right, interest or other benefit under African customary law shall have effect for the purposes of sub section (4) so far as it is repugnant to any written law.
47. Counsel submitted that the process outlined in Section 13 (2) of the Trust Land Act (repealed) was not followed. I think, with respect, in the context of the litigation herein, Mr. Kyeli misinterpreted that Section. If you carefully read that Section 13 of the Trust Land Act, you will see that it relates to setting apart trust land. But what does this setting apart mean? We have to remember that generally Trust Land was held under customary tenure and was managed by the County Councils. This setting apart would mean that it gets removed from such customary use and tenure and allocated to a public body, or other person, for use that would in most instances extinguish that customary tenure. You can see this when you read Section 117 (2) of the repealed constitution which I have outlined above. It does explicitly provide that the interests that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished. That is why, when you read Section 117 (4) of the Constitution together with Section 13(2) (4) of the Trust Land Act, there is provision for compensation to those affected by the setting apart, for it could mean that they are displaced. You would thus expect that setting apart would involve a rather large area of trust land. Some setting apart would be for purposes of creating townships and when this was done, the County Council would subsequently subdivide this land and then issue leases to individuals for the smaller plots out of the larger area of land that is set apart. That is where Section 117 (3) of the repealed Constitution now comes in. You will see that it says that once the county council has set apart an area of land, it could make grants and dispositions out of such land. Such grants could include leases.
48. In our case the setting apart in accordance with Section 13 (2) of the Trust Land Act is that depicted in the Gazette Notice No.1967 of 23 May 1966. If you read that Gazette Notice, some large area of land covering 215.85 acres was set apart for the expansion of Kisii Town. After this setting apart the land was then planned and it is this planning that led to the Development Plan approved in 1974. Once the land was set apart it now fell to the Council to allocate the areas that were not assigned for public use and/or public utility. This would be through issuance of leases to individuals either for commercial, residential, or industrial plots, as the case may be, and this allotment of leases should not be confused with the setting apart that is in Section 13 of the Trust Land Act which I have taken some trouble to explain above. That is why it is wrong to point at the procedure in Section 13 (2) of the Trust Land Act to claim that the procedure therein was not followed in our instance.
49. Now, under Section 53 of the Trust Land Act, the Commissioner of Lands would administer the Trust Land on behalf of the County Councils and it is useful to set down Section 53. It provides as follows :
53. Commissioner of Lands to administer Trust land
- The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may—
- (a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13(2)(d) of this Act; and
- (b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient:
- Provided that—



- (i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and
- (ii) the Minister may, by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself.

50. If you read the above, you will see that the Commissioner of Lands was empowered to administer trust land on behalf of the County Councils and could exercise, on behalf of the Council, the powers conferred by the Act to the Council and execute grants and leases on behalf of the Council. That is why you would have County Council leases drawn and executed by the Commissioner of Lands. The proviso to Section 53 is that the Commissioner of Lands needed to act in compliance with such general or special directions that the Council would have given him.
51. Now you will have to dig and find out what general or special directions the Gusii County Council gave the Commissioner of Lands, before you can claim that the Commissioner of Lands acted contrary to those instructions, unless it is a case of the facts speaking for themselves, such as an allocation of say a County Council dispensary to an individual, or such other land that is clearly used by a public body. I was not, within the hearing of this case given any general or special directions that the Gusii County Council gave the Commissioner of Lands regarding allotment of plots covered in Gazette Notice No. 1967 of 23 May 1966, and without that evidence, I do not see how it can be held that the Commissioner of Lands acted outside his powers, given in Section 53 of the Trust Land Act in the instance of this case. As I said earlier the Development Plan does not indicate these plots as market plots and there is every indication of the plots being BCR plots. I do not see how I can hold that the Commissioner of Lands in this case acted outside any general or special directions given by the Gusii County Council. In fact when I look at the process leading to the grant, there is mention of the grant being approved by the Plot Allocation Committee and I have no evidence that the Gusii County Council did not mandate such Committee to allocate plots within the land already set apart, and the record shows that there was communication between the allotting authority and the County Council with no issue being raised.
52. Importantly, no law relating to allocation of town leases by the Gusii County Council was given to me by the plaintiff, so that we can say that the said law was violated. Indeed, in his submissions, Mr. Kyeli, only referred me to Section 13 of the Trust Land Act, which I have already demonstrated cannot apply. In the plaint, there was generalised pleading of contravention of provisions of the Trust Land Act, Government Land Act, the Physical Planning Act, and the Local Government Act. This was reiterated in the evidence provided by the plaintiff's witnesses who also added the Town Planning and Land Planning Act. But other than merely citing the statutes, no specific section of these statutes was pointed at as having been the section that was violated. It was the duty of the plaintiff to lay down the specific sections of the law that were violated and demonstrate how they were violated. You cannot for example say that the Government Land Act was violated yet not point at any section of it. It is simply not good enough.
53. From my analysis above, I am not persuaded that the plaintiff has proved that the Plot No. 258 was public utility, or it was a plot set aside for a market, as alleged in the plaint, or that it is a plot that improperly allocated.
54. It was of course mentioned that the plot hosts vegetable vendors. I was not told when the vegetable vendors took possession, i.e whether before or after the allocation of the plot. The mere presence of vegetable vendors on a plot does not make it public land. The presence of the vegetable vendors is a problem for the 1st defendant to deal with.



55. I think I have said enough to demonstrate that I am not persuaded that the plaintiff has made out a case for the cancellation of the title of the 1st defendant nor made out a case that the 2nd defendant acted fraudulently. The plaintiff's case is for dismissal and it is hereby dismissed with costs to the defendants.

56. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Kyeli for the plaintiff

Mr. Ochwangi for the 1st defendant

Mr. Odino h/b for Mr. Kamaara for the 2nd defendant

Court Assistant : Michael Oyuko.

