



Ethics & Anti-Corruption Commission v Gisemba (Sued as Administrator of the Estate of James Gisemba Oriku (Deceased)) & another (Environment & Land Case 135 of 2010) [2025] KEELC 4102 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 135 OF 2010**

M SILA, J

MAY 29, 2025

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DUKE ORIKU GISEMBA (SUED AS ADMINISTRATOR OF THE ESTATE OF JAMES GISEMBA ORIKU (DECEASED)) 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. 133 of 2010. This case relates to the land parcel Kisii Municipality/Block III/259, whereas in the case Kisii ELC No. 133 of 2010, the land in dispute is the land parcel Kisii Municipality/Block III/258. 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. 133 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. The plaintiff sued James Gisemba as 1st defendant and James Raymond Njenga as the 2nd defendant. James Gisemba died on 20 May 2011 before the case could be heard. He was substituted by his son, Duke Orikú Gisemba, who obtained letters of administration ad litem on 30 July 2021. An amended plaint was subsequently filed on 17 November 2021 to reflect the substitution but the substance of the case remained unchanged.
3. The subject matter of the case is the land parcel Kisii Municipality/Block III/259 (sometimes also referred to as Block 3/259, or simply Plot No.259). In question is the leasehold title registered in favour of James Gisemba (the deceased) on 24 March 1980. The leasehold title shows that it was issued by the Gusii County Council for a term of 99 years from 1 September 1978. 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 was averred that vide Development Plan No. 51 of 1971, the suit land was reserved for a municipal market. It was 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. 259, on 24 March 1980, a register was opened indicating the Council as the absolute owner and a lease instrument was registered with the deceased as the lessee. This lease was executed and issued by the 2nd defendant who was at the time the Commissioner of Lands.
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 deceased 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 deceased (James Gisemba) with knowledge that it was trust/public land, that had been reserved for a municipal market;
 - iv. The deceased 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 deceased 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 deceased accepted a lease over the suit property without paying any consideration at all.
 - vii. The deceased accepted a lease over the suit property, with notice that it was part of trust/public land regulated by specific legal requirements having served as a Councillor/Mayor.



- viii. The deceased 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 deceased knowingly accepted a lease in respect of the suit property despite the lack of the requisite Council/Ministerial consents.
 - x. The deceased was arbitrarily selected and favoured in contravention of the law.
6. In the alternative it is pleaded that the suit land was leased to the deceased without authority or consent of the Council and in breach of the express provisions of the applicable statutes. The following were pleaded as constituting the breach of statutes :
- a. The suit property was leased to the deceased without a valid resolution of the Council;
 - b. The suit property was leased to the deceased without the consent of the Council nor of the Minister for Local Authorities;
 - c. The lease to the deceased 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 was pleaded that the deceased knowingly and willingly participated in the fraudulent scheme and cannot legally claim proper title. In the amended plaint the plaintiff seeks the following orders (Slightly paraphrased for brevity) :
- a. A declaration that the Lease (Certificate of Lease) issued and registered on 24 March 1980 in favour of the deceased over the land described as Kisii Municipality/Block 3/259 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 issuance of the lease and registered on 24 March 1980 in favour of the deceased over Kisii Municipality/Block 3/259.
 - c. An order for vacant possession.
 - d. An order of permanent injunction to restrain the 1st defendant or any beneficiary of the deceased from dealing with the suit land other than by way of a surrender to the County Council of Gusii.
 - e. General damages for misfeasance of office against the 2nd defendant.
 - f. Costs with interest.
8. The 1st defendant filed a Defence to the amended plaint. He more or less denied all allegations in the amended plaint.
9. The 2nd defendant had filed defence to the original plaint. 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; that he has no access to the records and is 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 Wenslaus Wekesa. He is a Principal Physical Planning Assistant in the Ministry of Lands. He worked in the same position in Kisii between 2010 and 2018. He had a pre-recorded witness statement dated 10 December 2020 which he adopted as his evidence. In that witness statement he elaborated on the process of land allocation. He stated that you start with the Development Plan which is a framework showing the use of the land in a particular area. For Kisii Town, he stated that the Development Plan is Plan Ref No. 37/71/1 of 8 October 1974, Approved Development Plan No. 51. It has legends indicating the various uses of the land as follows :
 0. Residential
 1. Industrial
 2. Educational
 3. Recreational
 4. Public purposes
 5. Commercial
 6. Public utilities
 7. Transportation
 8. Deferred
 9. Agricultural
11. He stated that once there is an approved Development Plan for a specific use then the said land is not available for re-allocation for private use; further, that where land is reserved without specific use, it can be reassigned for either private or public use, provided the authority to alienate is procedurally obtained and a Part Development Plan (PDP) is prepared and approved.
12. In respect of the suit land, he stated that it is in Zone 73 and this area in the Development Plan is indicated as Parking. According to him this is under legend 7 i.e the land was reserved for transportation use, thus public use. He stated that there is no approved PDP prepared for this zone that covers the suit land, and which changed the use from transportation to commercial, in order for it to be allocated to private individuals. He referred to an approved PDP Ref KSI/37/2002/02 of 24 July 2002, Plan No. 130, and stated that it is a PDP prepared for the municipal market, loading and unloading bays, and butchery stalls. He stated that Zone 73 was not and could not be included in the PDP because the suit land had already been surveyed and a lease issued. Thus in the Plan No. 130, the suit land is only highlighted as an abuttal, but is not part of the PDP that was prepared and approved. He was of the view that the lease and survey of the suit land was not done procedurally. He stated that there is no evidence of an approved PDP as the basis for alienation, survey, and registration of the land to a private person.



13. In court he testified that the Development Plan No. 71 was approved on 8 October 1974. He elaborated that the Development Plan covers a wide area and a Part Development Plan is specific to a plot. He pointed out that the suit land is shown as a Parking i.e 73 and that the parking is for public purpose. He produced the development plan as an exhibit. He testified that he has visited the ground and part of it is used for selling market produce, and a big portion of it is used as a parking. He averred that the plot is adjacent to the Municipal Market. He stated that he has no record of a PDP relating to the suit land. He testified that there is a PDP for the municipal market which is the Plan No. 130 approved on 24 July 2002. It did not capture the suit land as a lease over it had already been issued. He produced a letter dated 25 January 2021 and the said PDP No. 130. According to him the plot needs to remain for transportation purposes and for public use.
14. Cross-examined, he testified that he joined the Ministry in 1997. He acknowledged that the 1st defendant holds a lease to the suit plot. He could not comment on its authenticity for reason that he comes from the Physical Planning Department. He was questioned on the legend and user that he indicated in his statement. He was not clear; stating on one hand that 72 is parking then later saying it is 73, and also mentioned 72 for transportation, but he could not remember the precise user. He testified that there are no circumstances when the user of land can change but in the same breadth testified that there can be change of use which requires public participation. He stated that it is not possible to change use from public to private. Questioned what shows the suit land as the parcel 73 in the Development Plan he stated that you just look at it and the neighbourhood. He stated that the area 73 is subdivided into four plots i.e Plots No. 258, 259, 260 and 261. He testified that the user 'commercial' is in the legend as No. 5 and within this '5' you could have different functionalities indicated as 51 to 510. Not all would be indicative of a municipal market. According to him the market corresponds to 514. He could however not explain this 514 which he said was in a Legend that he did not have, though again he stated that 514 would mean 'municipal market.' He continued to testify that municipal market is zoned within commercial not public purpose. He tried to elaborate that it depends on the use, not the zone, and that 'market' is public use. 'Educational' would be zoned under Legend 2; and transportation Legend 7, which he said is for public. He acknowledged that there are plots planned for commercial which are private.
15. He relied on the Development Plan as the basis for this case. He testified that a PDP comes from the Development Plan and thus the PDP No. 130 was extracted from the Development Plan. He testified that there is no PDP in their records changing the plot from transportation to commercial purpose, and no PDP prepared for the suit land. He could see that PDP No. 130 has colour codes for three uses, i.e existing butchery (1), enclosed market (2) and loading bay (3) (none of which covered the suit land) but he asserted that the suit land is part of the market because this is what is in the Development Plan.
16. Re-examined, he reiterated that there is supposed to be a PDP for the subject plot but they do not have it in their records.
17. PW-2 was Dedan Ochieng' Okwama. He is an investigator with EACC and was part of the team that carried out investigations into illegal alienation of land belonging to the County Council of Gusii. He had a witness statement dated 6 May 2021 which he adopted as his evidence. 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 24 March 1980, 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 a lease issued to the



deceased. He was issued with a Certificate of Lease on 5 May 1980. 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 mentioned 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 purpose. 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.

18. In his oral evidence in court, he testified that in their investigations they established that the suit land formed part of a parking lot for the municipal market, and that even presently the land is used as part of the municipal market. He stated that now there are temporary structures and sheds where foodstuff, vegetables, and meat is sold, and that it is managed by the County Government. He added that the 1st defendant has never taken possession despite holding title. He testified that there is a procedure for changing use of land and that there needs to be a Council resolution and minutes for change of user as well as subdivision. If the procedure is not followed the change of use would be improper. He produced the Gazette Notice No. 1937 of 23 May 1966 demarcating the town and which gave rise to the Development Plan. He testified that in the Development Plan the plot is indicated as a parking and according to him it is for use by the municipal market and is currently being used as a market. He produced the Green Card and White Card of the suit land and the Lease as exhibits. He testified that they did not come across any document to show how the allocation was done. He testified that without following procedure the deceased could not have been allocated the land.
19. Cross-examined, he could identify the plot No. 334 in the PDP No. 130. He could not however identify the Plots No. 376 and 418 (it will be recalled that in the pleadings there was mention of 7 plots having been carved out of an illegal survey for market land including the plots No. 376 and 418). He could not tell whether these two i.e Plots No. 376 and 418 are part of the Municipal Market. He also could not identify Plot No. 334, 258, 259, 260, and 261 on the Development Plan. He could not find anywhere in the Development Plan where the suit land is shown as reserved for the municipal market. He could not tell whether the Development Plan covered the whole area in the Gazette Notice of 23 May 1966. It was suggested to him that some land such as that of the Golf Course and the Kisii School have been there for over 100 years yet not part of the Development Plan and he acknowledged that some developments were there prior to the Development Plan. He was not aware when the Municipal Council succeeded the County Council of Kisii.
20. PW-2 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. That letter appeared targeted at the Plot Block III/258 and not the subject plot herein which is Block III/259.
21. PW-3 was Wilson Kibichii. He works with the Ministry of Lands in the Survey Department. He is the Head of Survey Records. 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 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.
22. 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/ 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. He was questioned on the disparity in the allotment letter which shows the plot No. 259 as 0.034 ha and the survey plan as 0.0806 Ha. He stated that it is possible to have differences in acreages but within minimal limits, usually 14% and unless a serious explanation is given, it wouldn't be possible to have double the size. He testified that the survey plan had coordinates and shows the exact location of the plot. He had a google map illustration of the plot.
 23. Cross-examined, he testified 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.
 24. 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.
 25. 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.
 26. PW – 4 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. He then proceeded to give evidence on the manner of allocation of the Plot No. 258 which is not relevant for this case.

27. Cross-examined, he did not know under what circumstances the suit plot was allotted. He testified that it is not indicated to whom the land was reserved before alienation though he added that it was Government land planned as a public utility. He stated that it was reserved to the Municipal Council of Kisii as a trustee. According to him, Mayors and Councillors could not allocate the land. He testified that land is planned under the Planning and Land Use Act and the Municipal could not decide to change use and give the land to someone else.
28. Re-examined, he stated that the outcome of his investigation was that the land was planned as a bus park.
29. With the above evidence the plaintiff closed her case.
30. The 1st defendant testified as the sole defendant for his case. He is son of the deceased original 1st defendant. He also largely relied on pre-recorded witness statement as his evidence. In it, he stated that his deceased father was the registered proprietor of the suit land. He stated that his father was in possession and that he did significant developments on the plot. He stated that his father was issued with an allotment letter dated 28 August 1978 and that the land was later surveyed as indicated in a payment receipt of 16 November 1979. He stated that the PDP used to prepare the allotment letter was approved prior to issuance of the allotment letter. That a lease was prepared on 1 September 1978 and a Certificate of Lease issued on 5 May 1980. He denied that the land was allocated fraudulently and there was no indication that the land was reserved for a municipal market. In court, he produced various exhibits including a copy of the allotment letter. He testified that it was kept by his late father and he could not find the original of it. He had copies of two receipts dated 13 November 1978 and 16 November 1978. He had the original lease and the original certificate of lease, and receipts for payment of land rates.
31. Cross-examined, he testified that his father followed due process in getting the property allotted to him. The procedure in Section 3 and Section 13 of the Trust Land Act was put to him but he did not know under what procedure his father got the land. He did not have minutes of allocation of the land nor a resolution of Council that the land be allocated to his father. He did not have any letter from the Council to the Commissioner of Lands that he may issue an allotment letter to the deceased. He thought that his father had all the documents and it is unfortunate that he is deceased.
32. The 2nd defendant did not appear during defence hearing and I ordered his case closed without any evidence.
33. Counsel were invited to file submissions and I have taken note of the submissions filed.



D. ANALYSIS AND DISPOSITION

34. The plaintiff has of course come to court seeking the cancellation of the title in name of the deceased whose estate is now being represented by 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 deceased was a Leasehold interest for 99 years from 1 September 1978. The Lease shows that the grant was for purposes of setting up a supermarket. In the plaint, the plaintiff contended that the deceased acquired this interest fraudulently and illegally, for the principal reason that this land is public property set apart for a municipal market.
35. 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.
36. 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 title is a lawful one. That Section 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.
37. We have a lease here and the presumption of course has to be that it is a good lease unless the vitiating factors set out in Section 26 (1) (a) and (b) above are proved. 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 alleges, 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 ?
38. The evidence of the plaintiff was quite ambivalent, if not outrightly wishy washy, on whether this land is set apart as a Municipal Market as pleaded in the plaint. I would imagine that PW-1 was the plaintiff's star witness in this regard, but I am fully persuaded that the plaintiff fell short. I would expect that an issue relating to the planning of Kisii town would be within the firm domain of the Physical Planning



Department in Kisii County since Planning within County domains is a devolved function (See the 2010 Constitution, Schedule 4, Part 2, item 8). However, the plaintiff did not deem it prudent to call any officer from the Physical Planning Department of Kisii County to give evidence regarding the manner in which Kisii town is planned. But even then, the evidence of PW-1 was lacking in punch.

39. PW-1's evidence mainly centred around the Development Plan in an effort to show that the land was public land but I think he hopelessly failed in that regard. First, the Development Plan does not specifically identify the suit plots. In other words you cannot pinpoint the suit plot in the Development Plan. PW-1 contended that you can point out the plots from the larger area but I am afraid that what is in the development plan is too large an area for one to precisely narrow down on the suit plot. But let us even assume that the area was narrowed down with precision. That area bears Legend 73. We can see from the Development Plan that Legend 7 has an assignment of 'transport.' PW-1 did not however have any chart for the sub-numbering of what is in the Legend. It was his evidence that the assignment 73 means that it is for parking but in cross-examination he was at pains to differentiate the sub-numbering 72 and 73 and eventually owned up that he does not remember the precise use of these sub-numbering, and he did not have any chart where the sub-numbering could be referred to for identification of the specific use. Even if we are to further assume that what was assigned to the suit land is 'parking', 'parking' is not the same as a 'municipal market' which is what the plaintiff pleaded in her plaint.
40. Of course, PW-1 tried very much to put a connection between the words 'parking' and the 'market' by saying that this was 'parking for the market'. But you would expect this to be in the Development Plan, but it is not, and if indeed it is 'parking for the market' why not just have it as part of the market? But importantly for me, this area is not falling under the Legend 4, i.e public purpose, nor legend 6 under public utilities. It is difficult to support the claim that simply because the development plan shows 'parking' then the land is public land, or that it is part of the public market. It could as well be commercial parking for individual commercial use. It did not help that PW-4 was of opinion that this is a bus park i.e not parking for the market.
41. Whatever the case, there was acknowledgment from PW-1 that a development plan can change through a PDP. There was an LDP (which I assume is a Local Development Plan) attached to the allotment letter for the suit land, which to me is indicative of replanning of the area. It is of course not a PDP, and I think it was not a PDP because it was not for one particular plot, but for the general area. Out of this replanning, a survey of the area was done and this is the survey that was elaborated by PW-3.
42. As explained by PW-3 the survey was done in accordance with the instructions given for the survey works, and he could find nothing untoward with the survey. It is this survey that brought forth the parcels Block III/ 259, in issue here together with three other plots i.e No. 258, 260 and 261. Contrary to what was pleaded in the plaint, this survey did not include the plots No. 334, 376, and 418. No evidence was in fact led as to how the Plots No. 334, 376 and 418 in Block III/Kisii Municipality were created. It is also not clear to me whether the plaintiff ever sued in respect of the parcels No. 260 and 261 which were a product of the same survey, as that which produced the suit land, and if not, why then the plaintiff thought of narrowing down on only two of the four subdivisions (i.e Plots No. 258 and 259).The information I got from the bar was that there had been filed the suit (Kisii High Court) 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 neither offered the pleadings nor the final orders. Be that as it may I would hold that this survey was in accordance with the LDP attached to the allotment letter of the 1st defendant. 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 any mention made 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 for these letters would have given the full picture of why the survey was being done. Apart from not producing these letters that authorized the survey, nor even making reference to them, the plaintiff also did not avail the correspondence file of the suit plot which would ordinarily have the requisite documents on the alienation of the suit plot. I would have thought that PW-2, being the investigator, would have something to say on this, but he did not. I wonder if this file was deliberately kept away from the court.

43. My persuasion that the town planners had changed the planning of the area is supported by the other PDPs produced by the plaintiff. For example, PW-1 produced a letter dated 25 January 2021 written by the National Director of Physical Planning. That letter attached three PDPs, that is KSI/37/87/5, KSI/37/2002/02 and KSI/37/2003/01. The first of these three PDPs, is one of 1987, 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 a 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 and in my view this is a very important piece of evidence as it would be a PDP by the Municipal Council, and it is said here that the suit land is part of the municipal market. When you look at this PDP, it shows the 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 No. 258-261, including the suit Plot No. 259 in dispute herein, were 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 is my deduction that there was actually a 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. When he testified, PW-3 did mention a cancellation of Plots No. 255 and 256 which are in the same Plot Card with the suit lands but the suit lands remained untouched. That would infer quite some considerable respect for the two Plots No. 258 and 259 by the land officials.
44. I am aware that PW-2 in his evidence asserted that the plots were public utility. I cannot take this too seriously. First, PW-2 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. 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. As I mentioned earlier there is nothing in the Development Plan depicting the two suit lands as public utilities or reserved for any public purpose.
45. I have mentioned that PW-2 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 a 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 no issue given that it made a PDP in 2002 for the municipal market which PDP does not include the suit plot as part of the market. In fact they have gladly been collecting rents and rates for the Plot No. 259.

46. PW-2 produced a letter dated 14 September 2006 said to have been written by one J.K.N Sese, Town Clerk, Municipal Council of Kisii. That letter does not touch on the Plot No. 259 at all but only on the Plot No. 258 which I have analysed separately in the case No. 133 of 2010.
47. In a nutshell, I am not persuaded that the plaintiff has proved that the Plot Kisii Municipality/Block III/ 259 was public utility, or it was a plot set aside for a market as alleged in the plaint, or that it is not a plot that could not be allocated by the Gusii County Council.
48. 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. In his submissions, Mr. Kyeli, learned counsel for the plaintiff, pointed me to Section 13 of the Trust Land Act (repealed), on setting apart trust land, as having been violated. I think, with respect, that Mr. Kyeli misinterpreted that Section.
49. 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).

50. There is reference in the above section to Section 117 of the repealed 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.

51. If you carefully read 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 then 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.

52. 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) to claim that the procedure therein was not followed in our instance.

53. 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.

54. 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.
55. 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 issuing a lease to the deceased.
56. 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.



57. It was mentioned that the suit plot is occupied by people selling market produce. I did not see the need to visit the plot and I cannot vouch for that statement. Assuming that is the case, the court was not told when this occupation started. Was it an invasion by people after the allocation or were the people there prior to the allocation ? That evidence was not led. If it is occupied as said, that does not automatically mean that the people there occupy the land lawfully and it does not mean that the occupation alone proves that it is a market plot. Whatever the case, if it is occupied, that is a problem for the 1st defendant to deal with.
58. From the foregoing, it will be seen that I see no substance in the plaintiff's suit. The plaintiff's suit fails and it is hereby dismissed with costs.
59. 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

Ms. Chepkorir for the 1st defendant

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

Court Assistant : Michael Oyuko

