



**Mbugua (Suing as the Administrator of the Estate of George Mbugua Kirori - Deceased) v
Commissioner General of Prisons & 2 others; National Land Commission (Interested Party)
(Environment & Land Case 625 of 2017) [2025] KEELC 4117 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 625 OF 2017**

**JG KEMEI, J
MAY 29, 2025**

BETWEEN

**JAMES KABERIA MBUGUA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF GEORGE MBUGUA KIRORI - DECEASED) PLAINTIFF**

AND

THE COMMISSIONER GENERAL OF PRISONS 1ST DEFENDANT

THIKA WOMEN PRISON 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. The Plaintiff moved this court and sued the defendants vide the plaint dated the 1/7/2016 which plaint was later amended severally resting on the one dated the 17/7/2022. The Plaintiff sought the following orders;
 - a. An order of declaration that George Mbugua Kirori, deceased is the registered owner and so had the proprietary rights on the parcel of land Thika/municipality/block9/8X5(suit land).
 - b. An order of injunction restraining the 2nd defendant whether by itself agents’ servants and or employees from entering into the suit land and interfering with the said plot or in any way preventing the plaintiff legal representatives’ agents and servants and or employees from utilizing and or enjoying his said piece of land.
 - c. General damages for trespass



- d. Costs of the suit and interest thereon
2. The Plaintiffs claim was denied by the defendants vide their amended defence dated the 29/4/21. The Defendants contended that the suit land is public land which was not available for allocation to private citizens. That the suit land is the property of the defendants and that at no time did the Plaintiff occupy own or take possession of the same as it is within a protected area. That the land is reserved for the 2nd Defendant through a gazette notice and as per law it is classified as a protected area.
 3. In their counterclaim the Defendants pleaded fraud misrepresentation, illegality on the part of the plaintiff in the manner in which he acquired title to the suit land. They sought the following orders;
 - a. The suit be dismissed with costs and judgement entered in terms of the Counterclaim.
 4. At the hearing PW1 – James Kabere Mbugua testified and stated that he is the son and administrator of the estate of George Mbugua Kirori, deceased. He relied on his witness statement on page 64 of the trial bundle and produced documents marked as PEX No 1-17.
 5. He stated that his father purchased the suit land from Margaret Wambui and obtained title in July 2013. In the process of planning to construct on the land, his father was prevented from accessing the land by the defendants. The suit land is open space bordering other properties that have been constructed. He referred to a letter dated the 9/10/23 addressed to the prison authorities demanding the removal of trees planted on the suit land by the 2nd Defendant. He stated that issues on the land arose as early as 26/7/2013 with respect to the removal of beacons for the suit land.
 6. With that the Plaintiff closed his case.
 7. DW1 – Chief Inspector Leonard Ogotu Odhiambo testified and introduced himself as an officer of the 2nd Defendant in charge of Survey department. He relied on his witness statement dated the 9/10/2018 as his evidence in chief. He produced documents marked as DEX 1-5 in support of the defendant’s case and counterclaim.
 8. He added that the suit land is within the Thika Prisons land, a protected zone in law. That the suit land being Government land was reserved for prisons department in 1954 vide a gazette notice and planned under Plan no 48872/1X9A for purposes of Thika Prisons and other public facilities. After independence the land was declared a prison vide gazette notice No 1134 of 30/7/1968. The land being a protected zone is reserved for special public security measures regulations under Section 85 of the retired Constitution and the detention of person regulations, registration and restriction of movement into or out of the compulsory movement of persons regulation among others.
 9. The witness stated that the land has never been degazetted and that the gazette notice is still in force. That the land development plan is a legal document which shows the extent and use of the land. That the suit land is within the prison farm along Garissa Road within Thika Town. That it falls within the brick making plant marked blue on the map. That there are trees growing on the suit land belonging to the Prisons department and that the land is under the 2nd Defendant’s charge.
 10. He stated that there are other plots that were illegally acquired from the 2nd Defendant which are subject to pending litigation in court. He added that though the Plaintiff holds title the title was illegally acquired.
 11. At the close of the hearing parties visited the site on the 24/1/24 and a site report was filed on record.
 12. As to who is the legal owner of the suit land, the Plaintiff submitted that the plaintiff is the registered owner of the land since 2013 by virtue of holding a certificate of lease having acquired the suit land



from one Margaret Wambui after carrying out due diligence and the continued payments of outgoings since and that in line with the provisions of Art 40 of *the Constitution*, the court was beseeched to offer protection to the Plaintiff. That as a land owner the Plaintiff is entitled to the enjoyment of land rights and interest that accrue pursuant to the provisions of Section 25 of the *Land Registration Act*. Further it was submitted by the Plaintiff that the defendant's averments that the land is public land is not proven. That the gazette notices of 1968 were not tabled before the court and the same lacks any evidential value in support of the defendants' case. That where a document is not produced in court, it cannot be relied on by the court in making its conclusions in the suit. In addition, he argued that the Defendants have not proved fraud on the part of the Plaintiff in the acquisition of the suit land.

13. The Plaintiff submitted that since 2015 he has lost revenue that would have been derived from the suit land had he been allowed to develop the land by the Defendants. A figure of Kshs 1.0 Million as been prayed as general damages.
14. As to whether the suit land was available for allocation, the Defendant submitted that the Plaintiff claims to have acquired land within the Prisons which is public detention camp/facility as shown in the Land Plan No 48872/1X9A and PDP Ref TKA/4/96/157 of 13/7/1998. That Thika Prison camp was gazetted vide Notice No 1134 of 30/7/1954 and Legal Notice No 259 of 2/7/1968 way before the alleged allocation of the land in 1993 to Margaret Wambui Ngugi. That since inception the Defendants have used the land as a prison facility and has never surrendered it to the Commissioner of Lands for alienation as a public land. It was further argued that public land cannot be alienated except in accordance with the law.
15. In conclusion the defendant submitted that to the extent that the Plaintiff acquired a tainted interest in the suit land, the same is incapable of protection under the law and urged the court to cancel the same

Analysis and determination.

16. Having considered the pleadings, the evidence led and the written submissions of the parties the key issues for determination are;
 - a. Whether the suit land was public land
 - b. Whether the suit land was legally alienated
 - c. Whether the Defendants counterclaim is merited
 - d. Who meets the costs of the suit and the counterclaim?
17. It is the Plaintiffs case that he acquired the suit land through purchase from Margaret Wambui Ngugi in 2013. That in the process of commencing development of the suit land he and his workers were denied access to the land by the Defendants on the basis that the suit land belongs to the Prisons Department. The Plaintiff cited acts of aggression on the part of the plaintiff to include denial of access, planting trees on the land and removing the beacons thereon. This triggered a number of meetings and correspondences by the Plaintiff addressed to various government offices seeking their intervention to be allowed to access the land to no avail.
18. The Defendants case on the other hand is that the suit land is within land that has been reserved for Public and in this case Thika Prisons. That the land having been reserved as early as 1954 and confirmed in 1968, the Commissioner of Lands had no authority whatsoever to purport to alienate the land in law to private hands. That the Plaintiff has never taken possession nor developed it as the same was acquired illegally. The court was urged to cancel the illegally acquired title in the name of the Plaintiff and revert the land to the 2nd Defendant.



19. Evidence was led by DW1 that the land is situate within the larger Thika Prisons Farm. According to the Government Notice No 1134 OF 30/7/1954 E W Magor, the Secretary of Defence then under the delegated powers provided in the Prisons Ordinance declared the area as the Thika prison camp. Under Gazette Notice No 258 of 1968, the then Permanent Secretary , Mr A J Omanga under the powers then provided in law declared the area as a detention camp for purposes of the Detention Camps Act.
20. DW1 led unchallenged evidence and produced land Development Plan No 48872/1X9A which showed the boundaries of the Prison land. According to the site visit Report dated the 24/1/24 in which the parties were present, the suit land is situate within the map containing prisons land. The team found out that the land contains trees growing thereon which the plaintiff confirmed were planted by the 2nd Defendant. DW1 led evidence that the suit land falls within the brick making facility marked blue on the map and that it abuts Garissa Road. This evidence is in conformity with the site report which attests that the land borders Garissa road and that there are trees growing thereon. It was also noted that the land is not developed.
21. From the above background it is not disputed that the suit land is the one situated within the Prisons land as gazetted. It therefore follows that the land was reserved for prisons and related uses from as way back in 1954.
22. Under the current Constitution just like the retired constitution, public land is defined under Art 62 to include unalienated land, unregistered land, land held under the doctrine of bona vacantia, land lawfully held, used or occupied by any state organ except that is occupied as a lessee. Public land also includes any land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date. Going by the definition of public land clearly land put under the use for purposes of a detention camp/prison is but public land.
23. How was land then alienated to either private or public purposes. The Commissioner of lands had delegated powers under Section 3 of the Government Lands Act Cap 280 Laws of Kenya. The section provides that the President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—(a)subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;
24. The Act further states;

“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—(a)for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;
25. In this case the Plaintiff led evidence that he purchased the land from one Margaret Wambui Ngugi. He produced documentary evidence in support which I will delve into shortly.
26. It is borne from the record that the then Commissioner of Lands vide a letter dated the 10/12/1998 allocated one Margaret Wambui Ngugi the suit land vide the subdivision scheme approval of the mother parcel No 4953/2210. The plot measures 0.0036 Ha for a period of 99 years from 1/7/92. On 23/5/2008 Ms Ngugi sought the consent of the Commissioner of Lands to transfer the property to the Plaintiff. There is no evidence that the consent was granted save that what followed next is a transfer of the suit land from Ms Ngugi to the Plaintiff George Mbugua vide a transfer dated the 4/6/2008. This was before a lease certificate was issued to Ms Ngugi on the 18/7/2013 by the Commissioner of Lands, one Zablon Mabea as he was then. On the 3/7/2013 the Plaintiff became registered as owner of the suit land.



27. The Plaintiff has argued that he acquired a lawful interest in the suit land while the Defendants have contended that the land was not available for allocation. The question is whether the suit land was free for alienation to the Plaintiff.
28. Section 2 of the Government Lands Act Cap 280 (now repealed) defines Government Land as land for the time being vested in the Government by virtue of Sections 21, 22, 25 and 26 of *the Constitution* of Kenya, 1964 (now repealed). In the same text unalienated Government Land means; -
- “Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.
29. Section 3 of the Physical Planning Act defines unalienated Government Land as;
- “unalienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”
30. Section 3 of Government Lands Act aforesated vested the power to the President, subject to written law to make grants or dispositions of any estates, interests or rights in or over unalienated Government land. The powers of the President were delegated to the Commissioner of Lands and limited to alienation of unalienated Government land.
31. In the case of *In James Joram Nyaga & Another v the Hon. Attorney General & Another* [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;
- “The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.
32. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 Others vs. Pwani University* [2014] eKLR as follows:
- “...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.
131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reiterated in the case of *African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013* where Njagi J. held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey,



who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

33. I have keenly perused the record and find that the Plaintiff did not adduce evidence to show that the gazette notices resting on the one of 1968 was revoked; or that the land described in the said gazette notice was degazetted to remove it from the ambit of public land; or that the land ceased from being used for purposes of detention, correctional services and or prison services and related purposes. The Plaintiff failed to adduce any of the matters required before allocation of a land such as a PDP which is a legal document to show that the user of the land has been changed.
34. I am therefore persuaded that the Commissioner of Lands then had no power to allocate prisons land to private hands, least of all Margaret Ngugi. The attempted alienation was but illegal and contra law and any title that emanates from the illegal process cannot stand the test of the law.
35. In conclusion therefore, the court finds that the land is part of Prisons farm whose user under *the Constitution* is public land; the land being public land was not available for allocation; that being the case any allocation in favour of Ms Ngugi was illegal null and void.
36. The Plaintiff has alleged that he purchased the land from Margaret Ngugi. Had the Plaintiff carried out due diligence he would have discovered that the land is domiciled within the Thika Prisons land, a protected area whose user is for the detention and correctional purposes. The Plaintiff therefore did not acquire any valid title.
37. Section 80 of the Registered *Land Act* empowers this court to cancel title that has been acquired illegally which I shall proceed to so cancel. Luckily the Plaintiff is not without a remedy. I say no more.
38. Final orders for disposal
 - a. The Plaintiff suit fails.It is dismissed with costs
 - b. The counterclaim of the Defendants succeeds.
 - c. The Land Registrar be and is hereby ordered to cancel the title in the name of the Plaintiff to pave way for the suit land to revert back to Public Land for the use by the 1st and 2nd Defendants forthwith.
 - d. The costs shall be in favour of the Defendants.

Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY, 2025 VIA MICROSOFT TEAMS.

J.G. KEMEI

JUDGE

Delivered Online in the presence of:

Ms Anyango HB for Mr Magani for the Plaintiff

Ms Ndundu HB for Ms Kerubo for the 1st – 3rd Defendants

N/A for the Interested party

CA – Ms. Yvette

