



Odhiambo (Suing as the Holder of Power of Attorney on Behalf of Benjamin Ouma Otiende) ((Suing as the Holder of Power of Attorney on Behalf of Benjamin Ouma Otiende)) v County Government of Kisumu & another (Environment & Land Case E029 of 2024) [2025] KEELC 4165 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E029 OF 2024**

E ASATI, J

MAY 29, 2025

BETWEEN

**NELLY ANN ODHIAMBO PLAINTIFF
(SUING AS THE HOLDER OF POWER OF ATTORNEY ON BEHALF OF
BENJAMIN OUMA OTIENDE)**

AND

**COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT
KISUMU CITY MANAGER 2ND DEFENDANT**

JUDGMENT

1. Nelly Ann Odhiambo brought the suit in her capacity as holder of Power of Attorney for Benjamin Ouma Otiende the plaintiff (herein also called the Donor). Vide the plaint dated 19th April, 2021, the Plaintiff claimed that the Donor was the owner of land parcel number Kisumu/Mamboleo/UNS. BCR 8A measuring approximately 0.035 Ha. (the suit land) whose value together the developments therein was over Kshs.20,000,000/-. That the Plaintiff took possession of the land in the year 2009 and has been paying rates and all taxes due to the Defendants and the National Government as and when they fall due.
2. That sometimes on 31st March, 2021 the Defendants without any notice descended on the suit property and marked the same ready for demolition on allegations that the suit land was public land meant for a slaughter house and threatened to return to the suit land and demolish the whole residential building which actions were unlawful, illegal and irregular.
3. The Plaintiff therefore sought for the following relief against the Defendants;



- a. A declaration that the suit land parcel Kisumu/Mamboleo/UNS.BCR 8A was legally and procedurally acquired by the Plaintiff.
 - b. A declaration that the suit land parcel Kisumu/Mamboleo/UNS.BCR 8A is not public land or for public use as a slaughter house
 - c. An order of permanent injunction restraining the Defendants either by themselves, agents, representatives, servant and/or any other person authorized by them from demolishing, destroying or interfering with the developments on the suit land parcel number Kisumu/Mamboleo/UNS.BCR 8A
 - d. Damages for the loss of rental income.
 - e. Costs of the suit
 - f. Any other relief the court deems fit to award.
3. In reply to the Plaintiff's claim, the Defendants filed a statement of defence dated 8th February, 2023 vide which they denied the Plaintiff's claim.

The Evidence

4. PW1 reiterated the contents of the plaint vide her witness statement dated 19th April, 2021 which was adopted as her evidence in chief. She produced exhibits namely; Power of Attorney donated by Benjamin Ouma Otiende, allotment letter Ref.No.262867, approval for the building dated 12th November 2009, Certificate of rates clearance, Receipts, Clearance Certificate from City of Kisumu, Demand Notice, Photographs for the building, valuation report.
5. PW1 stated that the building on the property has rental units and that after the Defendants marked the property for demolition, the tenants panicked and moved out.
6. On behalf of the Defendants also one witness testified. He adopted the contents of his witness statement dated 8th February, 2023, as his evidence in chief. He stated that allocation of the suit land was illegal and irregular as Kisumu/Mamboleo/UNS.BCR 8A does not exist on the Deed Plan. That the land has been surveyed and, on the Deed, Plan it is indicated as L.R. NO.29515 measuring approximately 7.636 Ha. and belongs to the defunct Municipal Council of Kisumu and now County Government of Kisumu, designated as Mamboleo Slaughter House. He produced one document as exhibit namely; Deed Plan Folio No.536 register number 179.

Submissions

7. At the close of the evidence parties filed written submissions on the case. Written submissions dated 17th February, 2025 were filed by the firm of P.D. Onyango & Company Advocates for the Plaintiff and written submissions dated 18th February 2025 were filed by the Office of the County Attorney on behalf of the Defendants.

Issues for Determination

8. From the pleadings filed, the evidence placed before court and the submissions made, the following emerge as the issues for determination;
 - a. Whether or not the suit land is public land and whether or not the Plaintiff is liable for trespass onto public land.



- b. Whether or not the allotment of the suit land to the Plaintiff was unlawful and irregular;
- c. Whether or not the Defendants trespassed onto and unlawfully placed marks on the building on the suit land for demolition.
- d. Whether or not the Plaintiff is entitled to the reliefs sought.
- e. Costs of the suit.

Analysis and Determination

9. The first issue for determination is whether or not the suit land is public land and whether or not the Plaintiff is liable for trespass onto public land.
10. This issue was introduced by DW1 who testified that the suit land parcel number Kisumu/Moaboleo/UNS. BCR 8A does not exist on the Deed Plan. That what existed was land surveyed as L. R. NO. 29515 measuring 7.636 Ha belongs to the defunct Municipal Council of Kisumu and now the County Government of Kisumu and designated as Mamboleo slaughter house.
11. Counsel for the Defendants submitted that the suit land parcel No. Kisumu/Maboleo/BCR 8 A is public land which is designated the grazing space for the slaughter house. That under article 62 (d) of the *Constitution* of Kenya, public land is land in respect of which no individual or community ownership can be established by any legal process. That under article 40 (6), the right to property does not extend to any property that has been found to be unlawfully acquired.
12. Counsel submitted further that the plaintiff failed to apply due diligence while constructing on the land parcel No. Kisumu/Mamboleo/UNS. BCR 8 A by encroaching into public land because he never surveyed the land after buying it to ensure that he does not overstep into the slaughter house grazing land or to be sure that the plot of land he had bought exists. That the land on which the plaintiff has trespassed and encroached on is L. R. No. 29515 which is public land. Citing the provisions of section 3 (1) of the *Trespass Act* and Halsbury's Laws of England 4th Edition, Vol 45 at para 26, 1503, Counsel submitted that the plaintiff was liable for trespassing onto public land marked as Kisumu/Mamboleo/UNS. BCR 8 A.
13. The plaintiff's case was that the land was private land belonging to him after it was allocated to him vide the allotment letter produced. Further that parties are bound by their pleadings. Counsel relied on the case of *Agingu -vs- Owiti & 2 Others* (Civil Appeal 389 of 2019) 2025 KECA 188 (KLR)(7 February, 2025 Judgement] where it was held inter alia that parties are bound by their pleadings and that courts are bound to only determine that which is pleaded.
14. Under section 62 of the *Constitution*, as submitted by Counsel for the Defendants public land is all land not classified as private land or community land and is land that is the collective property of all the people of Kenya. The issue that the suit land is public land was not pleaded in the Defence filed by the Defendants. The Defendants only denied the plaintiff's claim and did not raise the issues that the suit land was public land designated for a slaughter house or that the suit land did not exist or that the plaintiff had encroached onto public land. It is not therefore an issue raised before the court for determination. What makes a matter an issue for determination in a suit is that it is pleaded by a party and denied by the opposite party in its pleadings.
15. In *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd* [2018] it was held that;

“It is now settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock



upon which all the proceedings derive from. It hence follows that any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of appeal in the case of Independent Electoral and Boundaries Commission & Anor vs Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoum Oladeji (NIG) vs Nigeria Breweries PLC SC 91.2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now (settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

...in fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and to avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

16. As it is the Defendants claiming that the suit land was public land, the burden of proof under sections 107 to 109 of the *Evidence Act* rested with the Defendants to prove the same. DW1 produced a Deed Plan as exhibit the same does not show the relationship of the suit land and the land shown on the Deed Plan. In their submissions, the Defendants were not clear whether the suit land exists or does not exist or whether the plaintiff had overstepped from his land and encroached onto public land or had entirely constructed his building on government land.
17. I find that no evidence has been tendered that the suit land is public land.
18. The next issue for determination is whether or not allotment of the suit land to the Plaintiff was unlawful and irregular.
19. The Plaintiff pleaded in paragraph 7 of the plaint that he purchased the suit property sometimes in the year 2009 and was issued with a Letter of Allotment after which he commenced construction thereon.
20. PW1 testified and among the documents she produced was an Allotment Letter dated 25th September, 1998 Ref. No.262867 in respect of UNS. BCR Plot No.8A Kisumu Municipality. The letter addressed to the Donor was signed by one E.M. Kambogo for the Commissioner of Lands.
21. Allotment of the Land to the Donor was not denied. The contention of the Defendants was that the allotment was irregular and unlawful. This was as per the evidence of DW1 who alleged through his witness statement that the land was public land meant for a slaughter house at Mamboleo area of Kisumu County.
22. It was submitted on behalf of the plaintiff that the genuineness of the Letter of Allotment was not an issue pleaded in the Defence in as much as the Defendant’s Counsel cross-examined on the same.
23. Counsel submitted further that the Defendant failed to produce any documents to prove that the land was meant for a slaughter house.
24. That no relationship was established between the Deed Plan produced and the suit land.
25. On behalf of the Defendants it was submitted that the allocation of land parcel number Kisumu/ Mabileo/UNS. BCR 8 A was illegal and irregular. That the letter of allotment was not accompanied with minutes from the defunct Municipal Council of Kisumu and that the sale came after the Letter of Allotment. That this shows that the Allotment Letter was fraudulently acquired by the plaintiff.



That there is no evidence that the plaintiff applied for the Part Development Plan and that the same was approved by the Municipal Council of Kisumu. Counsel relied on the authority of Dr. Joseph Arap Ngok vs Justice Moijo Ole Keiwa and 4 others where it was held that under section 23 (1) of Cap 281 title to land can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.

26. I have perused the statement of defence filed on behalf of the Defendant. The same only denies the Plaintiff's claim. There is no pleading that allotment of the suit to the Plaintiff was irregular.
27. The irregularity was alleged by DW1 who produced no evidence to demonstrate the same.
28. The allotment letter was issued by the Commissioner of Lands. The plaintiff has demonstrated that he has since been paying all rates and dues in respect of the suit land to the government. There is no complaint that the plaintiff failed to comply with the conditions of the Letter of Allotment.
29. I find that the allotment of the suit land to the Plaintiff was lawful.
30. The next issue is whether or not the Defendant unlawfully trespassed onto the suit land and placed markings on the building thereon of their intention to demolish the building.
31. The Plaintiff's complaint as contained in paragraph 11 of the plaint is that on 31st March, 2021, the Defendants without notice to the Plaintiff descended on the suit property and marked the same ready for demolition on the allegation that this was on public land.
32. PW1 narrated how this happened. PW1 produced photographs that show the red X mark and some writing on the gate and walls of the building.
33. In paragraph 6 of the statement of defence, the Defendant denied the contents of paragraph 11 of the plaint and stated that they did not enter into any contract with the Plaintiff. However, in his testimony, DW1 justified the actions of the Defendants and prayed that the Plaintiff vacates the suit land so that the land can be utilized for the intended purpose.
34. Having found that the allotment of the land to the Plaintiff was lawful, then it follows that the Plaintiff ought to enjoy the right to property provided for and protected by Article 40 of the Constitution and the Land Registration Act. The actions of the Defendants were unlawful and in violation of the Plaintiff's right to property.
35. The next issue for determination is whether or not the Plaintiff is entitled to the relief sought
36. The evidence placed before court shows that upon approval by the Defendants, the Plaintiff proceeded to develop the property. Photographs produced show the existence of the house.
37. DW1 did not deny the existence of the approval to build or the existence of the building. DW1 did not deny that the Plaintiff pays rates and all taxes due from him to the Defendants.
38. The contention of the Defendants was that payment rates was not equivalent to ownership of the property. From the evidence available, the Plaintiff has proved that the allotment of the land to him was lawful, that the Defendant unlawfully trespassed onto the suit land and placed marks thereon ready for demolition.
39. I find that the Plaintiff is entitled to the relief sought save for the claim for damages for loss of rental income, rental income which, although pleaded, the court finds has not been proved. No evidence was produced in the form of tenancy agreements, receipts or rent books or KRA returns to show the existence of the rental income and loss thereof due to the unlawful actions of the Defendants.



40. Regarding costs of the suit, as provided under Section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event.
41. For the foregoing reasons, the court finds that the Plaintiff has proved his case on a balance of probabilities and enters judgment in his favour for:
- i. A declaration that the suit land parcel Kisumu/Mamboleo/UNS.BCR 8 A was legally and procedurally acquired by the Plaintiff.
 - ii. A declaration that the suit land parcel Kisumu/Mamboleo/UNS.BCR 8 A is not public land or for public use as a slaughter house
 - iii. An order of permanent injunction restraining the Defendants either by themselves, agents, representatives, servant and/or any other person authorized by them from demolishing, destroying or interfering with the developments on the suit land parcel number Kisumu/Mamboleo/UNS.BCR 8A
 - iv. Costs of the suit

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 29TH DAY OF MAY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Onyango Jael h/b for Bagada for the Plaintiff.

Awuor for the Defendants.

