



Machoka t/a Hotel Storm Limited v Kenya Forest Service & another (Environment & Land Case E010 of 2021) [2025] KEELC 4106 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE E010 OF 2021**

M SILA, J

MAY 27, 2025

BETWEEN

SHEM THOMAS MACHOKA T/A HOTEL STORM LIMITED PLAINTIFF

AND

KENYA FOREST SERVICE 1ST DEFENDANT

K.A KURGAT – ECOSYSTEM CONSERVATOR, KISII

COUNTY 2ND DEFENDANT

JUDGMENT

(Plaintiff filing suit contending interference and threats of possession over his land by the defendants; defendants filing a counterclaim asserting that the suit land is public land that was allocated to the Forest Department; various correspondences produced by the defendant but none indicating that the suit land was actually reserved for use by the Forest Department; no evidence of the Forest Department ever having used or occupied the suit land; Forest Service occupying the other adjacent plots and suit land developed with a hotel; no evidence of any protest when the hotel was being put up; correspondences from land officials and the Town Clerk indicating that approval to develop the hotel was granted; no basis for the counterclaim and same is dismissed; defendants permanently restrained from the suit land)

A. Introduction and Pleadings

1. Through a letter dated 5 May 2021 written by the 2nd defendant, on behalf of the 1st defendant, the 1st defendant informed the plaintiff that what he considered to be his land parcel Kisii Municipality/Block III/291 was actually land belonging to the 1st defendant, and that the 1st defendant wished to fence it together with adjacent land that it owned, in order to consolidate her ownership of the land. It is this letter which prompted the plaintiff to commence this suit vide a plaint filed on 25 May 2021 asserting that he has good title to the said land parcel Kisii Municipality/Block III/291 (the suit property). On



- the suit property, he has constructed a hotel known as Storm Hotel. In the plaint, he pleaded that if his ownership of the suit property is to be affected, he is entitled to damages for the money he used in construction and for loss of use. He also asked for a declaration that he possesses an indefeasible title to the suit property.
2. The defendants filed a defence and counterclaim through the State Law Office. They pleaded that the suit land was allocated to Kenya Forest Service in 1978 and that the land was designated for growing and propagation of tree seedlings for conservation purposes. They pleaded that the land was public land that was not available for allocation to any entity. They pleaded that the Gusii County Council and Commissioner of Lands did not have authority to alienate the land. They pleaded that the 1st defendant had been allocated 0.3481 hectares in Kisii Municipality/Block III in Zone 35 before the plaintiff and other encroachers unlawfully invaded it and subdivided the land to create five parcels being Kisii Municipality/Block III/291, 292, 293, 294 and 295. They pleaded that the plaintiff took advantage of the fact that the land was not developed, and his standing in society, to irregularly obtain title to the public land. They pleaded that by the time the plaintiff was obtaining title, the area was marked for public utility and not private hotels. They contended that the plaintiff does not stand to suffer since he has been in occupation of public land for over 30 years, and in reality he should be the one to pay the defendants for using land meant for conservation.
 3. In the counterclaim they asked for the following orders :
 - a. A declaration that parcel No. LR Kisii Municipality/Block III in Zone 35 is public land and legitimately allocated to the 1st defendant.
 - b. An order of permanent injunction restraining the plaintiff from trespassing into the parcel Kisii Municipality/Block III in Zone 35.
 - c. An order to issue to recall all titles emanating from LR Kisii Municipality/Block III in Zone 35 for the purpose of cancellation.
 - d. An order of eviction to issue against the plaintiff to remove all the illegal structures on parcel LR Kisii Municipality/Block III in Zone 35.
 - e. Costs of the suit.
 - f. Any other relief this Honourable Court may deem fit and just to grant.
 4. A reply to defence and defence to counterclaim was filed more or less joining issue with the defendants.

B. Evidence of the Parties

5. Hearing commenced on 24 October 2024 when the plaintiff testified. He adopted a pre-recorded witness statement as his evidence. In that witness statement, he stated that in early 1986 he applied to the County Council of Gusii (for a plot) after seeing an advert on the newspaper. He stated that he was initially allocated a residential plot and later applied for change of user which application was allowed. He stated that he was lawfully allocated the plot by Gusii County Council which had authority to allocate the plot on behalf of the Commissioner of Lands, who accordingly issued him with an allotment letter, a Lease and Certificate of Lease. He stated that the plot was unsurveyed measuring 0.062 ha, and upon survey it was ascertained to be 0.0841 ha. He stated that he has been on the land since 1986 paying his rates regularly. On 10 May 2021, he received the notice from the Ecosystem Conservator, Kisii informing him that he acquired the plot illegally. He claimed entitlement to compensation if the defendants are to reclaim the land which he pegged at Kshs. 300,000,000/= or



as may be valued, alongside loss of future earnings which he calculated at Kshs. 3,000/= per room for the 78 rooms in the hotel.

6. In court, he testified that he balloted for the suit land in July 1980 and he got an allotment letter dated 17 March 1986. He obtained a lease dated 8 February 1988 and a Certificate of Lease issued on 9 February 1988. He had the original allotment letter, the original lease and original Certificate of Lease in court. He produced a letter 19 February 1990 which is a letter to the District Land Officer, Kisii, seeking a change of user from residential to commercial. That letter annexed a letter of even date from the Town Clerk which letter is addressed to the Commissioner of Lands. The letter states that the Town Planning Committee vide Minute No. 82/87 of 18 November 1987 gave consent for the change of user from residential to commercial. He produced two other letters relating to that application for change of user. One was dated 26 February 1990 from the Kisii/Nyamira Districts Physical Planning Officer to the District Land Officer, Kisii, which is a no objection letter to the proposed change of user. The second letter is one dated 30 April 1990 from the Land Officer to the Commissioner of Lands recommending the application for change of user.
7. Cross-examined by Mr. Ndiritu, State Counsel, for the defendants, he testified that the balloting took place in July 1980 and that the place was a bush with the Forest Department using the next plot. He stated that they had been given plots in Nyanchwa but they were not enough, and some persons were relocated to the subject plots. He pointed at the bottom of the allotment letter as indicative of the authority to allocate the plot. On it is typed "Authority – P.A.C of 17-7-1980. Alternative Plot C33 of 93521." He reiterated that he was allotted the plot in 1986 as an 'unsurveyed Plot B'. The allotment letter dated 17 September 1986 did not have any Plan number, this part being left blank, nor was there any plan attached. Questioned whether the allotment letter had any attachment he stated that he could not remember if the allotment letter had any attached plan. He did not have any letter accepting the offer in the allotment letter. The allotment letter required some money to be paid by cheque. He testified that he did not pay by cheque but through cash in the Lands Office, Ardhi House, Nairobi and that he was given a receipt. He did not have the receipt, his evidence being that he will go and look for it. He could not recall when he paid the money. He testified that the survey for the plot was done in 1988. He was not given a beacon certificate. He could not remember if he was given a survey plan. He was not present when survey was done. He stated that survey for all the plots in the area was done at the same time. According to him, the Forest Department was also given its plot by the Municipal Council but on temporary occupation. He testified that he was issued with a Lease after the plot was surveyed. He signed the Lease on 29 January 1988. The Lease was for a dwelling house. He stated that he applied for change of user. He testified that he went for the Lease himself in Nairobi thus there was no letter forwarding it. He got the Certificate of Lease on 9 February 1988. He stated that he had been on the land since 1983 and he started constructing the hotel in 1989. He opened it in 1993. He testified that he forwarded building plans which were approved by the Municipal Council. He however did not have them in court. He affirmed getting the letter dated 5 May 2021 from the 2nd defendant. He stated that the Forest Department have their tree nurseries on the next plot. Re-examined, he testified that he has seen no allotment letter nor Certificate of Lease in favour of the 1st defendant.
8. With the above evidence the plaintiff closed his case.
9. The 2nd defendant testified on behalf of the defendants. He is currently the Principal Conservator of Forests based in Nairobi. He previously served in Kisii as the Ecosystem Conservator of Forests, Kisii County, between 2018-2023. He also relied on a pre-recorded witness statement as his evidence. In it he stated that he is aware about the history of the land based on the records available in the office. He stated that the Kenya Forest Service identified land which was an open space comprising a riparian area in the Kisii Master Plan of 1971 hence ideal for its seedling and nursery activities. After several discussions



with relevant stakeholders, the Forest Department made an official application through a letter dated 26 October 1978 for allocation of the land through the allocating committee led by the then District Commissioner. He stated that another letter was done on 24 November 1974 to the Clerk, Kisii County Council as a follow up on the issue of plot allocation. He stated that the District Commissioner on receipt of their letter wrote a letter dated 28 November 1978 to the Provincial Physical Planning Officer-Nyanza, informing him of the request for allocation of the identified plot. He stated that through a letter dated 29 November 1978 written by the Senior District Commissioner, with approval of the Provincial Physical Planning Officer, Nyanza, the Forest Department was informed that their request had been approved and given the go ahead to occupy and carry out its activities on the land identified as Zone 35. He stated that the Forest Department then took immediate possession of the land and has been carrying out activities therein to date. He stated that around the year 2012, the Forest Department was sued by one Leah Magoma Ongai through the case No. 40 of 2012 (Kisii ELC) over the land parcel Kisii Municipality/Block III/294. Through this case, they discovered that their land, known as Zone 35, was illegally subdivided into five plots being the Plots No. 291, 292, 293, 294 and 295 and allotment letters issued to persons including the plaintiff. He stated that in respect of the case No. 40 of 2012, the court affirmed that Kenya Forest Service (KFS) was lawfully on the land and that the plaintiff's title was acquired unprocedurally and illegally. He avers that similarly for this case they ask the court to hold that the title held by the plaintiff herein is out of an illegal subdivision of the public land known as Zone 35 and that the land was never available for allocation to the plaintiff.

10. In court, he produced the various letters alluded to above. He also had a document said to be the Kisii Plan which he averred indicates the Zone 35. He elaborated that the area was riparian and this is why they asked to be allocated this area, as one of the basic requirements for a tree nursery is water. He testified that they took possession of the nursery in 1978 after allocation. He testified that in the year 2023 some persons came to fence their land and out of that he did some investigations. He discovered that their land had been subdivided into the Plots No. 291 – 295 through a survey plan. Out of the said map he realized that the Hotel Storm was on the Plot No. 291 which was part of the KFS land.
11. Cross-examined, he testified that there is no allotment letter issued to KFS and all they have is the correspondences that he produced. Neither does KFS have a Lease nor Certificate of Lease. He did not know when the hotel was constructed but he found it there in 2018 when he came to Kisii. He pointed out that in the letter of 24 November 1979, they asked for 2 ha which is about 5 acres. He stated that they were granted the space for seedling production and staff quarters. He testified that in the parcels No. 292-295 they have their tree nurseries and staff quarters. He was cross-examined on the letters he produced and on the conditions in the letter of 22 November 1978 which I will revert to in my analysis. He did not know if any objection was raised when the hotel was being put up.

C. Site Visit

12. I was of opinion that it would be useful to visit the land in dispute and we had a site visit. The suit land is fully developed with a hotel. Next to the hotel is some land that is occupied by the 1st defendant, in which the 1st defendant operates a tree nursery and has some structures. Between the hotel land and the main tarmac road are about three other plots. The suit land is therefore the fourth plot after the main tarmac road and is accessed from the tarmac road by a murrum road. You pass the three plots that I have mentioned before getting to the suit land. We had a surveyor on site, Mr. Geoffrey Magati, a surveyor working with the Ministry of Lands. He did state that the land that the 1st defendant is currently in occupation of covers the land parcels Kisii Municipality/Block III/292-295. We also found that the hotel has a separate bar and eatery opposite the main hotel building and across the murrum road. This bar and eatery is adjacent to a river. The plaintiff stated that he does not own this area but he built the bar and eatery on permission of the County Council. It was clear that this bar and eatery are in



a riparian area. However, the hotel was not, which was confirmed by the surveyor, as it is about 50 metres from the river.

13. With the above evidence, the parties closed their respective cases. I invited counsel to file their final submissions, which they did, and I have taken the same into account in arriving at my decision.

D. Analysis and Disposition

14. In a nutshell, the plaintiff came to court when he was threatened with eviction by the defendants, vide the defendants' letter dated 5 May 2021, which letter contended that where Storm Hotel is built, which is the suit land, forms part of land that was allocated to the 1st defendant sometime in the year 1978, and various letters relating to the alleged allocation were mentioned in that letter. It is the plaintiff's assertion that what he has is a good title and the defendants have no right to interfere with his possession of the suit land. The defendants have a counterclaim in which they claim that the suit land is in Zone 35 which was allocated to the 1st defendant in 1978, and that this Zone 35 land was illegally subdivided to create the parcels No. 291 – 295. In their counterclaim they not only seek a declaration that the suit land is public land, eviction and permanent injunction against the plaintiff, but they go further and ask for an order to recall all titles emanating from what they describe as Kisii Municipality/Block III in Zone 35.
15. The starting point of course has to be the acknowledgment that the plaintiff has a title to the suit land and that being the case, he benefits from Section 26 of the [Land Registration Act](#), which inter alia provides that a certificate of title is to be taken by all courts as prima facie evidence that the person named therein is the proprietor thereof. It may be useful to set out the whole of Section 26. It 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.
16. As seen, the assumption is that a title is a good title. Such title is impeachable as provided in Section 26 (1) (a) and (b) which is self explanatory as outlined above.
17. Thus, the burden rests on the defendants to demonstrate that indeed the title of the plaintiff is one that is impeachable as they claim. They of course assert that the title rests on public land and that this public land was allocated to the defendants, or at least set aside for public use, as claimed by the defendants. That is what they need to prove if the title of the plaintiff is to be impugned. I therefore opt to start with the counterclaim, for if it fails, the benefit of doubt has to be given to the plaintiff by dint of Section 26 of the [Land Registration Act](#) above.



18. I have assessed the evidence presented by the defendants to support the assertion that this land is public land and I have also compared the same with the documentation presented by the plaintiff. Much of the evidence of the defendants rests on various correspondences that were produced by the 2nd defendant. I will analyse the same in depth.
19. The defendants' correspondence starts with the letter dated 26 October 1978. It is from the Forest Extension Officer, Migori addressed to the District Commissioner, Kisii. It states as follows :

26 October 1978

The District Commissioner,

Kisii District,

O Box 590,

Kisii

Staff Houses and Nursery Sites

On 10th September 1978, I called in your offices and discussed the above two issues whereby you asked to liaise with the officer in charge MOW buildings and report back to you after our findings.

I am pleased to inform that the only best site which could accommodate the two projects if offered could be that one below the Administration Police quarters if the space is vacant as it is seen on the ground, my Ministry could start building and clearing the site immediately after getting your approval.

(full name not clear but name Muruga visible)

Forest Extension (not clear) Migori

CC

The Divisional Forest Officer,

Box 1046

Kisumu

The Town Clerk

Kisii

The Officer in Charge Buildings

Ministry of Work

Kisii

20. The next letter is a letter dated 3 November 1978. It is a letter from the Ag District Commissioner to the Forester, Extension Services. It provides as follows :

Ref : For.13/I/III/9

3rd November 1978

The Forester,

Extension Services,



Box 21

Suna-Migori.

Staff Houses And Nursery Sites

Ref: Your EXT.F.7/12/37 of 26th October, 1978

I would be grateful if you could indicate the site on a sketch-map so that we can check on the present plan if the area has been set aside for something else or not. But better still you could call on me and then we can physically see the site and check on the plan.

Please treat as most urgent.

N.K Mberia

Ag. District Commissioner

Kisii

cc. The Divisional Forest Officer, P.O Box 1048, Kisumu

The Town Clerk, Kisii.

21. It will be observed that this letter was referring to the letter of 26 October 1978. This letter asks for a sketch map of the site to be drawn so that it can be compared with the present plans to confirm if the area has been set aside for something else. No such sketch map was produced and it is not clear if one was ever drawn.
22. The next letter is dated 22 November 1978. It is from the Provincial Physical Planning Officer, Nyanza Province, to the District Commissioner, Kisii and is copied to the Town Clerk, Kisii Town Council, and The Divisional Forest Officer, Kisumu. It is drawn as follows :

Department of Physical Planning,

Provincial Planning Officer,

Box 1874

Kisumu.

22nd November 1978

PPD/N/37/Vol.III/549

The District Commissioner

Box 590

Kisii

Site For Tree Nursery

Please refer to your letter Ref. No. FOR 13/I/III/10 of 9th November, 1978.

I have no objection to the Forest Department establishing their tree nursery in Zone 35 in Kisii Development Plan.

However, the following conditions must be observed :-

1. That their occupation of the site is on Temporary basis only and they may be shifted to a more suitable site in future.



2. That apart from a pump house and probably a small store no other permanent buildings will be erected.
3. That if they want to house their staff they submit an application to the Commissioner of Lands in the usual manner indicating the site they would prefer.
4. A clear zone should be left for river protection – along the river.

Kamweru N. David

For Provincial Physical Planning Officer

Nyanza Province

Cc

The Town Clerk, Kisii Town Council, P.O Box 406, Kisii

The Divisional Forest Officer, P.O Box 1048, Kisumu.

23. Looking at this letter it makes reference to another of 9 November 1978. This letter of 9 November 1978 was not produced and we do not know its contents. But reading the letter of 22 November 1978, it is certainly a no objection letter to the Forest Department establishing a tree nursery in Zone 35 of Kisii Development Plan subject to the conditions stipulated therein. However, this letter does not actually say what area this Zone 35 is, or what size of land the Forest Department was allowed to occupy in the said Zone 35.
24. The next letter produced is that dated 24 November 1978/ If is from the Divisional Forest Officer, Kisumu, addressed to The Clerk, Kisii Town Council. It is drawn as follows :

24th November, '78

The Clerk to the Council,

Kisii Town Council,

Box 90,

Kisii

Application For Plots

- a. I would like to apply for two plots to build two Junior Staff quarters (Government grade 9). The site indicated to use next to the administrative Police quarters and Mr. Onyiego's Beer Hall would be preferred.
- b. I would like you to allocate an area of about 2 hectares or thereabouts for a nursery. The area just below the Administrative Police quarters and next to the River would be suitable.
- c. I would like to apply for a plot to put up Senior staff quarter house (Government grade 3). The area shown to us next to the Fisheries Office would be idea. (sic)
- d. I would like to apply for a plot to build an Office. The area indicated to be next to the Fisheries Office is acceptable.



Please note that funds have been allocated this financial year for all the issues, office and nursery. The matter of plot allocation has been discussed verbally before and I now formally submit the application. As soon as possible sketch showing the proposed sites will be sent to you.

J. O Angwenyi

Divisional Forest Officer,

Kisumu.

cc. The District Commissioner

Box 590 Kisii

The Conservator of Forests NAIROBI

The Provincial Planning Officer NYANZA (Refer visit to your office on 21/11/78)

The Forester (not clear but appears to be MIGORI) (Make and submit sketch).

25. From the above letter, it is discernible that the Forest Department was making an application to the Kisii Town Council to be allocated some land. It was not said to be within any Zone 35 but the location of it was indicated in reference to existing Administrative Police quarters and offices of the Fisheries Department. What was being applied for was 2 hectares of land. No sketch of the land sought to be allocated had been drawn, and there was direction in the same letter for one of the Foresters to make and submit the sketch. As I have pointed out before that sketch was never presented before this court.
26. The next letter is that dated 28 November 1978 from the District Commissioner, Kisii, to the Provincial Physical Planning Officer, Nyanza. It is as follows :

28th November 1978

LND.16/28/111/162

The Provincial Physical Planning Officer, NYANZA.

Application For Plots

I refer to letter No. AF/7/22/5 of 24th November 1978 from the Divisional Forest Officer to the Clerk to Council, Kisii Town Council copied to you and me among others on the above subject.

May I know whether the areas indicated are vacant for use by the department.

In the light of his last paragraph would you please treat the matter as most urgent

N.K Mberia

For: District Commissioner,

Kisii

Cc

The Town Clerk,

Kisii Town Council,



Kisii
The Conservator of Forests (R.A.E.S)
Nairobi.
The Forester (R.A.E.S)
Migori
The Divisional Forest Officer,
Box 1048,
Kisumu.

27. The above letter of course makes direct reference to the letter dated 24 November 1978 which I have copied above and seeks to know from the Physical Planner whether the land sought to be allocated is available for use by the Forest Department.
28. The last letter produced is that of 29th November 1978 yet again from the District Commissioner to the Forester Extension Services Migori. It is as follows :

29th November 1978
For.13/I/III/12
Forester Extension Services Migori,
BOX 21,
Migori
Staff Houses and Nursery Sites

I advert to yours No. EXT.F.7/12/37 of 26th October, 1978.

2. Having taken up the matter with the Provincial Physical Planning Officer, I attach hereto a copy of a self-explanatory letter No. PPD/N/37/Vol. III/549 of 22nd November, 1978 addressed to me by the Provincial Physical Planning Officer, Nyanza Province. I hope this meets with your request. The sooner you therefore start the better.

E.K Mbaabu
Senior District Commissioner

Kisii
Enc :
cc.
The Town Clerk,
Kisii Town Council,
Box 406,
Kisii
The Divisional Forest Officer,
Box 1048,



29. The above letter makes reference to the letter of 26 October 1978. It also attaches the letter of 22 November 1978 from the Provincial Physical Planning Officer which I copied above. It hopes that this letter from the Provincial Physical Planning Officer meets their request. I have not see any correspondence in response to this letter.
30. The totality of the above correspondence do indeed demonstrate that the Forest Department, the precursor to the 1st defendant, wished to have some land to put up some staff houses and a nursery. They wanted 2 hectares. Generally there does not seem to have been any serious objection to this request subject to the site being visited. There was supposed to be a sketch plan of what was desired to be allocated, but this sketch plan was never availed by the defendants, and it is not very clear exactly what ground was sought to be allocated, save for some pointers to existing offices. Significantly, we do not have any letter from the Kisii Town Council confirming any allocation of land to the Forest Service. If any land was allocated, its exact position on the ground and the size thereof, is not known, at least from the evidence that was presented in this case.
31. What I saw when we went to site is that the 1st defendant is certainly in occupation of some land but which is land after the suit land. The suit land is of course fully developed with a storeyed hotel. What is next to it is what the Forest Department occupies. I saw some houses and there was a tree nursery. This tree nursery from the description of the surveyor is in the land parcels Kisii Municipality/Block III/292-295. There was no iota of occupation of the suit land, i.e parcel No. 291, by the 1st defendant and no evidence whatsoever to suggest that this land had earlier been occupied by the Forest Department, or forms part of the land that the Forest Department wished to have in the several correspondences that I have outlined herein, nor is there any evidence that this land was actually set aside for use by the Forest Department.
32. I have also not seen any protest letter written by the Forest Department or the 1st defendant when the plaintiff wished to develop the suit land. The closest I have seen is a letter dated 19 March 1990, which seems to be from the District Environment Officer, addressed to the District Physical Planning Officer, Kisii ; The Clerk, Kisii Municipality: Attention Town Engineer; and the District Surveyor, Kisii. The reference is Kisii Central Tree Nursery and Plot Kisii Municipality/Block III/291. The letter states as follows :
- “ The allottee of the above plot M/s Shem Thomson Machoka has been given an okay by the (words not clear) to start construction work on his plot. However, before any work starts on the said plot the District Forest Officer must be shown access to the existing tree seedlings because the construction work will definitely block the present access to the nursery. The sooner the notice is taken the better.
- By copy of this letter M/s Shem Machoka is hereby asked to present his plans and any other document to the Council and Physical Planners for approval before he embarks on the development of the said plot.”
33. The tone of this letter suggests that there was no issue with the plaintiff developing the suit land. The only concern was access by the Forest Department to the tree nursery. I would assume that probably they were accessing the tree nursery through this plot, as it was adjacent, but there is no suggestion whatsoever in this letter of the Forest Department being in occupation of the suit land or having any interest in it.



34. The plaintiff of course produced his Allotment Letter, Lease, and Certificate of Lease. The Certificate of Lease was issued on 9 February 1988. He must have taken possession and there was no protest from the Forest Department. The allocation of the land was for a dwelling house and I have seen that he applied to change use from residential to commercial through his letter dated 19 February 1990 addressed to the District Land Officer, Kisii. The District Land Officer was the representative of the Commissioner of Lands in the District. He wrote a letter dated 30 April 1990 to the Commissioner of Lands and stated as follows :

30th April 1990

The Commissioner of Lands,
Box 30089,
Nairobi.

Re : Kisii Muni-Block III/291 – Change of User From Residential to Commercial (middle Class Hotel)

The above application was received and circulated to the District Physical Planner and Municipal Council.

Both authorities have recommended the application on the grounds that the adjoining zone is also commercial. I have also inspected it and recommend the same since it is situated at a corner suitable for commercial purposes.

Attached herewith, please find copies of letters recommending the application for your further action.

I.A Machuka

Land Officer Kisii/Nyamira/S.Nyanza Districts

35. Prior to this letter there was a letter dated 26 February 1990 from the District Physical Planning Officer, Kisii/Nyamira Districts addressed to the Land Officer, Kisii. He inter alia stated as follows :

“From town planning point of view, I would not object to the proposed change of user since the adjoining property zoned 58 is also commercial. Perhaps a special type of commercial user could be more appropriate, say, a high class hotel business, commercial rental flats, etc.”

36. There was also an earlier letter dated 19 February 1990 from the Town Clerk, Kisii, addressed to the Commissioner of Lands. It states as follows :

“Consent was granted for change of user to Shem Thomson Machoka...owner of property Kisii Town Block III/291 from residential to commercial vide Town Planning Committee Minute No. 82/87 of 18th November 1987. Please do the needful.

Gachuhi

Ag Town Clerk.”

37. Now these correspondences, emanate from the Physical Planner, the Town Clerk, and the Land Officer. The Town Clerk’s letter even particularizes the minute under which the change of user was discussed. It will be recalled that the applications for the land were being made to the Local Authority, and here the local authority confirms that the plot to the plaintiff is a good plot and they have even given consent for change of use from residential to commercial. The Physical Planner has no objection



and points out that the land adjoins a Zone 58 which is commercial. It is not mentioned at all that the suit land is in Zone 35 or that the Forest Department has any interest in it. The Land Officer under whose custody land allocations would be expected to be also had no issue. It is apparent that these offices, which are important officers on matters Land Administration, acknowledged the plaintiff to be the owner of the suit land.

38. These correspondences demonstrate that the Forest Department had no interest in the suit land at all. What it appears to have been occupied by the Forest Department is the adjoining land hence the letter seeking clarification on access to the tree nursery. It is the same thing that I found when I went to the site; that the 1st defendant is in occupation of the adjoining land and not the suit land.
39. In their evidence, the defendants produced these letters and a document that was said to be demonstrative of the Zone 35 which was supposed to be land of the 1st defendant. I have seen that document. It is titled Kisii Long Term Plan. This clearly is not a Development Plan but appears to be sketched extract from the actual plan with colour codes on zoning. But you cannot tell where the zones are. Importantly, I cannot see a Zone 35 in that sketch. Neither can I see any area set aside for the Forest Department. The suit land is also not shown in that sketch and you cannot tell whether it falls within what is colour coded as existing public space. It cannot be said by any stretch of imagination that this sketch demonstrates that the suit land is on public land.
40. In his submissions, Mr. Ndiritu, learned counsel for the defendants, made submissions to the effect that the suit land could not be allocated to the plaintiff as it had already been allocated to the 1st defendant. There is no evidence that the ground where the suit land lies was ever allocated to the Forest Department or the 1st defendant. The defendants never produced a sketch of what they proposed to be allocated to the Forest Department and also never produced any minutes from the Council, or any document from the Commissioner of Lands, to demonstrate what exactly was allocated to them. We do not know the size of land assigned to the Forest Department and/or the 1st defendant or its exact position from the evidence presented. And there was nothing difficult in getting this evidence. The evidence could have been readily available from the office of the National Land Commission, or the Land Administration Office of the County Government of Kisii, or from the Department of Physical Planning. The defendants brought no officer from any of these offices to support their contention that the suit land is part of what was allocated or assigned to the Forest Department.
41. The defendants did not even bring any evidence of existence of any land identified as Zone 35 in Kisii Municipality/Block III or at all. They never brought any evidence of where this Zone 35 is located or its size. That may have needed evidence of the Physical Planner and the actual Physical Plan for Kisii, but as I have already pointed out, no Physical Planner was called by the defendants and no Physical Plan was produced by the defendants. In essence the defendants have failed to prove that the suit land is in Zone 35 or falls under a zone that is set aside for public utility.
42. Mr. Ndiritu also made submissions poking holes at the process of allocation of the suit land to the plaintiff. I need not go into these because the defendants have demonstrated no evidence that this land was allocated to them and have not demonstrated that they have any interest in the said land. I would have made an in-depth analysis if the defendants had shown that indeed this land was allocated to them. But it is pointless doing any analysis since the defendants have failed to prove that they are entitled to this land at all. We cannot say that because a title holder has not produced a certain allocation document then automatically his title is bad and must be nullified. As I have said, the title has some form of protection from Section 26 of the *Land Registration Act*. Unless the party wishing to have it nullified proves that he has an interest in that title, and the factors for nullification of title exist, I wouldn't think



that an automatic cancellation must ensue merely because the title holder has not produced a certain allocation document.

43. In the counterclaim, part of the prayers sought was to recall all titles said to have emanated from this so called Zone 35. I am afraid that I can only deal with the one title that is before me, and that is Kisii Municipality/Block III/291, and I have found that the defendants have not demonstrated any interest in the said parcel of land.
44. Mr. Ndiritu also referred me to a past decision i.e the case Kisii ELC No. 40 of 2012 which case touched on the land parcel Kisii Municipality/Block III/294. I cannot import that decision to this suit. Each land parcel is distinct, separately allotted and separately owned, and judgment in respect of one parcel of land cannot be imported into another. In any event, as we saw, the 1st defendant is in occupation of this land parcel No. 294 and that was one of the reasons that the judgment was in her favour. To the contrary, the 1st defendant does not appear to have ever used the suit land at any one time.
45. The long and short of it is that the counterclaim must fail and it is hereby dismissed with costs.
46. Getting to the plaint, the first prayer was for general and exemplary damages. I have not seen any damage suffered by the plaintiff and the plaintiff did not say that he has suffered any. He still operates his hotel. I cannot in those circumstances grant any such damages. The second prayer was for compensation for the value of the property. I have no basis to grant this prayer since I have dismissed the counterclaim. The third prayer is for loss of use. Yet again, with the dismissal of the counterclaim, there is no basis for grant of such an order and there is no loss of use proven. The fourth prayer seeks a declaration that the plaintiff is entitled to the suit land as against the defendants. What I will issue is an order permanently restraining the defendants from interfering with the possession of the plaintiff of the suit land. The other prayers were for interest, other relief and costs. I have awarded no monetary sum so the issue of interest does not arise. I will however award the plaintiff the costs of both the suit and the counterclaim.
47. For the avoidance of doubt, the only order that I have issued herein is the order of permanent injunction, restraining the defendants from interfering with the possession of the suit land by the plaintiff, and costs of the suit to the plaintiff.
48. Judgment accordingly.

DATED AND DELIVERED THIS 27 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT Kisii

Delivered in the presence of :

Mr. Sagwe for the plaintiff

Mr. Wabwire for the defendants

Court Assistant : Michael Oyuko

