



Republic v Attorney General & 2 others; Kisii Country Lodge Limited (Exparte) (Environment and Land Judicial Review Case 2 of 2023) [2025] KEELC 3686 (KLR) (7 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2023**

**M SILA, J
MAY 7, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

**THE COUNTY SECRETARY, KISII COUNTY GOVERNMENT 2ND
RESPONDENT**

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

AND

KISII COUNTRY LODGE LIMITED EXPARTE

JUDGMENT

1. Through an application dated 10 November 2023 the ex parte applicant sought leave to commence judicial review proceedings for the following orders :
 - a. Prohibition against the respondents to restrain them from entering, causing destruction or damage to the ex parte applicant’s property LR No. Kisii Municipality/Block I/843.
 - b. Certiorari to quash a decision made on 5 October 2023 to stop the ex parte applicant from further construction on LR No. Kisii Municipality/Block I/843 and quash a decision that LR No. Kisii Municipality/Block I/843 does not belong to the ex parte applicant.
2. The leave was duly granted on 14 November 2023 and the main motion filed on 23 November 2023 and amended on 22 April 2024.
3. In the Statement of Facts and the Supporting Affidavit sworn by Jeremiah Nyangwara, the managing director of the ex parte applicant, it is averred that the ex-parte applicant is the registered proprietor



of the land parcel Kisii Municipality/Block I/843 (hereinafter referred to as ‘the suit property’) having purchased it for value from one Soma Saiga Traders Limited on 24 December 2013 who had in turn purchased it from one Rael Otundo the original allottee of the leasehold title. It is averred that the ex-parte applicant improved the suit land with the approval and knowledge of the 2nd respondent, the County Secretary of the County Government of Kisii. It is averred that on 6 October 2023, the ex-parte applicant was served with an enforcement notice with a request to provide ownership documents and approval plans of the on-going construction, within 7 days, on the basis that the ex-parte applicant was carrying out construction of a petrol station on Government Land. That vide a letter dated 6 October 2023, the ex-parte applicant supplied the documents requested, which were received on 11 October 2023, at which time the ex-parte applicant had completed the construction of the petrol station. It is averred that on the night of 17 and 18 October 2023, the employees of the 1st respondent (probably meant 2nd respondent) invaded the suit property and caused malicious destruction of the petrol station leading to loss and damage. The ex-parte applicant contends that she was never issued with any notice to remove the structures standing therein and that there are threats of further destruction of property. To his motion, the ex-parte applicant annexed copies of ownership documents, the enforcement notice dated 5 October 2023, his letter dated 6 October 2023, letter dated 31 August 2015 approving construction of a perimeter wall around the suit property, letter dated 23 December 2013 from the Kisii County Government confirming ownership of the suit property; copy of rates payment dated 1 September 2015, copy of clearance certificate dated 23 December 2013, copy of environment permit dated 26 July 2023, copy of a building inspection card executed by the County Engineer, and photographs of the property under construction.

4. The 2nd respondent filed Grounds of Opposition and a Replying Affidavit sworn by Patrick B. Achoki, its Director, Physical Planning, to oppose the motion. In the Grounds of Opposition, it is contended that the suit property is public land earmarked for construction of affordable housing. In his replying affidavit, Mr. Achoki has deposed that upon being served with the Motion, he checked the records of approved Part Development Plan and did not find any record alienating the suit property. He deposes that the suit property is within an area designated as public land for Government Housing according to the approved Development Plan for Kisii Town of 1971. He has continued to depose that in 2022 a Part Development Plan Ref NRB/37/22/91 was prepared and approved for Government Housing and the suit property falls within this plan. He has annexed the said Plan. He has stated that there has never been issued any change of use from Government Housing to Commercial as alleged and the suit property has never been alienated to any person and belongs to the County Government of Kisii.
5. The 1st and 3rd respondents, through the State Law Office, filed a replying affidavit sworn by Charles Ayienda, the County Land Registrar. He deposed that according to records held at the Kisii Land Registry, the suit property is a leasehold property registered in name of the defunct Gusii County Council now replaced by the Kisii County Government and he annexed the green card thereto. He deposed that there are no records to support the acquisition of title by the ex-parte applicant from Soma Saiga Traders on 24 December 2013. He has questioned how Soma Saiga Traders was issued with a Certificate of Lease on 27 February 1998 which is the same date as the first lessee, Rael Otundo, was registered but not issued with a Certificate of Lease and has made reference to the White Card thereto. He has deposed further that it is not clear how Rael Otundo was registered as the first lessee as there are no records to support her acquisition of the suit property from Gusii County Council. He has averred that Rael Otundo did not acquire any good title and was incapable of transferring title to Soma Saiga Traders and to the ex-parte applicant. He has contended that the ownership documents held by the ex-parte applicant were obtained fraudulently and through a corrupt scheme involving Rael Otundo, Soma Saiga Traders and the ex-parte applicant. He has further deposed that the Development Plan of the area where the suit property is situated indicates that the property is public land reserved



for Government Quarters through the Ministry of Housing and he has annexed a copy of the area Development Plan. He has added that the matter is under active investigations by the Ethics and Anticorruption Commission (EACC) with a view to recover the land in the interest of the public. He contends that the application herein is a calculated attempt by the ex-parte applicant to sanitize ownership of the suit property without going to the root of title and is of opinion that the suit herein is an abuse of the court process.

6. The ex-parte applicant filed a supplementary affidavit again sworn by Mr. Nyangwara. He contends that the allegation that the suit property is earmarked for affordable Housing Scheme is malicious and that he has never received any notice of intention to acquire the suit property. He adds that there has never been attempt to challenge ownership of the suit property by Rael Otundo and Soma Saiga Traders nor has there been any investigation by the EACC. He has denied committing any fraud. He has further claimed that the Development Plans annexed by Mr. Achoki and Mr. Ayienda are unsigned and that the Development Plan for the area is one approved on 21 November 1994.
7. The motion was canvassed through written submissions and oral highlighting at the hearing of the motion. I have considered the submissions presented.
8. I will be brief in my disposition as it is patently clear to me that the issues that have now panned out are not matters that can be determined in a judicial review motion.
9. It is not all cases that are suitable for hearing by way of judicial review. Where facts are hotly in dispute, such that there is need to have the dispute heard through an ordinary suit for all issues to be deeply interrogated, a court may decline to exercise its discretion to proceed to grant the remedies sought in judicial review.
10. What is apparent upon an assessment of the documents filed is that there is before me a full blown dispute over ownership of the suit property. Whereas the ex-parte applicant asserts to have good title to the suit property, the respondents contend that the suit property is public land and no title has ever been issued over it. This is now not a simple case of whether or not there was proper procedure followed in issuing an enforcement notice; this is a dispute over title and such dispute is best determined upon a full hearing on merits, which can only be done in an ordinary suit and not through a judicial review motion. Evidence regarding the root of title will have to be taken and witnesses subjected to cross-examination.
11. In fact, at the hearing of the motion herein, counsel for the ex-parte applicant did mention that his client has filed a suit, being Kisii ELC NO. E006 of 2025 and he sought a consolidation of that suit with this judicial review motion. I declined that request for consolidation, as judicial review is a special procedure. Now, if the issue of ownership, and whether the respondents ought to be permanently restrained from the suit property, is going to be determined in the civil suit, I wonder why the ex-parte applicant would insist on keeping this judicial review motion and even proceed to argue it. In my opinion, it serves no purpose at all, and this ought to have been apparent to the ex-parte applicant given the nature of the replies filed by the respondents.
12. Indeed, when the matter came up for mention for directions on 19 November 2024, I asked Mr. Nyaberi, learned counsel for the ex-parte applicant, whether the case is truly viable for hearing as a judicial review motion and he asked for time to seek instructions. It would appear that the instructions received was to proceed with the motion, but as I have pointed out, this is not a dispute that is suitable for hearing through judicial review. I cannot in those circumstances go to the merits or demerits of the issues raised in the motion herein.



13. It is clear to me that this suit is for dismissal and it is hereby dismissed. The only issue left is costs. If the ex-parte applicant had withdrawn this motion early enough, given the nature of the replies filed, I would have made no orders as to costs. Indeed, upon filing the suit Kisii ELCC No. E006 of 2025, the ex-parte applicant ought to have been gracious enough to withdraw this suit. However, insisting on proceeding, even after filing a substantive suit where all issues will be canvassed, is to me, an abuse of the court process. I will therefore dismiss this suit with costs to the respondents.

14. Judgment accordingly.

DATED AND DELIVERED THIS 7 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Nyaberi for the ex parte applicant

Ms. Gesora h/b for Mr. Ndiritu, State Counsel, for the 1st & 3rd respondents

Ms. Bonareri for the 2nd respondent

Court Assistant – David Ochieng’

