



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.LC CASE NO. 400 OF 2014**

**SIMON ABUKI OMBOTO.....PLAINTIFF**

**VERUS**

**KISII COUNTY GOVERNMENT**

**EXECUTIVE COMMITTEE MEMBER LANDS**

**KISII COUNTY GOVERNMENT .....DEFENDANTS**

**RULING**

**INTRODUCTION**

1. The Plaintiff instituted this suit against the Defendant claiming that he is the registered owner of the Land Parcel known as L.R Number KISII MUNICIPALITY/BLOCK/II/219 having purchased the same from one Samwel Kenani Omwando. The Plaintiff's claim against the Defendant is that between the 4<sup>th</sup> and 13<sup>th</sup> day of October 2014, the Defendants through their agents trespassed onto the suit property, erected a signboard with the words "Public Property, No Entry" and destroyed the boundary thereof. As a result of the aforesaid acts, the Plaintiff claims that his rights have been violated as he has been unable to take possession of the suit property. The Plaintiff seeks inter alia a declaration that he is the lawful owner of KISII MUNICIPALITY/BLOCK/II/219, a permanent injunction to restrain the Defendant from interfering with the suit property and general damages for trespass.

2. In its statement of Defence and Counterclaim dated 8<sup>th</sup> December 2014, the Defendant denies the Plaintiff's claim and avers that the purported transfer of the suit property to the Defendant was irregular and invalid as the suit property belongs to the government and is not meant for private development. They prayed that the Plaintiff's suit be dismissed with costs and sought the following reliefs in the Counterclaim:

- a) A declaration that Parcel **No. LR Kisii Municipality/BlockII/219** is public land irregularly acquired by the Plaintiff.
- b) An Order directing the Registrar of Lands Kisii to revoke/annul/cancel the transfer issued to the Plaintiff and revert to Public Government Land.
- c) A Mandatory injunction directing the Plaintiff to vacate the suit parcel of land, in default the Plaintiff be forcefully evicted there from.

3. On 10<sup>th</sup> February 2020 the Court directed that the Land Registrar Kisii County, County Surveyor, Director of Physical Planning and Director of Land Administration to visit the suit property for purposes of establishing the following:

- i. The ground position of Land Parcel No. KISII/MUNICIPALITY/BLOCK 11/219 and whether the ground position is in conformity with the Registry Index Map
- ii. The ownership thereof
- iii. The person or persons in occupation thereof
- iv. The developments on the land.

4. The said officers visited the suit property and prepared a joint report dated 10<sup>th</sup> March 2020. In the said report they made the following observations:

- The site is located along Kisii-Kilgoris road and neighbours parcels No. KISII MUNICIPALITY/BLOCK/II/220.202, 203,221 and a 10 m road of access.
- The site is developed with a permanent government house currently being used as Kisii County Public Service Board Offices, which is in tandem with the planned use as per the development plan for Kisii town ref number 37/KSI/1971/01.
- According to the Registry Index Map, the site is un-amended and remains a government house. However, a survey plan reference folio/register number 394/20 from Survey of Kenya indicates that parcel number KISII MUNICIPALITY/BLOCK/II/219 falls on government land hosting Kisii County Public Service Board. The land is approximately 0.165 hectares.
- Records at the Land Registry indicate the land is registered under the name Simon Abuki Omboto.

They conclude the report by stating that the lease KISII MUNICIPALITY/BLOCK/II/219 issued to Simon Abuki Omboto was irregularly created on government land with a government house.

5. After the report was filed in court, the parties were directed to obtain copies thereof and file their comments on the same. The Plaintiff filed his comments on 31.8.2020 while the Defendant filed his comments on 10<sup>th</sup> November 2020.
6. In his comments learned counsel for the Plaintiff cast aspersions on the report, claiming that it had been prepared by unauthorized officers from the County Government of Kisii which is sued as the 1<sup>st</sup> Defendant herein and the said report was therefore not objective. He urged the court to expunge it from the record.
7. On the other hand, the County Attorney submitted that the report is in conformity with the court order dated 10<sup>th</sup> February 2020 and the findings of the report are factual as they are supported by documents held by the Lands office .He denied the allegations of bias levelled against the officers who visited the suit property and contended that they could be called for purposes of being cross-examined on their report. Counsel also clarified that in accordance with the Fourth Schedule **Part 2** of the Constitution of Kenya 2010, County Planning and Development functions have been devolved.

#### **ISSUES, ANALYSIS AND DETERMINATION**

8. Having considered the report and the rival comments thereon the central issue for determination is whether the report determines the issues in controversy and whether it should be adopted by the court.
9. Learned counsel for the Plaintiff has submitted that the report should be discarded and expunged from the record as apart from the County Land Registrar, the other officers ought to have come from the national government and not the county government as officers from the county government would not be impartial since the case involves the County Government of Kisii.
10. Part Fourth Schedule of the Constitution of Kenya 2010 which contains the distribution of functions between the National and County Government at paragraph 8 provides that the following functions fall under the County Government:-
  8. “County Planning and development including
    - (a) statistics
    - (b) land and survey mapping
    - (c) boundaries and fencing
    - (d) housing...”
11. It is clear from the above provision of the Constitution that the officers who visited the suit property were the right officers as they are the ones designated to carry out the functions relating to physical planning and land survey. The said officers relied on maps which have been in existence before the establishment of the County Governments including the Development Plan for Kisii Town ref no. 37/KSI/ 1971/01 and the Registry Index Map from the Survey of Kenya. The allegations of bias are thus without basis.
12. From the joint report of the County Land Registrar, County Surveyor and Director of Physical Planning, the suit property to which the Plaintiff lays claim has a permanent government house currently being used as Kisii County Public Service Board Offices in line with the development plan for Kisii town ref number 37/KSI/1971/01.
13. Even though the report concludes that the suit property was irregularly allocated to the Plaintiff, it necessary for the court to take the evidence of both parties and subject the findings of the report to cross –examination before arriving at its conclusion.
14. In the premises therefore, the report shall form part of the court record and the County Land Registrar, County Surveyor and Director of Physical Planning shall be called as witnesses so that they can be cross-examined on their report.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of December 2020.**

**J.M ONYANGO**

**JUDGE**