County Government of Kakamega & another v Sila & another (Civil Appeal E033 of 2021) [2026] KECA 344 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KECA 344 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E033 OF 2021

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 27, 2026

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA ..... 1ST APPELLANT

KAKAMEGA COUNTY DEVELOPMENT CONTROL & DISPUTE RESOLUTION COMMITTEE ..... 2ND APPELLANT

AND

MUNYAO SILA ..... 1ST RESPONDENT

LINDA CHEPKORIR RUTO ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 25th September, 2019 in ELC Petition Case No. 6 of 2018)

JUDGMENT

1. In a petition dated 9th November, 2018, the respondents alleged that they are jointly the lawful proprietors of land parcel Kakamega Municipality/Block III/7 (hereinafter 'the suit property'), a leasehold property situated within Kakamega Municipality, measuring approximately 0.2025 Ha. They averred that the lease was for a period of 99 years, with effect from 1st July, 2001. They became registered proprietors of the suit property on 22nd November, 2011. They urged that due to the suit property's proximity to Kakamega Bukhungu Stadium, as well as previous reported cases of trespass, the respondents sought requisite approvals to construct a perimeter wall around the suit property. That the plan was approved by the appellants. The respondents engaged a contractor to erect a permanent stone wall around the suit property at a cost of Kshs.2,500,000.

2. The respondents averred that on 7th December, 2017, goons allegedly hired by the appellants invaded the suit property and started demolishing the erected wall, forcing the respondents to report the matter at Kakamega Police Station. That on 11th December, 2017, the 2nd appellant affixed an 'enforcement

notice' on the wall erected on the suit property, informing the respondents that construction of the said wall had not been approved, and that they had twenty-four hours to demolish the remainder of the Wall. That on the night of 12th and 13th December, 2017, at about 1.00 a.m., the appellants, using a bulldozer, demolished the entire wall erected by the respondents on the suit property.

3. It was the respondent's case that the demolition of the said wall by the appellants was illegal and in bad faith, and that it was part of a larger scheme aimed at expropriating and forcefully taking over the suit property. That in months of September and October, 2018, the appellants entered the suit property and began constructing a wall that annexed the suit property and enclosed it as part of Bukhungu Stadium. They further laid cabro blocks on the suit property in an effort to convert it into a car park area. That the respondents wrote a demand letter to the appellants and reported the invasion at Kakamega Police Station, but no action was taken against the appellants. That on 20th October, 2018, during the Mashujaa Day festivities that took place at Bukhungu Stadium, the appellants caused the suit property to be used as a motor vehicle parking area by the general public, and that it has been rendered for use by the public ever since. The respondents urged that the forceful expropriation of the suit property by the appellants without compensation was contrary to Article 40 of *the Constitution*, as well as Part VIII if the *Land Act* 2012. They averred that since they are unable to utilize the suit property, they are willing to surrender the leasehold title of the suit property to the appellants, contingent on the appellants compensating them to the tune of Kshs.42,900,000, being the value of the suit property.

4. The respondents prayed for declaratory orders that: the appellants abused their office and acted illegally in demolishing the perimeter wall erected on the suit property; the appellants' actions were in violation of Articles 2, 3, 10, 19, 20, 21, 27, 28, 40, 47, 50(1) of *the Constitution*, as well as provisions of the Fair Administrative Actions Act, The Physical Planning Act, the *Land Act* and the *Land Registration Act*; and, that the appellants actions constituted an eviction/constructive eviction for which the appellants are liable to pay full compensation.

5. The respondents further sought orders for payment of: Kshs.42,900,000, being compensation for value of the suit property, subject to surrender of the leasehold title; Kshs.2,500,000 being costs incurred by the respondents to erect the perimeter wall; Kshs.200,000 per month as loss of user from the date of demolition of the perimeter wall up to the date of judgment; special damages of Kshs.60,000 being cost of securing a valuation report; exemplary damages against the appellants for illegal demolition of the perimeter wall; exemplary damages against the appellants for illegal expropriation of suit property; general damages for pain, anguish, anxiety, trauma and suffering occasioned upon the them; general damages for trespass; interest; and cost of the suit.

6. In the alternative, the respondents sought for declaratory orders that they are the lawful owners of the suit property, and are entitled to quiet enjoyment of the same; as well as damages as listed in the main claim; and injunctive orders restraining the appellants from interfering in any way with the suit property.

7. The petition was opposed. The appellants filed a replying affidavit sworn by Stephen Chune on 20th March, 2019, and a further affidavit, dated 28th July, 2019. It was the appellants' case that the lease to the suit property held by the respondents was obtained fraudulently, and that it was issued on 6th November, 2011, after the promulgation of *the Constitution*, which transition was marred by illegal deals by government employees. They deponed that the respondents began construction of the perimeter wall after a suspension notice was issued to them by the appellants. As such, the appellants cannot be held liable for demolition of a wall that was illegally put up, without the requisite authorization from the appellants. The appellants urged that no evidence was led by the respondents

to establish that they were in use of the suit property, or proof of expected income to be obtained from the use of the suit property, so as to warrant damages for loss of user. On claim for damages for pain, anguish and psychological trauma, the appellants maintained that the respondents cannot be allowed to benefit from their own illegal acts. The appellants denied trespassing into the suit property, as the lease held by the respondents was invalid, and urged that no claim can arise out of the said lease.

8. The petition was heard by the Land and Environment Court "the ELRC). In a Judgment delivered on 25th September, 2019, the trial court (Matheka J.) determined that the respondents sufficiently proved how they acquired title to the suit property. The appellants did not furnish any evidence to establish that the same was acquired fraudulently. The learned Judge further found that vide a letter dated 18th November, 2016, the appellants did actually approve construction of the perimeter wall around the suit property. They cannot therefore deny that they did not approve the erection of the same. The learned Judge held that this was a case of compulsory acquisition of the suit property, and that the appellants did not follow laid down procedure with respect to compulsory acquisition of said parcel of land. The learned Judge allowed the respondents' petition as prayed, save for prayers for general and exemplary damages.

9. The appellants, aggrieved by the said decision, lodged appeal before this Court. They have proffered four (4) grounds of appeal. The appellants faulted the learned Judge for: failing to consider the provisions of the Registration of Titles Act and *Survey Act* in determining whether the title held by the respondents was legitimate; failing to properly evaluate the evidence on record which demonstrated that the title to the suit property held by the respondents was obtained illegally; finding that this was a case of compulsory acquisition of land, when in fact, the appellant's case was that the suit property was public land; and, for arriving at a decision that was against the evidence on record and the law. The appellants urged us to allow the appeal, and set aside the decision of the trial court.

10. The appeal was heard by way of written submissions. Mr. Ashitiva appeared for the appellants, while Mr. Abok was on record for the respondents.

11. It was the appellants' submission that although the respondents alleged ownership of the suit property by virtue of a certificate of lease issued in their favour, the appellants challenged the root of the said title. Counsel for the appellants urged that the suit property originally belonged to the defunct Kakamega Municipal Council, and following the establishment of County Governments, it now vests in the 1st appellant. Counsel submitted that the suit property was never lawfully allotted or issued as a lease to the respondents, or any other person, as it is public land, owned by the 1st appellant. Counsel submitted that the letter from the Ministry of Lands and Physical Planning dated 25th June, 2019, produced by the appellants, demonstrated that the title held by the respondents was illegal, and that this evidence was not controverted by the respondents.

12. Counsel further submitted that since the suit property was public land, it was incumbent that any disputes arising relating to the alleged compulsory acquisition of the suit property, including compensation, be determined by the National Land Commission. Counsel urged that the appellants had no jurisdiction to undertake compulsory acquisition without the involvement of the National Land Commission, and that the award of compensation by the trial court to the respondents was granted ultra vires, as that function was reserved for the National Land Commission.

13. It was the appellants' submission that constitutional petitions ordinarily granted declaratory orders as opposed to monetary compensation, particularly when the court is called upon to assess a claim for special damages. The appellants' urged that the reliefs sought by the respondents were in the nature of a civil claim, and that the claim for special damages was not established sufficiently. The appellants asserted that the assessment of quantum for compensation and special damages ought to have been

reserved for the National Land Commission. They maintained that the trial court acted beyond its mandate in finding in favour of the respondents.

14. The respondents, on their part, submitted that after the Environment and Land Court judgment was rendered, they surrendered the leasehold title with respect to the suit property to the appellants, but that the appellants failed to pay the compensation awarded, and instead lodged this appeal. The respondents maintained that due process was not accorded to them when the perimeter wall constructed on the suit property was demolished, irrespective of whether the approval for its construction was granted or not. The respondents urged that the suit property was registered under the Registered *Land Act*, and therefore the Registration of Titles Act and the *Survey Act* were not relevant.

15. On whether the suit property was public land, counsel for the respondents submitted that the appellants failed to file a cross- petition seeking nullification of the title held by the respondents, as required by the Mutunga Rules. In the absence of such pleadings, there was no basis upon which the trial court could have adjudged whether the suit property was public land, or whether the title held by the respondents was lawful. The respondents submitted that their title to the suit property was acquired lawfully, and deserved protection under Sections 24 and 26 of the *Land Registration Act*. They submitted that the suit property was leased by the County Council of Kakamega to the previous registered owner, one Joseph Kiratu Kioi, as evidenced by the copies of the register, certificate of lease and certificate of official search availed before the trial court.

16. It was their submission that the said Joseph Kiratu was the first registered owner of the suit property, and that the suit property was private land. The respondents urged that they purchased the suit property from the said Joseph Kiratu, and that the payment receipts and transfer documents were on record. They asserted that they have been remitting statutory land rates and rent to the appellants, and that the appellants are estopped from denying the leasehold held by the respondents. They maintained that the allegations of fraud were not proved by the appellants, as well as their allegation that the suit property was public land. The respondents urged that the suit property was among other parcels of land created in 1972, to comprise Block III in Kakamega Municipality, and that the said parcels formed private residential plots. They urged that if the appellants wished to designate the suit property as a public parking space, they ought to have duly compensated the respondents for the suit property, as mandated by Article 40(3) of *the Constitution*.

17. This being a first appeal, it is the duty of this Court to re-analyze and re-assess the evidence on record and reach its own conclusion. This duty was reiterated by this Court in Gitobu Imanyara & 2 other v Attorney General [2016] eKLR, where the Court observed thus;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect." See Selle v. Associated Motor Boat Co. [1968] EA 123.

18. There are three issues that emerge for determination by this Court in this appeal:

    i. Whether the suit parcel of land is public land and whether the leasehold title possessed by the respondent is illegal.

    ii. Whether the trial court erred in finding that the appellant breached the law by compulsorily acquiring the suit property from the respondent without following the due process.

    iii. Whether the respondents were entitled to the compensation that was ordered by the trial court.

19. As regards the first issue, it was the respondents' case that they purchased the suit property registered as Land Reference (L.R) No. Kakamega Municipality/Block 111/7 from the first registered owner, one Joseph Kiratu Kioi. The suit property was transferred to the respondents on 22nd November, 2011. The respondents asserted that they undertook the requisite due diligence, including obtaining the search certificate in respect of the suit property. They confirmed that the property was vacant. No one was in occupation of it at the time of purchase. To fend off trespassers, the respondents sought and were granted planning permission by the 1st appellant to construct a perimeter wall around the suit property. Planning permission was duly granted by the 1st appellant.

20. It is the appellants' appeal that the suit property is public land. For this assertion, the appellants submitted that the creation of the said parcel of land from a parcel of land owned by the defunct County Council of Kakamega, and later Kakamega Municipal Council, a predecessor in title to the 1st appellant, was fraudulent and illegal. It is the appellants' appeal that the root of the respondents' title was suspect as the suit property was public land and remains public land. The appellants argued that the suit property was never lawfully allotted to the Vendor who sold the suit property to the respondents.

21. We agree with the appellants' submission that to establish the legal owners of the suit property, this Court must of necessity examine the history of how the respondents came to be registered as the owners thereof. The Supreme Court in Dina Management Limited V County Government of Mombasa & 5 Others [Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) held that

> " To establish whether the appellant is a bona fide purchaser for value therefore, we must go to the root of the title, right from the first allotment, as this is the bone of contention here."

22. We are conversant with the land legal regime that existed before the Promulgation of the 2010 Constitution that delineated public, community and private land as provided under Article 61 (2) of *the Constitution*. Article 62(1) defines what constitutes public land. It provides thus:

> " 62 (1) Public Land is
>
> a. Land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date.
>
> b) .....
>
> c) .....
>
> d) "

23. For the appellants to succeed in establishing their claim that the suit property was public land, they were required to prove that the suit property was unalienated government land at the time *the Constitution* was promulgated on 27th August 2010. In the present appeal, the respondents produced in evidence a Survey Plan that established that the suit property was among several parcels of land that had been surveyed, demarcated and allotted to private individuals by the predecessor to the 1st appellant, the County Council of Kakamega. According to the certificate of lease issued in respect of the suit property, it was allotted and the certificate of lease issued to the first allottee on 4th July, 2002. The first allottee sold the lease in respect of suit property to the respondents and the said lease was transferred to the respondents on 16th November, 2011. The respondents were issued with the certificate of lease in respect of the suit property.

24. The appellants were required to establish to the required standard of proof that the suit property was "unalienated" government land or that it had been set aside for a particular public purpose at the time the 2010 Constitution was promulgated or that the process leading to the allotment of the suit property by the 1st appellant's predecessor in title was fraudulent or unprocedural. The appellant failed to discharge this burden that was placed on them. From the evidence placed before the trial court, it was clear that the process which the lease in respect of the suit property was alienated was legal. The 1st appellant's predecessor in title had the requisite legal mandate to alienate and allot land within its jurisdiction for private ownership and development. Other than making unsubstantiated allegations of fraud, the appellants placed no evidence before the trial court that the initial allotment to the first allottee was fraudulent or illegal.

25. In that regard, we cannot fault the ELC for reaching the finding that the leasehold title held by the respondents is legal and that they are entitled to the protection of the law as guaranteed by Article 40(1) of *the Constitution*. We therefore hold that the respondents established to the required standard of proof that they are the legal owners of the suit property.

26. The second issue for determination is whether the ELC erred in making the finding that the appellants had breached the respondents' right to own property by, in effect, compulsorily acquiring the suit property without compensating the respondents.

27. It is common ground that the appellants gave planning permission for the respondents to construct a perimeter wall around the suit property. It is also not disputed that after the respondents had constructed the perimeter wall, the appellants through their agents invaded the suit property, demolished the perimeter wall erected by the respondents, and thereafter erected its own perimeter wall incorporating the suit property into the land that Bukhungu Stadium occupies. It was further not disputed that the suit property is now being used as a parking space for the Stadium.

28. The actions taken by the appellants clearly showed its intention of acquiring the suit property. The appellants, under the pretext that the suit property was public land, used force to take possession of the suit property and thereby deprived the respondents of the same. It was submitted on behalf of the appellants that the ELC erred when it held that the appellants had compulsorily acquired the suit property yet there exists an elaborate procedure for compulsory acquisition of land under the mandate of National Land Commission as provided for under Article 67 of *the Constitution* and the *National Land Commission Act*. The respondents counted this argument by reiterating that it was the appellants who were required to put in motion the compulsory acquisition process if it required the suit property and not use force to take possession of the suit property without following the laid down due process.

29. Our re-evaluation of the conflicting positions taken by the appellants and the respondents leads us to the same conclusion that was reached by the ELC: The appellants, on its own free will and volition, chose to short-circuit the compulsory land acquisition process by a public entity. They took the law in their hands and forcefully took possession of the suit property. They cannot be heard to complain that the Court usurped the mandate of the National Land Commission yet it is the appellants themselves who brought about the state of affairs that the court was called upon to determine its legality or otherwise.

30. As stated earlier in this Judgment, the appellants took upon themselves the mandate to forcefully taken over occupation and possession of the suit property. If the appellants were a private entity, they would have been found liable for the tort of conversion or the very least the tort of trespass. Being a public entity with a coercive mandate, the ELC correctly in our view, made the finding that the appellants, having decided that they can forcefully take over occupation and possession of the suit property, they had in effect compulsorily acquired it and permanently deprived the respondents of its ownership.

They chose not to involve the National Land Commission. They can have it after fairly compensating the respondents for the value of the suit property.

31. Are the respondents entitled to the compensation that they were ordered to be paid by the trial court?

The respondents produced in evidence a valuation report in respect of the suit property dated 22nd December 2017. It was prepared by Odongo Kabita & Company Valuers. The term of reference of the report was to carry out "valuation of the Subject plot with a view of advising on the current replacement cost of the damage caused to the perimeter walling... We were also instructed to value the plot after wall demolition for compensation purposes." According to the said Valuers, the value of the damage to the perimeter wall was assessed at Kshs 2,400,000/= while the value of the plot was assessed at Kshs. 40,500,000/=. The appellants did not present any alternative valuation that would have informed the decision of the trial court. We cannot therefore fault the finding made by the ELC regarding the compensation that should be paid to the respondents. The trial court relied on the only evidence that was placed before it to made the compensation award.

32. From the foregoing, it is evident that the appeal cannot be allowed. It lacks merit and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY,2026.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR