

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ELC LA E012 OF 2025

ELIJAH AMOTA ONJIKA..... APPELLANT

VERSUS

KISII COUNTY GOVERNMENT.....1st RESPONDENT

CEC, LANDS HOUSING & PHYSICAL

PLANNING, KISII COUNTY GOV'T.....2nd RESPONDENT

(Appeal from the Judgment and Decree of Hon. B.O. Omwansa (Senior Principal Magistrate) dated and delivered on the 29th February 2024 in the original KISII CMCC ELC NO. E012 OF 2023)

JUDGMENT

1. The Appellant is the one who commenced the suit in the subordinate court, and the judgment did not turn out in his favour, hence this appeal. He has set out the following grounds of appeal:

- a. The learned trial magistrate erred in law and fact by failing to properly analyse the evidence on record demonstrating that L.R. No KISII MUN./BLOCK II/552 was legally and or duly registered in the name of the Appellant.
- b. In holding and finding that the title of the suit property had been revoked pursuant to a strange document read, “Kenya Gazette

issued in November, 2018”, that was neither lodged in court nor produced as an exhibit by either of the parties, the magistrate misapprehended the law on evidence and contravened the provisions of articles 10, 47 and 50 of the Constitution.

- c. The learned magistrate erred when same upheld the Respondent’s counter-claim despite evidence on record that the counter-claim was statute barred by dint of section 4 of the Limitation of Actions Act.
 - d. The trial magistrate relied on extraneous issues not before the court and thus arrived at a slanted and or unfair decision not anchored on the provisions of the law.
 - e. In holding and finding the suit property was public land, the trial magistrate disregarded the evidence on record and thereby failed to decipher the salient features in the Appellants case and thus arrived at a conclusion contrary to the weight of the evidence on record.
 - f. The learned trial magistrate failed to properly evaluate, appraise and or analyse the submissions and or authorities advanced on behalf of the Appellant, thereby mistaking and misconceiving the crux of the Appellant’s case, thus arriving at a slanted judgment/decision.
2. The appellant urged the court to find merit in his appeal and grant him these orders:

- a. **The appeal be allowed and judgement and decree of the trial magistrate dated 28th February 2025 in Kisii CMCC ELC NO E012 of 2023 be set aside, quashed and or varied.**
 - b. **The honourable court be pleased to substitute in lieu an order dismissing the Respondent's counter-claim with costs.**
 - c. **This Court be pleased to grant an order allowing the Plaintiff/suit by the Appellant vide KISII CMCC NO. E012 OF 2023 with costs.**
 - d. **Costs of this appeal.**
 - e. **Such further and or other relief (s) as the court may deem necessary, just and expedient.**
3. Directions were taken for the hearing of the appeal by way of written submissions. The Appellant filed submissions dated 25th September, 2025. The submissions by the Respondent are dated 2nd October, 2025.

Summary of the proceedings before the Magistrate's court:

4. Vide a plaint dated 3rd February, 2023, the Appellant pleaded that he was the registered owner of the land number Kisii Municipality/Block II/552, which he acquired pursuant to an allocation from the Municipal Council of Kisii, who is the predecessor in title to the Respondents. He pleaded that he applied for the allocation vide his letter dated 4th September, 1997. The application was duly considered

on 13th September, 1997 which led to him being issued with a letter of allotment dated 2nd January, 1998.

5. The Appellant averred that he complied with all the necessary procedures, made the requisite payments, and was subsequently issued with a 99-year lease. Notwithstanding the foregoing, in 2015/2016, the National Land Commission wrote to him requesting written representations explaining the process culminating in his acquisition of the suit property.
6. He averred that he tendered documents before the Commission to support his title, which resulted in the National Land Commission findings exonerating him from any impropriety. Despite the findings of the NLC and the fact of his registration as the owner of the land, the Appellant pleaded that on 26th January, 2023, the Respondents unlawfully entered the suit property and demolished his perimeter wall, necessitating the filing of the case.
7. The Respondents filed a statement of defence and counter-claim dated 28th March 2024, denying the claim. They pleaded that they have at all material times been in occupation and use of the suit property, which is government land. The Respondents counter-claimed that there were no municipal resolutions allocating the Appellant the suit property.

8. They accused the Appellant of acquiring land zoned for residential public housing by the government and pleaded the Appellant obtained his title through fraud. The Respondent sought an order declaring the suit land public property that was acquired irregularly, and an order directing the Land Registrar to cancel the Appellant's title.
9. During the oral hearing, each side called oral evidence. The Appellant produced several documents in support of his case, inter alia, his application letter to the Municipal Council dated 4.9.1997, the response thereto dated 13.9.1997, a letter of allotment dated 2.1.1998, a PDP approved on 26.3.1996, a lease and a certificate of lease bearing his name.
10. In his judgment, honourable Omwansa raised the question whether the suit property subsists and whether it is lawfully owned by the Appellant. He proceeded to highlight the procedure that must be followed to acquire a good title, from a title held by the government to an individual. He proceeded to state thus,

“Additionally, while carrying out some research on this matter owing to its complexity, I came across the Kenya gazette issued in November, 2018 in respect to the parcel of land in question which directed the Chief Land Registrar to revoke the Appellant's title and vest the same to the P.S. Ministry of Transport, Infrastructure, Housing and Urban Development.”

11. The hon. Magistrate further held that the Appellant did not lay a basis for non-production of primary evidence, instead producing uncertified secondary evidence, which he thought cast doubt on the existence of the suit parcel. It is for these reasons that the learned magistrate concluded that the Appellant had not demonstrated that the subject land exists, and or that it ceased to be government. He dismissed the Appellant's suit and granted the prayers sought in the counter-claim.

Analysis and Determination:

12. In the case of Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates (Civil Appeal 161 of 1999) [2013] KECA 208 (KLR) (11 October 2013) (Judgment), the Court of Appeal, in highlighting the duty of the first appellate court, held that;

“13. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

13. In light of the decision cited, it is my duty now as the first appellate court to re-evaluate and reassess the evidence adduced and before concluding whether to affirm or set aside the impugned judgment. Therefore, I have taken time to review and consider the evidence tendered before the Magistrate’s Court, the impugned judgment, as well as the submissions rendered in support of this appeal.

14. Consequently, I pose the following questions for my determination of this appeal;

- a. Whether the hon. trial magistrate erred in relying on extraneous material.**
- b. Whether or not the learned trial magistrate failed to consider the evidence adduced by the Appellant, hence he reached a wrong conclusion.**
- c. Whether or not the trial court erred in granting the orders sought in the counter-claim.**
- d. Whether the Appellant is entitled to any of the orders sought in the plaint.**

e. What reliefs this court ought to grant,

f. Who bears the costs of this appeal?

15. From the record, there is evidence that the certificate of lease issued on 13th April, 2010, bears the name of the Appellant as the registered owner. The Appellant presented evidence of applying to the then Municipal Council of Kisii to be allocated land for the purpose of setting up a sports academy to tap into local youth talents. This letter was responded to by the Respondents' predecessor via a letter dated 13th September, 1997.

16. According to the letter of 13th September, 1997, the Appellant was allocated an unsurveyed plot in the Milimani area. The letter further stated that the Appellant was to pay all charges, as the plot was unsurveyed. However, the letter does not identify the plot number of the allocated land (it was probably to be identified during the survey).

17. In his evidence, the Appellant stated that, on the basis of this letter, the Commissioner of Lands issued him the letter of allotment, ref no. 31002/XLV, dated 2nd January, 1998. Subsequently, he obtained a registered lease and a certificate of lease issued in his name.

18. The Appellant submitted that he had discharged the legal burden of proof by showing the legality of his title and that the acquisition thereof was as per the legal requirement. He further submitted that the Respondents failed to prove that the suit property was public land

which was acquired irregularly by the Appellant. This submission demonstrates that the Appellant was alive to the rule of evidence that the burden of proof lies on the shoulders of the person who alleges.

19. Honourable Omwansa, SPM, held that the Appellant did not lay a basis for non-production of primary evidence and instead relied on uncertified secondary evidence. The trial magistrate does not identify which of these documents he doubted, given that the documents had been produced in evidence without objection from the Respondents. He also referred to a **Kenya Gazette notice issued in November of 2018**, which did not form part of the evidence adduced by the parties.

20. When the learned trial magistrate came across this gazette notice, he did not invite the parties to comment on it before relying upon it in his judgment. He used it as one of the reasons to hold that the appellant's title was illegal. I find the trial court erred in relying on the extraneous document without giving the Appellant a chance to interrogate it thus violating his right to a fair hearing.

21. This error notwithstanding, I shall proceed to re-evaluate the evidence on record. The Appellant went to court because the Respondents did not recognise he was the owner of the suit land. The Respondent expressed this by demolishing the fence put up by the Appellant on the suit property.

22. The Appellant avers that he presented his documents to the National Land Commission, which exonerated him of any impropriety. It has been held in several cases, some of which were cited by the Appellant, that where a certificate of title is under challenge, it is not enough to dangle the title. You must show that the root of your title is verifiable. Inter alia, the decisions of the Supreme Court in **Dina Management Ltd versus County Government of Mombasa (2023) KESC 30 (KLR)** and **Daudi Kiptugen Versus Commissioner of Lands & 4 Others (2015) eKLR**.

23. Did the Appellant defend the root of his title? With regard to the two initial letters, the Appellant did not provide correspondence showing that the Town Clerk's letter was forwarded to the Commissioner for Lands for action. Therefore, it is unclear whether they referred to the same plot, considering that the letter issued by the Commissioner of Lands describes the plot allotted as "B", while the letter from the Town Clerk does not specify any number for the allocated plot.

24. As at the time of the allotment letter was issued, there is no evidence of a survey which had been conducted. The only link observable from the Appellant's documents is the minutes of the Kisii Municipal Council dated 16th July 1998, and the Town Clerk's letter dated 18th July 1998, with both documents now referring to plot "B". These documents were drawn up a few months after the Appellant had

already obtained the letter of allotment from the Commissioner of Lands.

25. Be that as it may, as the trial magistrate pointed out, one of the steps in allocation is to present evidence of a part development plan (PDP) whose purpose is to show the locality of the plot being allocated. I have noted that both the letters from the Town Clerk and the Commissioner of Lands, produced (at pages 279-281 of the record) in evidence by the Appellant, do not attach or annex a PDP or sketch map showing the location of the referenced plot.

26. The attachment of a sketch plan or PDP would help answer the question whether the land was available for allocation taking into consideration the counter-claim by the Respondents that the Appellant was allotted land on which stands a government house.

27. There is, however, on record a **PDP dated 19th March 1996** produced at page 294 of the record of appeal, which identifies three plots marked as **A, B, and C**. On the right side of this document, the plot sizes are listed, with plot **“B”** stated as measuring **0.1 Ha**. The **letter of allotment** lists the allocated plot size as **0.032 Ha**, the **Lease document** dated 18th August 2003 and registered on 24th November 2004 indicates the plot size as **0.2 Ha**, and the **Certificate of Lease** records the plot size as **0.032 Ha**. Nonetheless, the Appellant relied on

these documents to demonstrate compliance with the requirements for allocation of public land to private individuals.

28. Although the learned magistrate did not elaborate on the uncertified secondary evidence he referred to, I concur with his holding that the Appellant did not demonstrate with certainty the existence of the plot or that its acquisition was lawful and in accordance with procedure. This is in light of his key documents, which conflict with each other regarding the size of the allotted plot.

29. The Appellant submitted that the documents produced in court remain unchallenged because DW1 and DW2 did not call the authors to counter the evidence. Despite this, the burden on the Appellant was not discharged in view of the pointers I have made above, based on his own documents. There is a lack of proof of the specific location of the plot allocated to him because the Commissioner allotted a plot B measuring 0.032, and the Appellant relies on a PDP dated 19.3.1996 and approved on 26.3.1996, which refers to a plot "B" measuring 0.1 Ha. Can this PDP not be used to identify the Appellant's suit plot? My answer is no.

30. Did the Appellant note the variation in the sizes of land contained in the lease document, the allotment letter and the PDP? In my opinion, these three documents formed the root of the suit title. It is immaterial that the Appellant was paying annual rates to the Council and/or that

correspondence from the Ministry of Lands confirmed him as the owner.

31. The report by the National Land Commission dated 27th April, 2017 also referred to the Appellant's land as measuring 0.032Ha. The author does not mention the variations I have picked out which were available on the face of the documents presented to them. The photographic evidence produced in my view confirms the illegal demolition of the Appellant's fence and adds no value to the legality of the suit title.

32. On the basis of the conflicting documents, I conclude that the Appellant is not entitled to the declaratory orders that he is the lawful, bona fide owner of L.R No. Kisii Municipality Block II/552, nor to the permanent orders of injunction sought against the Respondent.

Special and general damages:

33. The Appellant also sought orders for special damages amounting to Kshs 1,449,500, representing the cost of materials for his demolished fence. He also claimed a disturbance allowance of Kshs 184000. It is a well-established principle of law that special damages must be specifically pleaded and strictly proved. The documents relied on by the Appellant to prove the loss included photographs of the demolished structure and a valuation report dated 1st February, 2023,

by Otundo & Associates, which estimated the total loss at Kshs 1,414,500.

34. The Respondents do not deny demolishing the fence of the Appellant as the statements by their witnesses on record were limited to the question of ownership of the suit land. There is no evidence of notice issued to the Appellant to remove the impugned fence before the demolition took place. There is no doubt from the report by the National Land Commission that the Respondents had contested the Appellant's title.

35. However, as a statutory body, they had a duty as provided for under article 47 of the Constitution and section 4 of the Fair Administrative Actions Act to have given notice to the Appellant. Article 47(2) provides thus;

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

36. As at the time the demolition took place, no finding had been made declaring the Appellant's title as illegal. Therefore, the Respondent had no right to demolish the fence without serving any notice on the Appellant. It is on this basis that I hold the Appellant is entitled to a remedy for the demolished fence under the heading of special damages. Since there is no alternative valuation report providing a

different value for the loss, I grant the Appellant special damages of Kshs 1,449,500.

37. Having found that the Appellant's title is invalid for questionable roots, I find that he is not entitled to the claim of general damages. Further, it is imperative that an order be issued to cancel the said title KISII MUN. BLOCK II/552 as prayed for in the Respondent's counter-claim. It follows that I do not fault the learned magistrate's finding allowing the order of cancellation as prayed in the counter-claim.

Final disposition:

38. In conclusion, I find that the appeal partially succeeds for the reasons stated hereinabove. Consequently, the order of the trial magistrate dismissing the Appellant's suit in its entirety is varied and substituted with an order dismissing the Appellant's suit in terms of prayers **I, II, III, and V** of the Plaint. The prayer **(iv)** on special damages is granted, and **(vi)** on interest to run from the date of this judgment until payment is made in full.

39. Since the appeal partially succeeds, I award the Appellant half the costs of the suit in the subordinate court and half the costs in this appeal.

Dated, Signed and Delivered at Kisii this 16th day of April, 2026

**A. OMOLLO
JUDGE**

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