



**Mugenyu v County Government of Nyeri & 2 others (Civil Appeal  
E067 of 2023) [2025] KECA 593 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 593 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL E067 OF 2023  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
MARCH 21, 2025**

**BETWEEN**

**PHELIS NDUTA MUGENYU ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF NYERI ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court  
at Nyeri (L.N. Waithaka, J.) dated 2nd June 2022 in ELC No. 30 OF 2014)*

**JUDGMENT**

1. Phelis Nduta Mugenyu, (hereafter the appellant), filed this appeal challenging the judgment of the Environment and Land Court ('ELC') dated 2<sup>nd</sup> June 2022 (L. N. Waithaka, J.) in ELC Case No. 30 of 2014.
2. By a plaint dated February 25, 2014 and amended on April 17, 2014, the appellant sought a permanent injunction to restrain the 1<sup>st</sup> respondent from interfering with her quiet enjoyment of LR No. 1246/7 - Naromoru (formerly LR No 1246/1/3/R-Naromoru, Nyeri District (the suit property); a declaration that the 1<sup>st</sup> respondent's acts and threats to forcefully invade and evict her from the suit property are unlawful; costs of the suit and any other or better relief the court may deem fit.
3. The appellant's suit was premised on the grounds that she is the bona fide owner of the suit land; that in disregard of her rights in the suit land, the 1<sup>st</sup> respondent through its employees, servants and/or agents threatened to forcefully take over the suit property from her and to demolish the structures she has erected thereon.



4. The suit was opposed through a statement of defence filed on March 31, 2014, where the 1<sup>st</sup> respondent denied the allegations levelled against it and contended that the suit land is public land that had been offered to the appellant's husband and later to her on a Temporary Occupation Licence (TOL).
5. The 2<sup>nd</sup> respondent also filed a statement of defence through which it contended that the suit land is public land that had been allocated to the appellant on TOL basis.
6. In a rejoinder, the appellant maintained that she was allocated the suit property and that all what remained was issuance of a certificate of lease in her favour.
7. The case was heard through viva voce evidence. The appellant testified that the suit land was initially allocated to her late husband for purposes of grazing livestock. Following her husband's death, the appellant applied for and was allocated the suit land in 1968 on temporary basis for a period of 9 months. The TOL was later extended for a term of three years effective from August 1, 1981.
8. It was the appellant's evidence that there was an option of converting the TOL to a freehold grant upon fulfilment of the conditions in the letter of offer. She stated that a Department of Lands receipt dated August 18, 1981 showed that she paid Kshs.410 in respect of the TOL. She stated that she complied with all the conditions listed in the temporary offer letter and the process to change the temporary offer to a leasehold was commenced. She produced before the court a Registry Index Map (RIM) dated July 8, 1992 and a letter from the Commissioner of Lands to the Director of Survey, dated June 5, 1996. Through the letter, the Commissioner of Lands was requesting for the deed plan in respect of the suit land in order to issue a new grant. Further a letter from the District Lands Officer Nyeri to the Commissioner of Lands showed that the suit land had been subdivided into three portions namely LR. No 1246/4; 1246/5 and 1246/6. The portions were occupied by the appellant, a Mr. Muchiri, and the Ministry of Lands. It was indicated that the appellant claimed ownership of the entire suit land. An official government receipt No BV039952 dated August 13, 2001 showed that the appellant paid Kshs.12,200.00 as survey fees in respect of the suit property. From the evidence placed before the trial court, there were plans to grant the appellant a freehold title for the property and the process had commenced.
9. However, this appears to have elicited a lot of interest from other persons who wanted to be allocated portions of the said land. The Ministry of Agriculture which had initially surrendered the land renewed its interest and asserted that the land was needed for grazing purposes as initially intended. Investigations were commenced and the history of the matter as seen from several correspondence between the Provincial administration, The Ministry of Lands and the Ministry of Agriculture revealed that although there had been an intention to process the Title Deed in the appellant's favour, the process had not been completed. After investigations, it was resolved that the suit land should revert to the Government as the same was Government land, hence the appellants decision to file the suit.
10. In opposition DW1, Silas King'ori Mburugu, a Land Administration Officer working with National Land Commission (NLC) testified that a letter dated January 16, 1914 signed for Lands Officer was in respect of Outspan Farm No 1246, West Kenya. He stated that through the letter, the writer informed the addressee that the whole of the farm under reference-Outspan No 1246, West Kenya, was reserved to the Government for possible future requirements. DW1 was unable to confirm whether the subject matter of that letter is the same as the subject matter of this suit to wit L R No.1246/1/3/R.
11. He stated that a letter from the appellant's deceased husband Mr.G. Mugenyu, to the Commissioner of Lands, dated May 4, 1966 showed that the appellant's deceased husband requested the Commissioner of Lands to issue him with a TOL in respect of the suit property for grazing purposes. In the letter, the appellant's husband acknowledged that the suit property constituted government land vested in



- the Ministry of Agriculture, Directorate of Veterinary Services. Further he testified that a TOL was granted to the appellant's husband pursuant to the request and that the Commissioner of Lands in 1968 issued the said TOL.
12. The witness told the court that in a letter from the Senior Lands Officer to the appellant, dated April 6, 1970, the appellant was informed that complaints had been received that she had not initiated developments in the suit land and warning her that unless she develops the land it would be repossessed and allocated to other people willing to develop it.
  13. He stated that in a letter from the Provincial Director of Agriculture, Central Province to the DC Nyeri, dated October 23, 1973 informing the DC that the allottee of the suit property, the appellant had not improved her development in the suit property and advising that the suit property should be re-allocated. The witness referred to a letter from the Director of Veterinary Services to the Commissioner of Lands, dated April 12, 1976 recommending that the TOL issued to the appellant be cancelled on the ground that the land was not being utilized well.
  14. Further he testified that in a letter from the Commissioner of Lands to the appellant, dated November 4, 1976, the appellant was informed that the TOL issued to her would determine after expiration of three months from November 1, 1976. He testified that in a letter from the appellant to the Commissioner of Lands dated May 28, 1977, the appellant requested the Commissioner of Lands to reconsider his decision to determine her TOL.
  15. Further it was submitted in a letter from the Commissioner of Lands to the District Commissioner, Nyeri dated August 26, 1977 he was directed to sub-divide the suit property between the appellant and one Mr. Wanjau which directive was objected to through a letter from the Permanent Secretary Ministry of Agriculture to Mr Simon Muchiri Wanjau dated May 23, 1984 stating that it was regrettable that the subdivision of the plot between him and Mrs. Mugenyu could not be effected as the land was the property of the Kenya Government and specifically belonged to the Ministry of Agriculture and Livestock Development. It stated that the appellant was temporarily occupying the said land and who would also have to vacate it for government use as recommended by the Nyeri DCC and DAC.
  16. There was extensive exchange of letters between the relevant Government ministries in respect to the suit land on the question whether the TOL should be converted to a leasehold. There seemed to have been varied opinions on the matter but, eventually it was agreed that it was in the public interest that the suit land should revert to relevant ministry to be utilized for the purposes for which it was originally intended.
  17. In her judgment dated 2<sup>nd</sup> June 2022 the learned Judge found that the suit property constituted public land that was irregularly alienated in favour of the appellant, she found that the appellant had not made a case for being granted the orders sought and that the land being public land vested in the 1<sup>st</sup> respondent and managed by the 2<sup>nd</sup> respondent on behalf of the people of Nyeri County. She held that the 2<sup>nd</sup> respondent may, upon strict compliance with the law on eviction of persons in unlawful occupation of the suit property, evict the appellant from the suit property. The appellant's suit was dismissed.
  18. Aggrieved by the said judgment the appellant preferred this appeal to this Court. In her memorandum of appeal, the appellant faults the learned Judge on five (5) grounds that the learned Judge misdirected herself in misapprehending or construing the doctrine of land alienation; in finding that Land Reference Number 1246/7 was alienated land as at the time it was offered or allocated by the Government to the appellant; in finding without evidence or in the face of blurred evidence and



contrary to the Ministry's own intimation that LR No 1246/7 was alienated to the Ministry of Agriculture and Livestock Development or for other government purpose as at the time it was offered to or allocated to the appellant; in failing to recognise that the allotment of the suit land to the appellant was in accordance with the land law regime and practice prevailing as at the time of the allocation; in failing to find that there was a valid and enforceable contract to be completed by the 2<sup>nd</sup> respondent by registering or causing to be registered the suit land in favour of the appellant; and in failing to find that the 1<sup>st</sup> respondent had no interest in the suit land whatsoever.

19. At the hearing of the appeal before us on 25<sup>th</sup> June 2024, learned counsel Mr. Mwangi Kariuki appeared for the appellant, Mr. Wahome Gikonyo appeared for 1<sup>st</sup> respondent, while Mary Chege, Principal State Counsel appeared for the 3<sup>rd</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent.
20. On behalf of the appellant, it was submitted with regards to ground 1, that the trial Judge appears to be of the view that land reserved for a particular use by the government is alienated land. It was submitted that this is a misconception as a government cannot alienate to itself land already in its possession or use and that alienation must refer as respects the government disposal to the entity other than the government. The appellant submitted that it did not agree that there can be internal alienation of land within a government.
21. It was submitted that it cannot be envisaged by the interpretation of section 3 of the repealed Government Lands Act that one department of government would be allocating land to another government department by means of an allotment letter. Further it was submitted that from this misdirection that the trial court arrived at the conclusion that the suit land being already alienated to the Ministry of Agriculture and Livestock Department was unavailable for alienation to the appellant.
22. Further it was submitted that if the trial Judge had correctly applied her mind as to the meaning and purport of alienation of land, she would have come to the rightful conclusion that the Commissioner of Lands, the then office charged with disposal of Government land, rightfully and lawfully made an offer of the suit property to the appellant.
23. With regards to ground 2, it was submitted that there was no sufficient evidence by which the trial Judge could have come to the conclusion that the suit land had been set aside or alienated for the use by the Ministry of Agriculture. It was submitted that it is clear that at various times before the issue of allotment to the appellant in 1981, the Ministry of Agriculture had okayed allotment of the suit land if not to the appellant, to other private players. Further that the Ministry or whoever was making decisions on behalf of the Ministry cannot, by the doctrine of estoppel, be heard to retract or act against the government's own undertaking or intimations.
24. With regards to ground 3, it was submitted that the trial Judge heavily relied on Henry Muthee Kathurima -vs- Commissioner of Lands & Another [2015] eKLR which decision the appellant submitted that the Court of Appeal misconstrued section 3 of the Government *Land Act* and particularly failed to take cognisance of subsection (a) of that section which subordinates that provision to any other written law.
25. With regards to ground 4, it was submitted that there was an offer and acceptance which created a contractual relationship between the appellant and the 2<sup>nd</sup> respondent on the basis of which the appellant sued the respondent for specific performance as the appellant had performed her part of the contract.
26. It was submitted that the 1<sup>st</sup> respondent's conduct amounted to trespass and the trial court should have granted the appellant and the 2<sup>nd</sup> plaintiff at the trial court the orders prayed for in the amended plaint



dated 15<sup>th</sup> April 2014. Reliance was placed on *Dina Management Limited -vs- County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)

27. In opposition the 1<sup>st</sup> respondent maintained that the suit land is public land reserved for the Ministry of Agriculture and Livestock Development. It was submitted that as was evident from the letter dated 4<sup>th</sup> May 1966 the appellant's deceased husband knew from the word go that the suit land was public land reserved for the Ministry of Agriculture and Livestock Development-Veterinary Department and that is why he was applying for a Temporary Occupation Licence (TOL).
28. It was submitted, further, that the commissioner of Lands had no powers to alienate the suit land as the same was public land already lawfully held by the Ministry of Agriculture and Livestock Development and as such that the commissioner of lands had no powers to alienate the same and allocate it to the appellant under Section 3 of the Government Lands Act. Reliance was placed on *James Joram Nyaga & another -vs- Attorney General & another* [2019] eKLR and *Henry Muthee Kathurima -vs- Commissioner of Lands & Anor* [2015]eKLR.
29. The 3<sup>rd</sup> respondent submitted that the suit land was government land which had been alienated for use by the Ministry of Agriculture and fisheries as a sort of a buffer zone that would be used by the department of veterinary services for vaccination of livestock against a variety of diseases. Further it was submitted that the suit land had been issued to the appellant on a Temporary Occupational Licence (TOL) as per section 40 of the Government *Land Act* and that such a licence was subject to terms and conditions that were set out by the Ministry of Agriculture and Fisheries for occupation of such land.
30. Counsel submitted that the issuance of such a licence was not a conveyance of ownership to the appellant and the same was merely an occupational right that was granted. Further, that the suit land was already alienated public land and that the same was not available for allocation to any private citizen.
31. We have considered the evidence adduced before the Environment and Land Court, the submissions by counsel, both oral and written, and the law including but not limited to the law espoused in the caselaw cited to us by learned counsel. This being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions as commanded by Rule 31(1) of the Court of Appeal Rules and as aptly expressed in *Selle -vs- Associated Motor Boat Co.* [1968] EA 123, 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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

See also *Jabane -vs- Olenja*, [1986] KLR 664.

32. Having considered the evidence and the submissions of parties, we find the issues that present themselves to us for determination are: whether the suit land, being Government land was available for allocation to the appellant; and whether a Temporary Occupation License (TOL) to occupy Government land is sufficient to create or transfer title to the grantee or his personal representative.



33. Article 62 of *the Constitution* defines ‘public land’ to include:
- “62(1) land which at the effective date was unalienated government land as defined by  
(a) an Act of Parliament in force at the effective date; [Emphasis Added].”
34. From the record it is not in dispute that the appellant’s husband applied to the Commissioner of Lands on 4<sup>th</sup> May 1966 for a Temporary Occupation Licence (TOL) in respect of the suit land. From the said letter it was evident that the appellant’s deceased husband was clear that the suit land, which was under the Veterinary Department was rather idle and he requested to be issued with a TOL in order to use the land for grazing purposes. His letter addressed to the Commissioner of Lands in that regard stated as follows:
- “Application for TOL on LR 1246/1/3 Outspan for Grazing Land.
- I come to know that the Veterinary Department is not using the above-mentioned land and they have reported this fact recently to the Director of Veterinary Service, Nairobi. I shall, therefore, be grateful if you will issue me the Temporary Occupation Licence in order to use this land for grazing purpose which will be very useful to me and to the country.”
35. The relevant law in operation then was Government *Land Act*, Cap 280(GLA)(repealed). It is common ground that at the time the temporary licence was issued, the same was Government land and was not held under any private tenure. It is clear that as at 1966 when the appellant’s husband first applied for the suit land, it constituted alienated public land vested in the Ministry of Agriculture, Veterinary Department, a fact that the deceased was fully aware of.
36. It is also not disputed that after the appellant’s husband died, the appellant was allowed to continue utilising the suit land by the District Commissioner Nyeri through a letter dated October 23, 1973 from the Provincial Director of Agriculture, Nyeri Province to the District Commissioner.
37. From the record, on or about 7<sup>th</sup> July 1981, the Commissioner of Lands offered the suit property to the 1<sup>st</sup> appellant on lease on her application. The terms of the offer were as follows:
- “Area-approximately 285 acres Term 3 years from 1-8-1981.Capital value Sh 5700-payable after three years. Annual Rent: Shs 570 ”
38. However, on June 3, 1983, the Deputy Director of Livestock Development Administration wrote to the Commissioner of Lands protesting allocation of the suit land as follows:
- “Ministry of livestock development outspans-LR No 1246-285 acres naromoro have been informed by the Provincial Officer-Nyeri that the above quoted Livestock Outspan under this Ministry has been allocated to individuals and other purposes.
- From my record, I have not surrendered this land to you as it is still very important to the Ministry when trekking cattle and also for fodder production. I would be grateful if you could let me know the circumstances which led to the allocation of the land to individuals and also for other purposes.”
39. We can tell from the said letter that the suit property was government land, held in trust by the Commissioner of Lands for public use. The principle of trust required the Commissioner not to use the suit property for any other purpose than that which would benefit the public. As a trustee of





the public, the Commissioner of Lands could not use the presidential powers delegated to him of alienating unalienated land to allocate land for any use other than for the public good.

40. All the transactions in this matter took place during the subsistence of the Government *Land Act*, now repealed. That is, therefore, the law that applies in this matter. Sections, 3, 7, 9 and 12 of the Government *Land Act*, (repealed) did not vest the Commissioner of Lands with any powers or authority to alienate the suit property and offer the suit land to any private person. Like the trial court, we find that the Commissioner of Lands had no powers to allocate or confer the title to the suit land to private individuals. The purported allocation of the suit property to the appellant was an illegality and cannot be sustained. This Court in *Henry Muthee Kathurima -vs- Commissioner of Lands & another* (2015) (*supra*) held:

“...The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v. Shariff Mohammed Shatry*, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.”

41. On the second issue, we note from the record that a Temporary Occupation Licence (TOL) was issued to the appellant’s husband and later to her for the sole purpose of use of the land for grazing. A Temporary Occupation License (T.O.L) is defined under section 2 of the *Land Act* as follows:

“A permission by the Commissioner in respect of public land or a proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit.”

42. As the custodian of unoccupied Government land in Kenya, the Commissioner of Lands was empowered by the Government Lands Act (now repealed), to grant and revoke Temporary Occupation Licences. Section 40 of the Act provided:

- “40 Licences to occupy unalienated Government land for temporary purposes may
- (1) be granted by the Commissioner;
  2. Unless it is expressly provided under this section shall continue for one year and thenceforth until the expiration of any three months’ notice to quit. PROVIDED that the notice to quit may be served upon the licensees at any time after the expiration of nine months from the date of the licence.”
  3. The rent payable under a licence under this section, the period and the agreements and conditions of the licence shall be such as may be prescribed by rules under this Act or as may be determined by the Commissioner.
  4. The benefit of a licence under this section may, with the consent of the Commissioner, be transferred by the licensee, and the transfer and the consent thereto shall be endorsed on the license.”

43. Under the mandatory provisions of section 40 the Government is required to give notice to the licensee to terminate the license. A license issued under section 40 may also be forfeited under section 42 for failure on the part of licensee to meet the conditions stated in the licence.



44. This Court in Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) -vs- J. B. Martin Glass Industries & 3 Others, in Mombasa Court of Appeal Civil Appeal No. 130 of 2003, observed:

“The temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The appellant does not possess title under the Act. It is indeed settled law in Kenya that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative.”

[Emphasis ours].

The above provision can be extrapolated to apply to land under the repealed GLA.

45. We hold that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative. The appellant cannot cling on the same and claim that she was offered the said parcel of land by the Commissioner of Lands while it is very clear that the suit property constituted alienated public land, vested in the Ministry of Agriculture, Department of Veterinary Services, and as such the Commissioner of Lands who purported to allocate it to the appellant had no power to alienate or offer for alienation the suit property to her.

46. We reiterate that a TOL was akin to a licence that confers a licensee a right to work on the land in accordance with the terms stipulated in the letter, but which the licensor can withdraw as need arises. The letter does not confer on the holder permanent proprietary rights unlike a Title Deed or Certificate of lease.

47. We sympathise with the appellant because having utilized the suit land since the 1960s, she may have grown some attachment to the same and it could be painful to relinquish. We note also that although at some point the Commissioner of Lands and some other government officials started the process of conferring Title to the appellant the process was not completed. We appreciate that the doctrine of estoppel cannot be called into play, because estoppel can only apply if the process was sanctioned by the law, which was not the case here.

48. In the end, our conclusion is that the learned Judge did not err in finding as she did. We find this appeal without merit and dismiss it accordingly, with no order as to costs.

**DELIVERED AND DATED AT NYERI THIS 21<sup>ST</sup> DAY OF MARCH 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

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

Signed





**DEPUTY REGISTRAR**

