



Wood & 16 others v Commission General, Kenya Prisons Service & another (Environment & Land Case 22 of 2021) [2024] KEELC 1487 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 22 OF 2021**

**A OMBWAYO, J
MARCH 15, 2024**

BETWEEN

**CHRISTINE DAISY WOOD 1ST PLAINTIFF
REGINA WANGUI NGUGI 2ND PLAINTIFF
JOSEPHINE WAMBURA WAIHENYA 3RD PLAINTIFF
WAWERU NJOROGE KAMAU 4TH PLAINTIFF
ROBERT KARIUKI MWARAGU 5TH PLAINTIFF
TOM MUKWERI NYAMACHE 6TH PLAINTIFF
LAWRENCE MWANGI GITAU 7TH PLAINTIFF
EDWARD NJOKORIO MUCHIRI 8TH PLAINTIFF
CHRISTOPHER CHERUTICH KOMEN 9TH PLAINTIFF
KIPLIMO JONES KOSGEY 10TH PLAINTIFF
MACHARIA GETHI 11TH PLAINTIFF
GEORGE GISORE MBOGE 12TH PLAINTIFF
FRANCIS MAKORI OMENTA 13TH PLAINTIFF
PHILEMON KIPKOECH 14TH PLAINTIFF
JOHN NGORE NJUGUNA 15TH PLAINTIFF
GLADYS NYASUGUNA ONDIEKI 16TH PLAINTIFF
CHRISTINE ODHIAMBO OWIYE 17TH PLAINTIFF**

AND



**THE COMMISSIONER GENERAL, KENYA PRISONS SERVICE 1ST
DEFENDANT**

THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

Introduction

a. Plaintiffs Case

1. The plaintiffs came to this court by way of plaint seeking several orders including an order of permanent injunction to issue restraining the 1st defendant his agents, servants and or employees from intruding or trespassing into the plaintiffs land and more specifically restraining the 1st defendant from interfering with the plaintiffs peaceful occupation of their respective parcels of land or demolishing building standing on land parcels number Njoro/Ngata Block 16/239,219,181,197,215,217,224,228,244,287,197,s253,290,127, Block 9/88,89,91,90,79 and 80.
2. The plaintiffs pray for a declaration that they are the rightful owners of the aforementioned parcels of land hence the marking of the properties was unlawful. The plaintiffs pray for general damages costs and interest of the suit.
3. The plaintiffs allege that they are the registered owners of the suit properties. They allege that the parcels of land were a resultant of a subdivision of Njoro/Ngata Block 16 formerly I.R 21988, LR 11788 measuring 70 acres where a grant was issued as a private land in 1967 to Patricia Stewart Peters for 951 years. According to the plaintiffs the entire parcel of land I.R 21998 LR 11788 was transferred to Mr. Martin Luther Olweny Owuor. It was later in the year 1990 transferred to Boma Investments Limited who later sold to Catholic Diocese at a purchase price of Kshs54,400,000.00.
4. The Catholic Dioceses Converted the property from grant IR 21998 LR11788 to the Registered Land Act which was then registered as Njoro/Ngata Block 16 that was eventually subdivided into plots and sold to the plaintiffs who are title holders of Block16. Moreover, that in the year 2000 some plaintiffs bought the plots from Mr. Martin Luther Olweny Owuor through Olweny & Associates Surveyors. The plaintiffs claim that the suit property has never belonged to the 1st defendant.
5. The plaintiffs state that on 22nd February 2021, the 1st defendant agents, servants or employees from Nakuru G.K Prison invaded their properties and marked them with letter X in red paint and scribbled the signage K.P.S, meaning the properties belonged to Kenya Prison Services. The marking of the properties served as a warning for the plaintiffs to vacate or pull down their buildings or face eviction and demolition. The plaintiff claimed that no written notice was given to them to allow them demonstrate their legal rights.
6. The plaintiffs state on 23rd February 2021, the officers of the officers of the 1st defendant returned and informed them that the markings were wrong and done by mistake.
7. When the matter came up for hearing, PW1, Samuel Kimotho an employee of the Catholic Dioceses of Nakuru adopted his statement dated 25th February 2021 as evidence in chief. The gist of his evidence is that he works for Makao Project Programmers of the Catholic Diocese of Nakuru which is an poverty eradication programme. He testified that the land in dispute had been purchased by Boma Investments Limited from one Martin Luther Olweny Owuor. Mr. Martin Luther Olweny Owuor had acquired the land in 1968 from one Patricia Stewart Peters who had acquired the title to the land in 1967. PW1



produced a sale agreement between Boma Investments Limited and Catholic Diocese of Nakuru dated 22nd August 2006 when the church bought 70 acres of land at a consideration of Kshs54, 400,000.

8. The Catholic Church converted the land from leasehold to freehold. The Catholic Church further subdivided the land into a total of 335 plots and had Registry Index Map amended and sold to the public under the programme. The land did not belong to Kenya Prisons Services and was occupied by private persons.
9. PW2, Col John Ngore Njuguna adopted his evidence in chief as his testimony whose gist was that he bought 3 plots he developed the plots and constructed a petrol station. He was in his office at the Petrol station when he saw a contingent of prison Wardens marking the buildings and his structure was marked amongst others. The prison Wardens claimed that the land belonged to Kenya Prison Services.

b Defence Case

10. The defendants in their statement of defence averred that the plaintiffs were not the legal owners of the property as their registration was fraudulently obtained without regard to law. The defendants claimed that the property belonged to Kenya Prisons Services and therefore their marking was done lawfully. The defendant averred that the markings were done legally and that the plaintiffs were not entitled to quiet possession as their titles were obtained illegally. The defendant claimed that the suit did not disclose a reasonable cause of action and the suit was to be dismissed with costs.
11. The defendant called 4 witnesses DW1, S.S.P Richard Koskei, testified that the prison land measured 628 acres but the same has been encroached by the plaintiffs. They engaged the County surveyor who found that the land had been encroached. DW-2 S.P George Odera testified that the survey team report revealed encroachment. DW-3 Atai King'oine, the County Surveyor testified that out of the 628 acres belonging to Prison, 57 acres was being occupied by AIC and school, 47 acres was being used as dumpsite, adjacent was a jua kali Association and private developers were occupying 40 acres. DW-4 Mary Gatakaa a surveyor by profession employed by prisons testified that the prison land was gazetted in 1961 with a survey plan recorded under FR26 registered 146. L.R 452/1/4 measuring 628 acres was gazetted. The gazette notice has never been degazetted.

2. Issues For Determination

12. The parties have identified the following issues for determination
 1. Whether land parcel number L.R 452/1/14 predicated on survey Plan FR26/146 of 11th November 1925 was indicated public.
 2. Whether legal notice no.3171 of 22nd June 2961 by the P.S for defence in exercise of powers conferred by section 3 of the Prisons ordinance visited land LR 452/1/4 to Prisons department or it was gazetting building on L.R 452/1/4 to be used as a prison.
 3. Whether the suit properties was available for allocation.
 4. Whether the prisons land is as per L.R 452/1/4 survey plan FR26/146 of 11th November 1925 or as per the approved PDP prepared by the Director of Physical Planning dated 16th July 1997 and approved by the Commissioner of Lands on 14th May 1998.
 5. What orders should the court give and
 6. Who is entitled to costs?



a. Submissions by the Plaintiffs

13. On the 1st issue, as to whether land parcel number L.R 452/1/4 predicated on survey Plan FR26/146 of 11th November 1925 was un alienated public land, the plaintiffs through their able Counsel Mr. Ndubi argues that Land parcel number L.R 452/1/4 predicated on survey Plan LR26/146 date 11th November 1925 was unalienated public land. The parties are not in agreement with the acreage of parcel number LR.452/1/4 and whether the gazette notice number 317 of 22nd June 1961 gazetted the said parcel of land as Prisons land. The plaintiffs argue that parcels number 452/1/4 and 452/3/2 and 452/4/2 had a total acreage of 628 acres and were represented in FR26/146 that the other parcels in FR 26/146 identified 452/3/2 and 432/4/2 were marked as K.U.R quarry services.
14. The land being claimed by the defendants is identifiable as government land, meaning it was government land not belonging to prison services. According to the plaintiffs the report by DW-3 Alei King’oine was of little evidential value as the survey was supposed to be carried out on 452/1/4 which the prison was claiming to have vested in them vide gazette notices of 1961. The plaintiff submits that section 2 of the Government Land Act defines un-alienated as:-
- “unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.
15. The plaintiffs argue that having obtained Registration of the land they have absolute title which is indefeasible. The defendants have not proved any fraud against the plaintiffs. The plaintiffs argue that there is no evidence to prove that the suit parcel of land was reserved for prisons. The plaintiff rely on section 26 (1) of the Land Registration Act that provides: -
- Section 26 states as follows; -
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.
16. On the 2nd issue, thus whether legal notice no.3171 of 22nd June 2961 by the P.S for defence in exercise of powers conferred by section 3 of the Prisons ordinance vested land LR 452/1/4 to Prisons department or it was gazetting building on L.R 452/1/4 to be used as a prison.
17. The plaintiffs argue that the assertion by the defendant that gazette notice No.371 of 22nd June 1996 was vesting land parcel No. L.R 452/1/4 to Nakuru Prisons under the prisons Ordinance Cap 70 is



completely misplaced and wrong both in fact and law. The plaintiff argues that what was gazetted was the prisons camp building under the prisons ordinance and not the land.

18. The plaintiffs argue that though Nakuru Prison Camp had been established on part of unalienated public land parcel LR 452/1/4, the parcel was surveyed in 1925 under F.R 26/146. When the land was surveyed in 1925 it is not true that it was set aside or reserved for Kenya Prisons Services. The plaintiff argues that the gazette notice No 371 of 1961 was purely limited to declaration of the establishment of the prisons in Nakuru and Eldoret
19. The plaintiffs argue that land number L.R No.452/1/4 remained un-alienated until 1967 when a small portion of it was procedurally alienated and consolidated with land parcel No. LR6357/7 to create land parcel number LR11788 measuring 70 acres under certificate issued to Patricia Stewart Peters and a title issued under Registration of Title Act.
20. On the 3rd issue, whether the suit properties was available for allocation, the plaintiffs argue that Gazette notice of 1961 for prisons under section 3 of the prisons ordinance was a declaration of Prisons but had nothing to do with Prisons land. He argues that the permanent secretary for defence had no permission to declare public land to be prison land. The plaintiff argue to be the bonafide purchaser for value without notice. The plaintiff argues that the suit parcel of land was un-alienated government land available for allocation.
21. On the 4th issue, the defendants argue that the PDP produced as PEX 12 is the authentic government documents showing the land reserved for Nakuru G.K Prisons and is consistent with the actual ground or area of land size currently reserved for Nakuru G.K Prisons and since occupied by the prisons services. The plan shows the land delineated as 458.12 acres and that is the land that an allotment letter should be issued to Kenya Prisons Services. The plaintiffs contend that they are entitled to the order sought with costs.

Submissions by Defendants

22. The defendants, through litigation counsel Priscah Ademeyon eloquently argues that the land was not available for allocation because it was public land reserved for the Prisons. The Kenya Prisons Services was gazetted vide a gazette notice No.361 dated 22nd June 1961 by the then permanent Secretary of Defence G.j Ellerton.
23. The Attorney General further argues that the land belongs to the 1st defendant and therefore public land and cannot be disposed or allocated except in terms of an act of parliament. The Attorney General further argues that the Prison department has been utilizing the land prior to gazettelement and the same has never been available for allocation. The initial prison land indicated on the survey plan and deed plan indicated that the land is public land (GL). The defendant contends that without revoking the gazette notice No.361 of 1961, the land remains public land and cannot be allocated for private use.
24. According to the defendants, the Commissioner of lands had no powers to allocate land already allocated for the prisons department. On whether the original grantee had a good title to pass to subsequent purchaser. The Attorney General argues that the suit property is indeed public property and was never available for allocation. The plaintiff acquired the property illegally, un-procedurally and through a corrupt scheme. The defendants submits that the plaintiffs did not do due diligence before purchasing the property.
25. The defendant argues that the site visit conducted by the court established that the parcels occupied and allocated to the plaintiffs are within the Kenya Prisons Property. The Attorney General prays that the suit be dismissed with costs.



3. Analysis And Determination

a. Site Visit

26. This court visited the site and came to the conclusion at the end of the site visit that the disputed parcels of land claimed by the plaintiffs are situate within parcel of land known as LR.452/1/4 defined by the beacons on FR26/146 of 1925. The site visit was facilitated by three surveyors as the experts on the issue of mapping. The surveyors identified the beacons as N,VE4, TU17, K,VE1, VE2 AND VE3 and the court visited each beacon. With their assistance, the court came to the conclusion that the parcel of lands in dispute fall within LR 452/1/4. This court finds that as per the survey plan No.26/146 of 11th November 1925 the land parcel L.R 452/1/4 was created as public land and had the prisons building however, it is not clear when the prison was put up.
27. This court finds that on the 22nd June 1961 before Kenya attained its independence the P.S defence vide gazette notice No 361 gazetted the prisons buildings situate on plot No.L.R 452/1/4 on the Kampi ya Moto Road in the Nakuru District of the Rift Valley Province. The plaintiffs argue that the land identified as FR26/146 was government land and not prisons lands and did not belong to Prisons Services.
28. The plaintiffs argue that they were properly allocated the land after successive grants to Patricia Stewart Peters, and one Mr Martin Luther Olweny, Boma Investments, Catholic Church and the plaintiffs.
29. This court finds that the argument by the plaintiffs that the parcel of land was un-alienated Government land or (public land) does not hold water because in 1961 the parcel of land was already public land that was being used by the prisons department where there was a prison building and structures.
30. This court takes judicial notice that land occupied by the government organs was never alienated by the Commissioner of Lands to the government organs but it was presumed that the land belonged to the government organs. The Commissioner of Lands had a duty to protect un-alienated government land occupied by government departments such as the judiciary, prisons, police, public works and schools but instead of protecting the government organization he breached the trust bestowed to upon him and allocated the same un-alienated government already occupied by a state organ or department to private persons for private use.
31. Moreover the Commissioner of Lands had no powers to alienate un-alienated land unless it was for religious, Education or such purposes. The commissioner of land had delegated powers under Section 3 of the Government Lands Act Cap 280 Laws of Kenya. The section provides that the President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
 - (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

The act further states;

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

- (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;



32. In *James Joram Nyaga & Another v the Hon. Attorney General & Another* [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.

33. I do find that it was un-procedural for the Commissioner of Lands to alienate land where there was a prisons building and allocate the same to Patricia Stewart Peters as he had no authority to do so. The subsequent subdivision and transfer to Mr. Martin Luther Olweny, Boma Limited, Catholic Church and finally the plaintiffs was illegal and cannot be sanctioned by the court.
34. On the issue as to the whether legal notice No.361 of 22nd June 1961 by P.S for Defence in exercise of powers conferred by section 3 of Prisons Ordinance was for vesting land parcel L.R 452/1/4 to the prisons department or whether it was specifically for establishment of prison in Nakuru or Eldoret, I do find that the Gazettement affected the building plus the land where the building was situate. It was not reasonable for the Gazette to affect the building alone because the building was situate on the suit land. I do not agree with the plaintiffs that the Gazette notice affected the building only and not the land. The alienation of LR No.452/1/4 in 1967 when a small portion was alienated and consolidated with Lr.6357/7 to create Lr11788 measuring 70 acres was illegal and un-procedural because the land had been set aside for Kenya Prisons Services and therefore public land. In fact in the grant creating parcel no LR NO 11788, it is explained that public land was merged with private land to create LR 11788.
35. On the argument that the P.S defence could not legally alienate and vest public land to the prisons department, I do find that the Gazette notice No.371 of 1961 was not an alienation of public land but a statement that the land was being utilized for public purpose by a state organ and therefore not available for alienation for private use.
36. The plaintiffs argue that they bonafide purchasers for value without notice. In the case of *Katende V Haridar & Company Limited* [2008] 2 E.A.173 , the Court of Appeal in Uganda held that:

For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;



(g) he was not party to any fraud.”

37. The plaintiffs are not bona fide purchasers for value without notice because the land was not available for allocation for private use as it had been gazetted as public land and therefore the subsequent vendors did not have valid titles. The plaintiffs are presumed to have read the gazette notice.
38. On the PDP dated 16th April 1997 prepared by the Director of Physical Planning, I do find that the approval by the Commissioner of Lands on the 14th May 1998 was an act of illegality when it was known well that there was a prison on the parcel of the land. The titles created on the said parcel of land therefore were illegal and liable to cancellation.
39. I do find that the plaintiff have not proved their case on a balance of probabilities and that their parcels of land fall within 452/1/4. which belongs to prison services by virtue of the gazette notice no 361 of 1961 and therefore I decline to grant the orders sought.
40. I do agree with the argument made by the defendant that courts can invalidate a registered title if the process followed prior to the issuance of the title did not comply with the law or is tainted with an illegality. The plaintiff's titles are tainted with an illegality because at the time of alienation of the land the same had a prisons building and was gazetted as such. Section 62 of *The Constitution* of Kenya 2010 defines public land to include land being occupied by a state organ and therefore the land was always public land. The process of acquisition of the land was illegal.
41. The supreme court in *Dina Management Ltd Vrs County Government of Mombasa and 5 others* petition 8 (E010) of 2021 (2023) KESC 30 (KLR) Appl 2023 where it found:-

“As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR* the Court of Appeal, which decision this court affirmed, stated that: “...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, section 10 of the GLA is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully



acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

112. We therefore agree with the appellate court that the appellant's title is not protected under article 40 of *the Constitution* and the land automatically vests to the 1st respondent pursuant to article 62(2) of *the Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.”

42. In this matter, it was very clear that the parcel of land comprised a gazetted prisons building that was so visible and yet the commissioner lands brazenly allocated the same without considering the public interest and further approved a PDP that reduced the prisons land and set a stage for ratifying the plaintiffs titles and in the process the prisons Services lost part of their land. The upshot of the above is that the suit is dismissed with no costs as the plaintiffs are victims of the mistakes and misrepresentations by the Commissioner of Lands.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF MARCH 2024.

A. O. OMBWAYO

JUDGE

