



Nyawir v Trustees Evangelical Lutheran Church Kenya & another (Environmental and Land Originating Summons 16 of 2020) [2024] KEELC 3775 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 16 OF 2020**

E ASATI, J

MAY 9, 2024

BETWEEN

YONA ODHIAMBO NYAWIR PLAINTIFF

AND

**THE TRUSTEES EVANGELICAL LUTHERAN CHURCH KENYA 1ST
DEFENDANT**

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. Vide the plaint dated 21st January, 2015, the Evangelical Lutheran Church Of Kenya (herein ELCK) sued Yona Odhiambo Nyawir in respect of two pieces of land known as LR NO.21513 and LR NO.21514 Mamboleo (the suit lands herein). The claim of the ELCK in the suit was that it was the holder of a leasehold which runs for 99 years from 1st April, 1998. Its complaint was that YONA Odhiambo Nyawir had on 14th January, 2015 entered the suit lands and commenced construction of a semi-permanent house thereon unlawfully. The ELCK sought for orders of;
 - a. a declaration that the plots number LR 21513 and 21514 MAMBOLEO belong to the Plaintiff and that the Defendant had no lawful authority to construct a home thereon.
 - b. a permanent injunction against the Defendant restraining him whether jointly or individually or by his agents, servant and/or employees from howsoever, trespassing, constructing a house, leasing, transferring, or in any other way interfering with the Plaintiff's peaceful possession and/or occupation of land parcels No. LR 21513 and 21514 MAMBOLEO.
 - c. costs of the suit and interest.
2. In response to the plaint, Yona Odhiambo Nyawir filed a defence dated 28th January, 2015 denying the claim.



3. The suit was later, vide a court order dated 28th November, 2018, transferred to the Chief Magistrate's Court, Kisumu for hearing and disposal. It was registered at the Chief Magistrate's court Kisumu as KISUMU CMC EL NO.476 OF 2018.
4. Before the suit could be heard and disposed of, Yona Odhiambo Nyawir vide Originating Summons dated 18th February, 2020 sued the ELCK and the National Land Commission in KISUMU ELC NO.16 OF 2020 (OS) wherein he sought for orders of;
 - a. a declaration that the 1st Respondent's title regarding Land Reference NO.21513 and 21514 within Mamboleo area in Kisumu County were illegally acquired hence same are invalid and have no legal consequences.
 - b. a declaration that the 2nd Respondent illegally and un-procedurally conferred title of the two parcels to the 1st Respondent.
 - c. a declaration that Kenya gazette Notice No.3400 of 1976 was never implemented.
 - d. a declaration that by virtue of the Applicant's occupation, user, possession and peaceful enjoyment of land parcels reference number 21513 and 21514 through his late father stretching through to his grandfather with accumulative of over 70 years, the Applicant's interest and that of his family overrides the 1st Respondent's interest in Land Reference Number 21513 and 21514 in Mamboleo area of Kisumu County.
 - e. a declaration that the Applicant and his family are the bona fide owners of land parcel Reference Number 21513 and 21514 by virtue of adverse possession rights and same be transferred into his name by the 2nd Respondent.
 - f. the Respondents pay the costs of the suit.
5. In response to the claim in the Originating Summons, the ELCK filed grounds of opposition dated 4th December, 2020 and a Replying Affidavit sworn by TITUS OKOYO OKODA on the same date.
6. By a court order made in KISUMU ELC MISC. APPLICATION NO.8 OF 2020, and by a court order made by consent herein on 28th July, 2022, KISUMU CMC EL NO.476 OF 2018 was transferred to the ELC Court and consolidated with ELC CASE NO.16 OF 2020 (OS) for hearing and disposal.
7. Directions were given that the Originating Summons be treated as the plaint, the Supporting Affidavit as the witness statement, the annexures to the Supporting Affidavit as the list of documents and trial documents, the plaint as defence and counter-claim and the matter be disposed of through viva voce evidence.

The Evidence

8. Yona Odhiambo Nyawir, the Plaintiff in the consolidated suit testified as PW1 and produced exhibits in the case. He adopted the contents of his witness statement dated 29th February, 2023 as his evidence in chief. He stated that since he was born, his family had always resided on the land he currently occupies and that his grandfather, father, mother and deceased siblings were all buried thereon.
9. That the government of the Republic of Kenya wanted to expand the then Kisumu town and thereby issued a Gazette Notice No.3400 dated 19th November, 1976. That the intention was to acquire several parcels of land and register the same into the name of the then Kisumu County Council after all the procedures and compensatory process had been finalized.



- That the County Council of Kisumu never compensated his family hence as a family, they have been living in the same place since he was born. That all activities including adjudication process have not been done since the gazette Notice No.3400 has not been degazetted.
10. That his communities affected by the Gazette Notice No.3400 have been in constant communication with the relevant authorities to find a solution to the problem. That the gazette area as covered by the Gazette Notice No.3400 of 1976 has had non-resolved issues.
 11. That his community petitioned the National Land Commission under the 2010 Constitution and that the National Land Commission through its department of Historical Land Injustices received the Petition and made a determination on it hence confirming that the Plaintiff's family is one of the people recognized as not having been compensated.
 12. That the Defendants have been disturbing him and his family. That the Defendants have not acquired any proprietary interest in the land measuring 5 acres or any portion thereof and that there is no way that the Defendants could be allotted land which was fully occupied and in full use by the Plaintiff's entire family. That Kenya Gazette Notice No.3400 is still in force as it has not been de-gazetted. That the intended acquisition was to be done under the Trust Lands Act Cap 288 Laws of Kenya (now *Community Land Act*). That it is apparent that the Defendants want the court to usurp the jurisdiction of the National Land Commission. That the claim by the 1st Defendant is based on an illegal anticipation hence their counter-claim should be dismissed.
 13. The Plaintiff produced as exhibits; his National Identity Card, Certificate of death for Alexander Nyawir and Clement Manyala, Photographs, Gazette Notice No.3400, Petition to Minister of Lands and Settlement dated 20th June 1978, Letters dated 12th October 1997 from the District Commissioner Kisumu, 12th October 1977 from the Chief Land Registrar, 24th July 1979 from the District Commissioner, 1st August 1996 from the Chief Land Registrar, 30th November 1999 from the District Land Officer Kisumu and 6th January 2000 from the Commissioner of Lands, Petition and Kenya Gazette Notice No.1995 dated 1st March 1999, Advocates' letter dated 16th December 2021 and the National Land Commission's Letter dated 20th December 2021.
 14. On cross-examination the Plaintiff stated that the 1st Defendant (the ELCK) was laying claim to land which was his ancestral land and which is the place where he stays. That his claim was both a family and community claim. That every member of his family has a portion of the suit land that he/she is entitled to. That in his father's household they are 20 members and that it was his share which was affected. He stated further that the name of the 1st Defendant was not mentioned in the gazette notice. That he traces his ownership of the suit land through his grandfather. That he did not have Letters of Administration in respect of the estate of his grandfather one Clement Manyala. That he did not have a document which showed that the land belonged to his father. That his grandfather died in 1967 or 1968. That his name was not in the list contained in exhibit P 7(a) which was a list of Members of KIKAKO association. That the 1st Respondent was not a party in the Petition to the National Land Commission. That he built his house on the suit land in the year 2008 and not January 2015. That the ELCK has never occupied his land. That investigations by National Land Commission were still ongoing. That he would like the National Land Commission to continue with the Alternative Dispute Resolution for this matter. And on re-examination, he stated that the Church had not built anything on the side of the suit land where he occupies.
 15. On behalf of the 1st Defendant the ELCK, REV. HENRY KABASA testified. He stated through his witness statement dated 12th April 2023 that he was the immediate former Diocesan Secretary having served from the year 2012 to 2022 when he retired. That he is aware that the Church is the proprietor



- of the suit lands both of which are located within Mamboleo area of Kisumu City within Kisumu County. That the particulars of the suit lands are L.R. No.Kisumu Municipality/21514 measuring 3.05 Ha and Kisumu Municipality/21513 measuring about 0.66 Ha. That the Church acquired the suit lands by way of allotment from the Government of Kenya through the now defunct Municipal Council of Kisumu after which the plots were surveyed and the Church paid the requisite charges and took possession thereof. That the suit lands were allotted to the Church properly and regularly.
16. DW1 testified further that the Plaintiff has refused to allow the Church quiet possession of the parcels of land under the pretext that the suit parcels of land were his ancestral land. That sometime about the year 2015, the Plaintiff invaded one of the suit lands and erected a temporary mud house thereon that caused the Church to move to court where the Church filed Kisumu High Court ELC NO.11 OF 2015 which was subsequently transferred to the lower court and registered as KISUMU CM ELC NO.476 OF 2018 which was consolidated with the present case.
 17. That the invasion of the suit lands by the Plaintiff was unjustified and without basis. That vide the High Court ELC Case No.11 of 2015 the High Court issued two court orders restraining the Plaintiff from constructing a house or moving to stay on, leasing or by other means whatsoever dealing adversely with the suit lands. That the Plaintiff ignored the court orders and proceeded to construct a permanent house on the suit land. That the suit lands were allotted to the 1st Defendant in vacant possession as there were no human settlements at all thereon. That the suit lands were still vacant when the 1st Defendant moved in fenced and began to develop the same. That the 1st Defendant is an innocent purchaser without notice. That the 1st Defendant is currently in actual occupation and use of the parcels of land and has been developing it since the year 1998 by erecting buildings thereon where operates a School and an Orphanage. DW1 prayed that the Originating Summons be dismissed and the suit by the 1st Defendant be allowed.
 18. DW1 produced exhibits 1 to 18 as marked in his witness statement.
 19. On cross-examination, DW1 stated that the 1st Defendant was a registered Church. That other than the Allotment Letters in respect of the suit lands, the Church had not received any other title documents. That the suit lands were given by the Municipality of Kisumu and that the process of issuing the 1st Defendant with grant for the suit lands was ongoing. That it was the Municipal Council of Kisumu that took the 1st Defendant to the ground and showed it the lands. That the Plaintiff occupies only a portion of the suit land. That the Allotment Letters were signed by the Commissioner of Lands.
 20. On re-examination DW1 stated that the land reference numbers for the suit lands were shown on exhibits D8 and exhibit D9.
 21. DW2 was one Titus Odogo Okoda. He adopted the contents of his witness statement dated 12/4/2023 and Affidavit sworn on 4/12/2020 as his evidence in chief. He stated vide his witness statement that he was the Bishop of the 1st Respondent Church's Lake Diocese. His statement was in all material particulars the same as that of DW1.
 22. The 2nd Respondent, the National Land Commission adduced no evidence.

Submissions

23. At the close of the evidence, parties filed and exchanged written submissions on the case. Written submissions dated 24th November 2023 were filed by Enock Anyul O. Dickson Advocate on behalf of the Plaintiff. Counsel submitted that the present Defendant has no claim to the locus quo. That the Allotment Letters produced by the 1st Defendant have the same reference numbers namely: number 30973/LXVIII. That two parcels of land can never have the same Allotment Letter. That as at the



year 2006 the two parcels were surveyed, they already had been given L. R. numbers 21513 and 21514 Mamboleo. That the 1st Defendant had no title to the suit lands. That the alleged land registration number 21513 and 21514 are fictitious titles and do not exist at the Central Registry Nairobi. That the Court cannot exercise its discretion by pronouncing in favor of the 1st Defendant's Counter-claim that it has proprietary interest in the two non-existent parcels of land.

24. That the so called Evangelical Lutheran Church does not exist and is not registered. Relying on the case of Civil Appeal number 269 of 1997 the Town Council of Ol Kabu -vs - Ng'ang'a General Hardware Counsel submitted that the court has jurisdiction to question how a party acquired title. Counsel also relied on Civil Suit No. 423 of 1996 Mohamed - Vs - Commissioner of Lands and 4 Others where the court held that land that was under the then Trust Lands Act could not be alienated under the Government Lands Act. That in the present case, the Allotment Letters could not originate from the Commissioner of Lands directly. That there is an elaborate procedure to be followed under the Trust Lands Act and the Local Governments Act.
25. That the suit lands were the Plaintiff's ancestral land. That exhibit P 7(a) the Kenya Gazette Notice No.1995 of 1st March 2019 confirmed that the Kenyan population and citizen affected by Gazette Notice No.3400 of 1976 were yet to be settled hence no eviction can issue in such circumstances. That on the other hand the Plaintiff has established that he is in lawful occupation of the ancestral land and that the Defendant's counter-claim cannot override his proprietary interest.
26. On behalf of the 1st Defendant, written submissions dated 9th February 2024 were filed by the firm of Otieno Ochich & Associates Advocates. Counsel submitted that the suit by the Plaintiff was an abuse of the court process as the Plaintiff purports to be pursuing several claims all at the same time and all within the same proceedings namely; an ancestral claim, a claim for nullification of title, a challenge to implementation of Kenya Gazette Notice No.3400 of 1976, an implied claim against the state for compensation for compulsory acquisition and a claim for adverse possession. That the Applicant should have instituted the various aspects of his case in appropriate forum so as to make it possible for the 1st Defendant to know the exact ingredients and standards to address in respect of each case.
27. Counsel submitted further that the Applicant's claim is vague, inconsistent and unintelligible. That this is because the Applicant purports to be pursuing several claims all at the same time and all within the same proceedings. That whereas on one hand the Applicant is challenging the implementation of Kenya Gazette Notice No.3400 of 1976, on the other hand the Applicant laments that his family was not compensated on the basis of the same Gazette Notice No.3400 of 1976. That this is contradictory. That while on the one hand the Applicant claims that the suit parcels of land are his family/ancestral land, on the other hand, the Applicant claims that he is entitled to the suit parcels of land by virtue of prescription and adverse possession. That a person entitled to land by virtue of family inheritance cannot at the same time claim entitlement of the same land by adverse possession.
28. Counsel submitted that the Applicant's claim was too vague, generalized and unsubstantiated. That the Applicant did not specify which of the two suit lands he has an interest in or the size of the portion of land he claims.
29. That the Applicant has no locus standi to bring the proceedings. That it was the Applicant's case that the suit lands belonged to his grandfather and later to his father. That applicant did not demonstrate that he possessed Letters of Administration in respect of the estates of his alleged ancestors and/or late grandfather and/or late father before initiating the case. That he thus lacks the requisite locus standi to institute and maintain the proceedings.



30. Counsel further submitted that the applicant was non-suited in respect of the suit lands. That the suit is incurably defective, incompetent and bad in law for lack of Letters of Administration on the part of the Applicant. Counsel relied on the case of Madan Mohan Singh Varma and 2 Others - Vs - Athi Stores Limited [2019]eKLR where it was held that without Letters of Administration or Probate a party has no capacity to litigate on behalf of the deceased or his estate.
31. Counsel submitted further that the Applicant is a trespasser. That the evidence before court does not demonstrate any link between the Applicant and the suit land. That the Applicant simply took the law into his hands entered the suit land and stated construction thereon. That the Applicant has no regard for the law and has disobeyed court orders. That the court issued two orders namely court orders dated 22nd January 2015 and 11th April 2015 which restrained the Applicant from constructing a house on, moving to stay on, leasing or by any other means whatsoever dealing adversely with the suit parcels of land. That despite being aware of the existence of the court orders, the applicant did not obey them. That the Applicant is guilty of unclean hands.
32. Counsel submitted that the suit was an afterthought since the suit lands have been the subject of litigation since the year 2015 when case No.ELC No.11 of 2015 was filed.
33. That the 1st Defendant is an innocent bona fide purchaser for value. That it was allotted the suit lands like any other citizen. That there is nothing on the Allotment Letters to show that the Applicant had a claim to the lands. That the 1st Defendant took actual occupation of the suit land in the year 1998 and had uninterrupted occupation till the year 2015. That the Applicant's ancestral claim if any had been extinguished and statutorily time barred and does not meet the threshold for a claim based on adverse possession.
34. Counsel submitted further that the suit lands were not ancestral lands as the same were part of a larger Trust Land that was excised and allotted to the 1st Defendant. That the Trust Land was not set apart under the Government Lands Act as the Kenya Gazette Notice No.3400 of 1976 expressly showed that the setting apart of the land was done under the Trust Lands Act. That allotment was not irregular or unlawful.
35. That the Applicant's claim as seen from the bulk of exhibits produced by the Applicant is for compensation. That Gazette Notice No.1995 of 2019 recommended compensation and hence the applicant should have directed his claim to the government. That hence the applicant's claim, if any, lies elsewhere. That both the 1st Respondent and the Applicant are strangers to an organization called KIKAKO Welfare Association as the applicant is not a member and the 1st Respondent is not privy to communication between KIKAKO Welfare Association and the and the 2nd Respondent.
36. Counsel submitted further that the Applicant did not prove his case, he relied on irrelevant documents, he was not forthright and that he is an opportunist. That the Applicant by his submissions elected to abandon his claims for compensation and adverse possession and focused on his ancestral claim.
37. Counsel submitted that the 1st Defendant's ownership documents emanated from the relevant organs. That the Letters of Allotment were issued by the office of the Commissioner of Lands which was the proper organ for the issuance of Letters of Allotment at the material time. That the deed plans were issued by Director of Surveys which is the proper organ with the mandate to issue the same. That there was no basis upon which the Applicant could impeach the authenticity of those documents. That the 1st Defendant is in actual possession of the suit premise and has been developing the same since the year 1998. That the photographs produced as exhibit D.10 show the developments which include a school and an orphanage.



That the process of titling so as to enable the 1st Defendant obtain the final title documents was still ongoing.

38. Counsel submitted that there was conflict of interest on the part of Counsel for the Applicant as he was also serving in a task force set up by the 2nd Respondent. That Counsel for the Applicant was thus serving as an advisor of the 2nd Respondent in relation to matters touching on issues that featured prominently in these proceedings namely the proceedings that had been raised by KIKAKO Welfare Association and Kolwa Development Association. That Counsel for the Applicant had been appointed vide Kenya Gazette Notice No.5375 of 6th May 2022 into a Task Force on Implementation of Historical Land Injustices Determination for KIKAKO Welfare Association and Kolwa Development Association. That by virtue of the said appointment the Applicant's Counsel stood in a privileged position. That this ran contrary to the cardinal principle of justice to the effect that justice ought to be seen to be done. Counsel prayed that the Applicant's case be dismissed and the 1st Defendant's prayers in the counter-claim be allowed.

Issues for determination

39. From the pleadings filed, the evidence adduced and submissions made, the following are the issues that emerge for determination herein;
- a. whether or not the suit lands are ancestral lands of the Plaintiff.
 - b. whether or not the suit lands were acquired by the government.
 - c. whether or not allotment of the suit lands to the 1st Defendant was lawful.
 - d. whether or not the Plaintiff proved his case.
 - e. whether or not the 1st Defendant proved its counter-claim
 - f. what orders to make regarding costs.

Analysis and determination

40. The first issue for determination is whether or not the suit lands are ancestral lands of the plaintiff. It was the Plaintiff's case as deposed in the Supporting Affidavit that his grandfather, the late Clement Manyala settled in the land the plaintiff is currently occupying and that he (Plaintiff) inherited the land from his late father Alexander Nyawir. He claimed in his evidence in court that since he was born, he had always resided on the suit land and that his grandparents and parents were buried on the suit land. That the land was his ancestral land.
41. The 1st Defendant on the other hand denied that the suit lands were at any time before the acts the subject of the suit held or occupied by the Plaintiff. In paragraph 8 of the plaint, in Case number Kisumu CMC ELC No.476 of 2018, the 1st Defendant pleaded that it was only on 14th January, 2015 that the Plaintiff entered the suit lands and commenced construction of semi-permanent mad house thereon with the intention of moving together with his family to stay on the suit land. The 1st Defendant pleaded further that it applied and was allotted the suit lands in the year 1998, fenced around the two parcels of land together and commenced construction of a school.
42. The Court of appeal in the case of Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR stated that ancestral land is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. Hence, to succeed in a claim based on the concept of ancestral land,



the claimant must prove that the land belonged to his ancestors and has been handed down from one generation to the next.

43. There was no evidence that the Plaintiff owned the suit lands either before or after the same was allocated to the 1st Defendant. The Plaintiff stated on cross-examination that his grandfather through whom he claims the land died in the year 1967 or 1968. That he had no documents to show that the land belonged to his father. He also conceded that his name was not in exhibit P.7(a) which was the list of members of an association called KIKAKO made up of people claiming to have been affected by Kenya Gazette Notice No.3400 of 1976.
44. The documents produced by the Plaintiff more particularly Petition to minister of Lands and Settlement dated 20th June, 1978, letters dated 12th October, 1977 from the District Commissioner, Kisumu, 12th October, 1977 from the Chief Land Registrar, 24th July, 1979 from the District Commissioner, 1st August, 1996 from the Chief Land Registrar, 30th November, 1999 from the District Land Officer, Kisumu and 6th January, 2000 from the Commissioner of Lands, concern the effects of Gazette Notice no.3400 of 1976. There is nothing in those documents or letters connecting the Plaintiff to the suit land. Neither his name nor the names of his father and grandfather appears in any of the documents.
45. I find that the suit lands were not ancestral lands of the plaintiff.
46. The next issue for determination is whether or not the suit lands were acquired by the government. The Plaintiff testified that the government of the Republic of Kenya wanted to expand the then Kisumu town and thereby issued a Gazette Notice No.3400 dated 19th November, 1976 whose intention was to acquire several parcels of land and register the same into the name of the then Kisumu County Council of but that the County Council never compensated his family. That the process has not been completed. That Gazette Notice No.3400 of 1976 has not been degazetted. The Plaintiff produced Gazette Notice No.3400 of 1976 as exhibit P.4. It reads as follows;

“THE TRUST LAND ACT

(Cap288)

Setting apart of land for the extended area of the Kisumu Municipality in Kanyakwar, South Kajulu, Manyatta and Nyalenda Pand pieri sub-location of Kisumu District.

WHEREAS the County Council of Kisumu was on 18th October, 1976 given a written notice by the President that the of Trust Land specified in the schedule hereto is required for purposes of the Government of Kenya, Notice is hereby given for and on behalf of the Kisumu County Council that the said land is required to be set apart for housing and industrial development and for the purpose auxiliary thereto, and that all applications for compensation under Section 8 of the Trust Land Act should be submitted to the District Commissioner, Kisumu beginning from 15th November, 1976 upto and including the 15th day of December, 1976.

SCHEDULE

The area of presently unregistered Trust Land situated generally to the North East and South of the old Kisumu Municipality and as more particularly shown on the plans which may be seen at the offices of the District Commissioner, Kisumu and at the department of Lands Nairobi or obtained from the Commissioner of Lands, P.O. Box 30089, Nairobi at the cost of per copy.



Dated at Nairobi this 6th day of November, 1976.

J.R. NJENGA

Commissioner of Land.”

47. From the evidence on record, the land described in the Gazette Notice was acquired by the government and set apart for housing and industrial development and other ancillary purposes. There is no dispute that the suit land was within that area, hence the same became government land by virtue of the acquisition. Exhibit P.6(f) produced by the Plaintiff which was a letter from the Commissioner of Lands to the District Land Officer, Kisumu confirmed the acquisition that;

“The land for the extended areas of Kisumu Municipality covering Kanyakwar and others was set apart vide Gazette Notice No.3400 of 19th November, 1976. As you are aware, the exercise of setting apart of land under the Trust *Land Act*, Cap 288 is normally carried out by the District Commissioner of the area and the role of the Commissioner of Lands is to gazette the setting apart of the land and to advise on reasonable value.

In this particular case, the District Commissioner, Kisumu was responsible for this exercise.

That office established the owners of the land, the area of parcels acquired with the assistance of the Chiefs and the Surveyors and effected compensation with advise on values from this office

48. I find that the land was acquired and set apart by the government and that there was system put in place for compensating those who were affected by the acquisition.
49. The next issue for determination is whether or not allotment of the suit land to the 1st Defendant was lawful. The plaintiff pleaded in the Originating Summons that since the interest of the plaintiff in the suit land had not been terminated, there was no land available for allocation by the 2nd Defendant. He deposed in the Supporting Affidavit that after the Gazettement many individuals in conjunction with the officers from the Commissioner of Lands started issuing titles while exhibiting the gazette Notices No. 3400 of 1976 as the basis of the allocation and acquisition.
50. The 1st Defendant pleaded in the plaint that sometime on or about April 1998 the plaintiff (1st Defendant herein) applied to the now defunct Municipal Council of Kisumu and was allotted plot No. 258 measuring approximately 3.0 Ha and plot No. 257 measuring approximately 0.77 Ha within Mamboleo area in Kisumu County which were described as L.R 21513 and L.R 21514 Mamboleo. That the leasehold that was granted to the 1st Defendant was for 99 years effective from 1st August 1998. To prove this, the 1st Defendant produced Letter of Allotment dated 16th April, 1998 allotting UNS. SITE FOR CHURCH – KISUMU measuring 0.77 hectares to Evangelical Lutheran Church in Kenya, receipt for payment of the requisite charges of Kshs. 5950/ dated 22/4/98, Letter of Allotment dated 16th April, 1998 allotting UNS. PLOT FOR A PRIMARY SCHOOL- KISUMU to the 1st Defendant measuring 3.0 Ha for a term of 99 years with effect from 1.4.1998 and a payment receipt dated 22/4/1998 for the requisite charges of Kshs. 3554.
51. The 1st Defendant also produced a letter dated 5th October 1999 from Department of Lands confirming that the offer in the Allotment Letters had been formally accepted. The letter was addressed to the Director of Surveys Nairobi asking the Director to arrange for survey of the allotted lands. From the available stated documentary evidence it is clear that the land was allocated to the 1st Defendant lawfully. As at the time of the allotment, the land belonged to the government through gazette Notice



No. 3400 of 1976 and was therefore available for allotment. From the foregoing, I find that the allocation of the suit land to the 1st Defendant was regular and lawful

52. The next issue for determination is whether or not the plaintiff has proved his case. The plaintiff's claim is based on ancestral land rights, and the doctrine of adverse possession. As regards ancestral land, the court has already found that there is no evidence to show that the plaintiff or members of his family occupied the suit land before the year 2015 when, according to the 1st Defendant, the plaintiff unlawfully invaded the suit land. In addition, if indeed the suit lands belonged to the plaintiff or his ancestors at the time of acquisition, he or his ancestors ought to have applied for compensation as provided in the gazette Notice No. 3400 of 1976. There is no evidence that the plaintiff or his father or grandfather made such application for compensation as directed in the Gazette Notice No. 3400 of 1976. As regards the claim based on the doctrine of adverse possession, there is no evidence on record that the plaintiff has had open, continuous, peaceful and exclusive occupation of the suit lands for the period prescribed by law for adverse possession to happen. And as submitted on behalf of the 1st Defendant the plaintiff's claim was vague and contradictory. It was not clear whether the plaintiff was pursuing his own personal claim or the claim of his father's family of 20 members or the entire community that was affected by the acquisition.
53. I find that the plaintiff has not proved his case on a balance of probabilities.
54. The next issue is whether the 1st Defendant has proved its case. On the basis of the evidence presented before Court, I find that the 1st Defendant has proved its claim on a balance of probabilities. It has proved that it was lawfully allotted the suit lands. That it accepted the offer in the allotment Letters and complied with the conditions thereof and hence it is the lawful owner of the suit lands. Further the 1st Defendant has proved that the Plaintiff's entry onto the suit land was unlawful.
55. On the basis of the foregoing findings the court makes the following orders:
- a. The plaintiff's suit as contained in the Originating Summons dated 18th February 2020 is dismissed with no order as to costs.
 - b. Judgment is entered in favour of the 1st Defendant as prayed in the plaint dated 21st January 2015 (counter-claim) for:
 - i. A declaration that the plot numbers L.R 21513 and L.R 21514 MAMBOLEO belong to the 1st Defendant and the plaintiff has not lawful authority to construct a home thereon or trespass into the plots.
 - ii. An order of permanent injunction is hereby issued restraining the plaintiff, his agents, servants or employees from howsoever trespassing onto, constructing a house on, leasing or in any other way interfering with the 1st Defendant's peaceful possession and occupation of Plot No.s L.R 21513 and L.R 21514 MAMBOLEO.
 - iii. Costs of the counterclaim.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 9TH DAY OF MAY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:



Maureen Court Assistant.

No appearance for the Plaintiff.

Otieno Ochich for the 1st Defendant.

No appearance for the 2nd Defendant.

