Okemwa v Kenya Agricultural and Livestock Research Organisation & another (Environment & Land Case 204 of 2014) [2024] KEELC 5791 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5791 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 204 OF 2014

M SILA, J

JULY 29, 2024

BETWEEN

MERENCIA KINANGA OKEMWA ..... PLAINTIFF

AND

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION ..... 1ST DEFENDANT

LAND REGISTRAR, KISII ..... 2ND DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 23 May 2014. The plaintiff has pleaded that she is the registered proprietor of the land parcel Kisii Municipality/Block IV/2 (the suit land). She avers that she has been in possession since purchasing it for value without notice. She complains that the defendant lodged a caution on the land in the following terms : "Caution in favour of Kenya Agricultural Research Institute claiming an interest as licencee." It is her pleading that the actions of the defendant have no basis at all and infringes on her constitutional right to own property. In the suit she asks for the following orders :

    i. Temporary injunction restraining the defendant from interfering with the plaintiff's ownership of the suit land.

    ii. A permanent injunction restraining the defendant from interfering with the plaintiff's ownership of the suit land.

    iii. Removal of the notice of caution forthwith.

    iv. Compensation by way of general and aggravated damages for the loss caused from wanton destruction of property, inconvenience and suffering.

    v. Costs of the suit and interest.

vi. Such other orders that the court may deem fit.

2. The defendant filed defence and counterclaim. The counterclaim is against the plaintiff and the Land Registrar, Kisii. The defendant admitted registering the caution in order to protect its interest and guard against fraudulent dealings. It pleaded fraud against the plaintiff and contended that the plaintiff purchased the land when the defendant was in possession; that the said land is public land meant for research activities; that the defendant has never sold, or alienated the land to third parties or the plaintiff; that the plaintiff deliberately facilitated transfer of alienated public land. In the counterclaim, it is pleaded that through fraud the defendants in the counterclaim transferred and registered the suit land in the name of the plaintiff without approval or consent from the counterclaimant or the Government of Kenya as envisaged in the *Government Land Act*; that the land was alienated without adopting the laid down procedure; that the plaintiff alleges to have bought the suit land from a third party who has never been owner of the land; that the Land Registrar colluded by allowing transfer of the land; tampering with the records in relation to the suit land; and manufacturing a fake title.

3. In the counterclaim the defendant seeks the following orders :

   a. The plaintiff's suit be dismissed with costs.

   b. A declaration that the suit property is unalienated land belonging to the Government of Kenya.

   c. A declaration that the purported alienation of the suit land in favour of the plaintiff is invalid and null and void ab initio.

   d. An order compelling the Land Registrar to revoke the Certificate of Lease issued in favour of the plaintiff on 14 February 2014;

   e. An order for rectification of the register so as to reflect the Government of Kenya as the registered proprietor of the suit land;

   f. A permanent injunction to restrain the plaintiff from the suit land;

   g. The counterclaim be allowed with costs;

   h. Any other relief deemed fit to grant.

4. Hearing commenced on 3 October 2018 before Mutungi J when the plaintiff testified. She stated that she is a Secondary School Principal and that she purchased the suit land from Mary Sagini through a sale agreement entered into on 9 January 2007. She testified that the Municipal Council gave consent to transfer which she exhibited and that the transfer to her name was effected. She was issued with a Certificate of Lease on 14 February 2007. She had an official search dated 14 April 2010 confirming her as proprietor. She did another search on 5 August 2011 which now showed a caution registered by the defendant claiming a licencee interest. She testified that she has never given a licence to the defendant or any person. She testified that she did not take possession of the suit land immediately upon purchase. In 2011 she wished to undertake construction and discovered the defendant, then known as Kenya Agricultural Research Institute (KARI) using the land. She wrote a letter demanding removal of the caution. The Land Registrar wrote a letter dated 18 October 2011 being a notice of intention to remove the caution but the defendant did not respond to the notice. She asserted that she acquired the land procedurally and there is no reason to encumber it.

5. Cross-examined, she testified that when she bought the land it was delineated and fenced. She did not immedieatly use the land but was intended to develop it. She did not fence the land and there is nobody in it. She testified that she believed that Mary Sagini had good title to the land and that she had even

charged it to Kenya Commercial Bank. She visited the land several times before purchasing it and it was vacant without any building nor any growing of crops. She stated that the immediate neighbour of the land is Coca-Cola and they share a boundary and there are also shops and farmlands. The defendant is now using the land for framing. She was not aware of who was using the land between 2007 and 2010. She did not engage with KARI before buying the land and neither did she employ a surveyor. The land was fenced with barbed wire all round and she had no information that KARI had an interest in the land. Re-examined she testified that she was a School Principal in Nairobi and does not get much opportunity to get out of her work station.

6. PW2 was John Allan Okemwa. He is a businessman in aviation based at Nairobi. He testified that the plaintiff is his wife. He introduced her to Mary Sagini who was selling land and was fully involved in its purchase. He testified that they visited the land and it was vacant and the land was charged to Kenya Commercial Bank (KCB). He stated that it was fenced on one side though open on another. Cross-examined he testified that Mary Sagini was the late wife of a Mr. Sagini who was a Minister for Local Government at one time. Cross-examined he testified that he was shown the land by the people of Mary Sagini and that he went with a surveyor who showed him the extent of the land. He reiterated that the land was vacant. They have not utilised the land because of the caution lodge and presently there is a crop of maize. They had no idea that KARI had an interest in the land otherwise they would not have purchased it.

7. With that evidence the plaintiff closed her case.

8. The defendant called David Lemaiyan, a Surveyor working with the Ministry of Lands at Kisii, as its first witness. He had the survey plan for the land, the Registry index Map and a satellite image of it. He stated that there should be a Part Development Plan (PDP) but the file for the parcel is domiciled in Nairobi so he did not have it. He testified that the survey plan that he has is authenticated. It was authenticated on 6 August 1992. He could see that it was authenticated by one J.K Kahindi who he believed is still in service. He could not tell who instructed him to undertake the survey as this can only be done by looking at the survey file. He could not tell if beacons were placed on the land. He testified that ordinarily the documents pertaining to leasehold land are domiciled in Nairobi and it would be useful to have those records. He did not have these records. He testified that he was familiar with the area which is an agricultural area. He had not visited the suit land in particular but had visited the general area. He was not able to trace the PDP from the Physical Planner. He did not have the records of the owner of the land as the name of an owner is not noted in the survey plan.

9. Cross-examined he testified that the summons to witness did not ask him to come with documents. He was not aware that there was a title issued for the land nor the previous or current ownership. He testified that he knows the general layout of the land and that there are some parcels with fences. He had not particularly visited the suit land.

10. DW2 was Dr. Oscar Magenya. He is the Agricultural Research Secretary based in Nairobi. He served as the Centre Director at Kisii from 2011 to 2015. He had a witness statement which he relied on as his evidence and produced thirteen documents as exhibits. In his witness statement he stated that the Kisii Centre was established in 1963 and allocated 100 Ha adjoining the Kisii Farmers Training Centre for research activities. He stated that the centre has been in continuous and uninterrupted possession of the land since allocation in 1963. He stated that current research activities cover maize, oil crops, beans, sorghum, and other crops, and that the research activities are supported by the Government and donors for the benefit of more than four million farmers. He stated that over the years there have been spirited attempts by individuals and unscrupulous Government officials to alienate the land of the Centre and that indeed some of the land was allocated illegally to individuals and private entities. For that reason the Centre put a caution on its land to avoid further alienation or dealings. He singled out

the plaintiff as one such individual who has benefited from illegal allocations of the Centre's land and that her acquisition of the land was without the knowledge of the defendant. He stated that the manner in which the land changed hands from the Centre to the plaintiff was unprocedural, without sanction of the Government or the Board of Management of the Centre and was thus null and void. He stated that the Centre has never ceded occupation of its land to the plaintiff or any other individual and that all illegally alienated land is being repossessed and handed back to the Centre for the intended research purposes. He added that the Centre has spent enormous funds carrying out research activities on the land in addition to expensive investment on research activities. He stated that if the orders herein are granted the Centre shall incur irreparable losses and consequently fail in its mandate to advise farmers on the best production practices and technologies that increase yields. He asked the court to reject the plaintiff's claim to avoid setting a bad precedent that may see all the Centre's land grabbed and allocated to individuals. The exhibits that he produced following their chronological sequence were :

1. A letter dated 8 June 1989 from one J.N Miyogo the Deputy Director, Department of Planning Finance and Administration of KARI. The letter is addressed to the Centre Director – RRC, Kisii. It is titled Research Center Land Problem. The letter raises concern on moves to take away land supposed to be used for research activities. It assures the Centre Director that this issue is being considered seriously at another level and as soon as it is concluded they shall make it known to him. The Director is also informed of plans to put up an administration/ Lab Block whose plans are being worked on. He is told that it would be a good thing for him to monitor the situation and inform the headquarters as and when he feels it is necessary.

2. A letter dated 22 July 1992 from the District Commissioner, Kisii, addressed to the Clerk, Kisii Municipal Council, The Clerk Gusii County Council, District Land Officer Kisii, District Physical Planning Officer Kisii, District Surveyor Kisii, District Land Registrar Kisii, and Centre Direcotr, KARI Kisii. It is titled "Allocation of Research Land- Kisii Research Centre." The writer refers to his own letter dated 29 June 1992 and states that the exercise he had asked them to carry out has been suspended by the Government until further notice. It ends by saying "please stop any work you were doing with immediate effect."

3. A letter dated 25 May 1998 titled "Preparation for PDPs for Land Occupied by Government Ministries and Parastatals." It is from Felister Makini, the Centre Director, RRC, Kisii, to the Physical Planner, Kisii District. The letter refers to another from the District Commissioner dated 29 April 1998. It requests for title deeds to be issued for land that KARI occupies.

4. A letter dated 29 June 1998 from KARI, Kisii Centre, to the Physical Planner Kisii. It is titled "Preparation for PDPs for Land Occupied by Government and Parastatals" and is also written by Felister Makini the Centre Director, RRC Kisii. It refers to the letter dated 25 May 1998 and states that it is a follow up to that letter. The letter requests for PDPs to be prepared for all KARI land which it currently occupies.

5. A Ministerial Circular from the office of the Permanent Secretary, Ministry of Lands and Housing dated 29 June 2005. The letter is addressed to the Attorney General, all Permanent Secretaries, The Controller and Auditor General, the Private Secretary/Comptroller of State House, the Secretary Public Service Commission, The Clerk of the National Assembly, the Registrar High Court, The Secretary Teachers Service Commission, The Chairman Electoral Commission of Kenya, The Director General National Security Intelligence Service, All Chief Executives of State Corporations, and All Provincial Commissioners (with sufficient copies for District Commissioners). The letter is titled, Repossession of Irregularly/Illegally allocated public land. It is a general letter which states that the Governemnt upon release of the Report of the Commission of Inquiry into the illegal/irregular allocation of Public Land, has directed

all public land subject to irregular allocation to be repossessed by Government institutions that have lost it. It closes by asking those addressed in the letter to bring its contents to the attention of all public institutions under their charge for appropriate action.

6. A very faint development plan for a KARI Plot. The document is so faint that I cannot tell what it is that is being planned.

7. An electricity bill addressed to KARI- Kisii dated 30 May 2015 from Kenya Power & Lighting Company (KPLC) a commercial plot that appears to be to be unidentified. It just says it is for "PLT AT KISII KARI."

8. A similar electricity bill dated 30 September 2016.

9. A similar electricity bill dated 30 December 2016.

10. A letter from Water Resource Management Authority to KARI- Kisii, dated 31 October 2016, being a debit note for Kshs. 11,037.22/= as balance brought forward.

11. A Visitor's Book spanning 1 February 1991 to 13 July 2016.

12. A Satellite Image.

13. The Board showing those who were in charge Kari-Kisii from 1963 to 2015.

11. The witness was not taken through any of the exhibits in order to explain them.

12. Cross-examined, he did affirm that he has mentioned in his statement that unscrupulous persons wanted to alienate the Centre's land. He conceded that beyond the statement he has not produced anything to support the allegations of fraud. He was not aware that the plaintiff has exhibited title to the land which he thought would still be fraudulent even if produced. He affirmed that a caution was lodged claiming a status of a licencee which he explained that KARI was a licencee of the Government. He elaborated that they put a caution as they had been instructed to process title for KARI Centres. He stated that he knows the land and that it has no fence. He stated that of the initial 100 hectares some have been taken by Government institutions such as Government Staff Training, Nyayo Bus and a Police Post. He stated that there were many attempts from private individuals (to grab KARI land). He was not aware of previous suits against KARI.

13. I inquired from him about the KARI land. He stated that it is 100 ha. I inquired if he has anything to show that the 2 acres which comprises the title of the suit land falls within the 100 ha of KARI land and he acknowledged that he has nothing.

14. With the above evidence the defendant closed its case.

15. I invited counsel to file submissions which they did and I have taken note of the same.

16. The issue here is whether the title of the plaintiff falls under land belonging to KARI. It will be recalled that the plaintiff does have a title to the suit land and my starting point will therefore be Section 26 of the *Land Registration Act*, which provides as follows :

26.

(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.

(emphasis mine).

17. It will be seen from the above that the law is protective of title. It in fact provides that the title is to be taken as *prima facie* proof that the person noted therein is the correct owner of the suit land. The law goes further to state on what basis a person's title can be impeached. It says that title can be impeached, where the same has been acquired through fraud or misrepresentation for which the title holder is proved to be a party, or where it is shown that the title is procured illegally, unprocedurally or through a corrupt scheme.

18. Therefore, when one displays title, the court is to take it that it is a good title, and the court will only nullify it if the vitiating factors under Section 26 (1) (a) and (b) are demonstrated. The onus of proving bad title is on the person who seeks the said title to be nullified. In other words, if there is no evidence that the title is a bad title, the court will take it that *prima facie* it is a good title, and the court will need to uphold it. The court cannot nullify a title based on innuendo and general statements that do not constitute concrete evidence of the factors that will invite the court to cancel title. In other words, the person who seeks nullification of title needs to prove through direct and/or indirect evidence, that the title was acquired fraudulently or by misrepresentation , or it was procured illegally, unprocedurally or through a corrupt scheme. Cancelling a title is therefore not a simple matter. You cannot simply come to court and say 'cancel that title' and pray that by those meagre words, with nothing else to support, the court will then proceed to nullify a title. Nullifying a title is serious business that should not be taken casually.

19. In our case, the plaintiff does have a title to the suit land. I can see that it is a leasehold title for 99 years with effect from 1 April 1992 from the Gusii County Council. The land measures 0.8415 Ha which is just above two acres of land. The Green Card was not produced but I see that the registration of the plaintiff is the seventh entry in the register as indicated in the search. The plaintiff got registered as proprietor on 14 February 2007 and she has displayed the sale agreement that shows that she bought the land from Mary Sagini. It is on 11 March 2011 that the defendant placed a caution. It states "Caution in favour of Kenya Agricultural Research Institute Claiming an Interest as Licencee." This is a curious interest. In that caution, KARI does not purport to be the owner of the land. It only says that it is a licencee. That caution does not even say who the licensor is.

20. In the defence and counterclaim, the defendant/counterclaimant did plead that the title of the plaintiff was acquired fraudulently. The test for fraud is now well established to be above a balance of probabilities though not beyond reasonable doubt. This was affirmed by the Court of Appeal in

the case of *Nizar Virani t/a Kisumu Beach Resort v Phoenix East Africa Assurance Company Limited* (2004) 2 KLR 269 wherein it was held that :

> " Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation."

21. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garret* (1973) 7 Ch. 473 at 439."

22. In the case of *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* [2016] eKLR the court stated that:

> " It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others* the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.

23. The court of appeal in the case of *Central Kenya Ltd v Trust Bank Limited & 4 others* [1996] eKLR observed as follows;

> The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.

24. What I am trying to demonstrate here is that there is a heavy onus on the litigant who alleges fraud. Such litigant needs to plead the particulars of fraud and go further to prove them. Thus, it is not sufficient merely to say that a person has alleged fraud in pleadings. Evidence of proof of such fraud must be led. In the case of title to land, the person claiming that a title is fraudulent needs to plead the particulars of fraud regarding the acquisition of that title then proceed to demonstrate, through evidence, that the title is a bad one. Merely pleading that a person's title is fraudulent and not proceeding to call for evidence in proof of the fraud is certainly insufficient to nullify a title.

25. In our case, the particulars of fraud pleaded were more or less to the effect that the suit land was alienated public land which was not legally placed into private hands and properly transferred to the plaintiff. It was alleged that this land was set aside for research activities of the defendant/ counterclaimant. It was claimed that the land was granted to the plaintiff without the laid down procedure being followed and that the Land Registrar colluded in transferring the property to the plaintiff; and further that the plaintiff and Land Registrar tampered with the records and manufactured a fake title.

26. I have carefully gone through the statement of Dr. Magenya, which now constitutes his evidence, and also his oral evidence in court. Apart from generally complaining that unscrupulous individuals had targeted KARI land, there is completely nothing at all particularising any impropriety in the title of the plaintiff. His evidence does insinuate that the suit land was allegedly carved out of about 100 hectares that was allocated to the defendant/counterclaimant. However, neither Dr. Magenya nor Mr. Lemaiyan produced any evidence to demonstrate the extent of this 100 hectares claimed by Dr. Magenya to have been allocated to KARI in 1963. Now, if you cannot point at any evidence, oral or documentary, that says "this is the 100 hectares of KARI land and here is the 2 acres of the plaintiff which is within the 100 hectares", I wonder on what basis the defendant can contend that the title of the plaintiff falls within its 100 hectares. If at all the suit land was KARI land that was irregularly allocated as alleged, then at the bare minimum, this is the evidence that you would have expected the defendant to present. You would also have expected the defendant to forward and attack the documents that led to the issuance of title to the plaintiff. You would expect the defendant to bring to court the documents said to have been manipulated in order have the plaintiff registered as proprietor. The defendant brought no such evidence despite alleging that the process of allocation of the land was irregular. Nothing was brought by the defendant to demonstrate how the title was created so that we can conclude that it was an illegally created title. Even when you look at the exhibits of the defendant, you wonder what it is that they are trying to portray, and importantly those exhibits have absolutely no mention of the plaintiff's title or how it was fraudulently created. I elaborated the exhibits but we can still go through them again.

27. The letter of 8 June 1989 from Mr. Miyogo, only raises concerns about moves to take away KARI land. It is a general letter. The land of the plaintiff is not mentioned. The letter dated 22 July 1992 from the District Commissioner merely informs the Land Officials not to proceed with works regarding KARI land. How does that help the defendant ? The Circular dated 29 June 2005 informing the persons copied therein to repossess irregularly allocated land is a general letter that has no indication of the plaintiff's title being among the plots to be repossessed. How does that help the defendant impeach the plaintiff's title ? The letters of 25 May 1998 and 29 June 1998 asking for PDPs and Titles to KARI land don't tell us anything about the title comprised in the land of the plaintiff. In fact I would have thought that the defendant would say what happened to its requests and whether it got title to any of the parcels of land. The defendant's witnesses said nothing on this regard. I am also at a loss as to why the defendant brought a development plan that appears to me to have nothing to do with the plaintiff's title forget for a moment that the same is so faint. And pray, why were electricity bills being produced ? They were not even explained, but even on the face of them, they have nothing to do with the plot in dispute. The plaintiff said that her plot is vacant and has no structures. The defendant did not say anything in its evidence regarding structures on the land or anything to do with electricity being connected therein. Merely throwing electricity bills at the court and expecting the court to know what they are all about is simply ludicrous. Surely how do such electricity bills prove that the suit land belongs to the defendant ? I will say the same thing on the debit note of Kshs. 11,037.22/= from Water Resources Management Authority. Nothing was elaborated regarding that debit note; nobody said what it is that was being paid for and the information is not indicated in that note; there is no plot mentioned there. I am baffled as to why it was presented as an exhibit. As far as I can see it has zero bearing on the plot in issue and if it has I have no idea what it is meant to portray. Again, a debit note was thrown at the court with no explanation at all. It does not help in proving that the plaintiff's title is not a good title. What about the Visitor's Book ? How does a Visitor's Book tell me that the plaintiff's title is fraudulent ? It can only tell me that KARI has a presence in Kisii and that people used to visit its offices. It was never said that KARI offices were on the suit land. And what about the Notice Board telling me who the Centre Directors were ? How does that tell me that the suit land is supposed to be owned by the defendant

and not the plaintiff ? Need I answer that question ? I would say the same about the satellite image. It does not identify the suit land and does not identify that it falls on KARI land.

28. The defendant cannot come to court with tasteless, if not outrageously ridiculous documents, and seek to have a title cancelled. If at all this was ever KARI land I would have expected much better from the defendant. I would have expected some more serious input from the defendant and some serious evidence; not a measly bunch of unexplained electricity bills and general circulars informing State Corporations to protect Government land. Surely, where is the evidence that the suit land was ever KARI land ? What I see is a lease from the Gusii County Council and nothing, totally nothing, that tells me what KARI land is, and that the suit land was carved out of KARI land. While the plaintiff was armed with the shield of title, the defendant came to battle with some pitiful papers that cannot penetrate the shield of title of the plaintiff. Whatever the defendant brought is certainly not convincing enough to lead this court to nullify the title of the plaintiff.

29. Moreover, it will be observed that the suit land is a lease from the Gusii County Council. The plaintiff is merely the beneficiary of a lease. Why didn't the defendant/counterclaimant sue the head lessor who is the Gusii County Council so that they can come and defend their radical title ?

30. I think I have said enough to show that the defendant has hopelessly failed to show that the title of the plaintiff is not a good title.

31. In his submissions, counsel for the defendant tried to make a meal out of the claim that the plaintiff is not in possession of the land and the evidence of Dr. Magenya that KARI has all along been in possession. First, that claim by Dr. Magenya that KARI has all along been in possession of the land is unsubstantiated. Dr. Magenya never singled out the suit land and never said what it is that they have been doing on this particular plot for all those years. No ground report was ever presented to support the empty words of Dr. Magenya. The plaintiff herself testified that this land was fenced. Given that contention in evidence, it cannot be said that it was proved that KARI was all along in possession of the suit land. In any event, possession of the suit land does not mean that KARI owns it. I will repeat that what KARI needed to demonstrate was the extent of their 100 hectares, show that it was granted it, and further show that the plaintiff's title is within the 100 hectares. I have no such evidence.

32. If there was an iota of evidence that this was ever KARI land then I would have shifted the burden of proof to the plaintiff but there was absolutely nothing from the defendant showing that this was ever her land. There is even nothing presented to tell me that KARI has 100 hectares in Kisii. In those circumstances, this court must be guided by Section 26 of the *Land Registration Act* which protects title and which provides that title is *prima facie* evidence of ownership.

33. In a nutshell the defendant has failed to prove that the title of the plaintiff was irregularly acquired. Its counterclaim is dismissed with costs. And having dismissed the counterclaim, I have no reason not to uphold the case of the plaintiff. Without demonstrating any interest in the plaintiff's title the defendant cannot maintain a caution in the register of the suit land. I order the Land Registrar to remove the said caution. The defendant is also permanently restrained from interfering with the plaintiff's ownership of the suit land. In her plaint, the plaintiff asked for general damages for loss caused by wanton destruction of property and inconvenience. I was not shown what it is that was destroyed or what inconvenience was suffered. In light of that I am unable to make any award in general damages.

34. Costs will follow the event. The plaintiff will have the costs of both the suit and the counterclaim.

35. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF JULY 2024.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

Mr. Ojuku for the plaintiff instructed by M/s Akunga Momanyi & Company Advocates;

Mr. Ngethe for the defendant instructed by M/s Milimo, Muthomi & Company Advocates;

Court Assistant – David Ochieng'