



**Presbyterian Foundation v Wang’ola & 3 others (Environment & Land Case 239 & 20 of 2017 (Consolidated)) [2024] KEELC 6111 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 239 & 20 OF 2017 (CONSOLIDATED)  
MN GICHERU, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**THE PRESBYTERIAN FOUNDATION ..... PLAINTIFF**

**AND**

**JACOB WANG’OLA ..... 1<sup>ST</sup> DEFENDANT**

**DEVELOPMENT ORGANIZATION ..... 2<sup>ND</sup> DEFENDANT**

**KENNEDY GITAU ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF KAJIADO ..... RESPONDENT**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the defendants.
  - a. A permanent injunction to restrain the defendants, their employees, servants, agents or any person claiming or acting in their name howsoever from entering, encroaching on or in any other way interfering with the possession and use of all that parcel of land known as Ngong/ Ngong/528.
  - b. General damages for trespass.
  - c. Any other relief that this court may deem fit.
  - d. Costs of the suit.

This is according to the plaint dated 10<sup>th</sup> June 2011.

2. The plaintiff’s case is as follows. It is the registered owner of the suit land which measures 152 acres or thereabouts. The land is located within Kajiado, Murunya Sublocation. This land was one of the



nine (9) or so parcels that were allocated to the PCEA Church long before Kenya gained independence in 1963. The church was in occupation of the land before the land was registered in the name of the plaintiff. In the year 1970, PCEA Church Ngong applied for the formal registration as the owner of the suit land. The then Moderator and Kirk Session wrote a letter dated 11<sup>th</sup> June 1970 requesting for the land. The clerk of the Olkejuado County Council responded through a letter dated 19<sup>th</sup> June 1970. The letter by the County Council formally allocated the suit land to the church.

In the year 1999, the church decided to pursue the title to the suit land, among other parcels. On 15/12/1999, after complying with all the registration requirements, the plaintiff was issued with a title deed for the suit land by the Kajiado District Land Registry.

3. Over the years, the church has allowed various community benefit institutions to be developed on parts of the suit land. They include the following. PCEA Nakeel Secondary School. PCEA Ongata Rongai Primary School. PCEA Nkai Murunya Secondary School. PCEA Nakeel Primary School. Oloolaiser Water Company. Ongata Rongai Health Centre. Matumaini Children's Home.

The church has a master plan for development of the suit land but the local chief together with some community activists calling themselves Orendo have been trying to obstruct the church. It is for the above stated reasons that the plaintiff filed the current suit seeking for the above orders.

4. In support of its case, the plaintiff filed the following evidence.
  - i. Copy of title deed for the suit land.
  - ii. Copy of PCEA's development master plan for the suit land.
  - iii. Copies of letters to various institutions on the suit land all dated 22/1/2009.
  - iv. Copy of letter dated 3/3/2012 from the plaintiff to the Director Physical Planning, Ministry of Lands.
  - v. Copy of demand letter before action dated 21/1/2011.
  - vi. Copy of letter of Olkejuado County Council dated 19/6/1970.
  - vii. Copy of letter by the plaintiff dated 9/8/1993.
  - viii. Copy of minutes of Olkejuado County Council dated 11/3/1999 and 31/3/1999.
  - ix. Copies of letters of Olkejuado County Council dated 26/4/1999 and 28/5/1999.
  - x. Copy of letter by P.S. Ministry Local Government dated 11/8/1999.
  - xi. Copy of letter by Commissioner of Land dated 8/12/1999.
  - xii. Copies of judgments in criminal case No. 1202/2005 and Criminal Appeal No. 468/2009.
  - xiii. Copy of letter from Oloolaiser Water Company.
  - xiv. Copies of witness statements by Revered Robert Waihenya, Samuel Waweru Njoroge, Samuel Gatheru Kanyoro, Josephat Sirona Ole Kimiti, Geoffrey Kihara Mungai, Wilson Wahome Kiboi, Reverend Janathan Ole Lilah, Esther Githuka and Dickson Mugo Mwangi.
  - xv. Other documents.
5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants, though counsel on record filed a written statement of defence and counterclaim dated 10/8/2011 in which they plead as follows. Firstly, the entire claim by the plaintiff is denied generally. Secondly, the various developments on the suit land are admitted but it is denied



that they were put up with the permission or the acquiescence of the plaintiff. Thirdly, it is denied that the plaintiff has a master plan capable of being implemented on the suit land. Fourthly, it is contended that the suit by the plaintiff being based on trespass and claim to occupy the suit land should have been instituted at District Land Disputes Tribunal, Kajiado.

6. In the counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> defendants seek the following orders against the plaintiff.
  - a. Rectification of the register in respect to the suit land by cancellation of any entry in the register purporting to vest the proprietorship thereof to the plaintiff.
  - b. Rectification of the register in respect to the suit land by amendment of the entries to reflect the registered proprietor thereof as County Council of Olkejuado.
7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' case in the counterclaim is as follows. Firstly, on the suit parcel, there are eleven (11) community development organization as follows.
  - a. Ongata Rongai Primary School built in the year 1948, registered in the year 1950 and again in the year 1962 under registration number 11162. It occupies 30 acres of the suit parcel and at the time of filing of the defence and counterclaim it had 1466 students. Its teachers are employed by the Government through the Teachers Service Commission.
  - b. Nakeel Secondary School built in 1985, registered in 1987 which is a Government Provincial Boys Secondary School with forms 1-4 double stream classes with 521 students and 29 Government teachers. It covers approximately 40 acres of the suit land and has dormitories and teachers quarters.
  - c. Nakeel Primary School built in 1985 and registered in 2008 with 1639 enrolled students and sitting on about 14 acres on the suit parcel.
  - d. Nkaimurunya Mixed Day Secondary School which was built in 1999 and registered in 2008 with 327 boys and girls enrolled and 15 Government teachers and situated on approximately 20 acres of the suit parcel.
  - e. Ongata Rongai Nursery School built in the year 1964 and sitting on approximately 4 acres of the suit parcel.
  - f. Ongata Rongai Health Centre built in 1988 with 34 members of staff including nurses, laboratory technicians and clinical officers. It serves the broader community and sits on 12 acres of the suit land. The Government of Kenya has built civil servants quarters which are registered under the Ministry of Housing.
  - g. Matumaini Save the Children Centre which was built in 1989 and is aided by a Japanese donor. It shelters orphaned and destitute children and sits on about 12 acres of the suit land.
  - h. Oololaiser Water Supply which is also called Dancan Springs or Nyakio Water Treatment Plant. It is the source of water for Ongata Rongai residents. The ponds have been in existence since the year 1987 and it occupies approximately 12 acres of the suit land.
  - i. Administrative offices which include DO's and chief's offices which occupy an area of 5 acres of the suit land.
  - j. Ongata Rongai playground and recreational field/local stadium which occupies approximately 12 ½ acres of the suit land. It has been used as the local stadium, recreational and play ground since 1960's. Public barazas, local football matches and many other events take place here serving the residents of Nkaimurunya and Ongata Rongai locations.



- k. Presbyterian Church of East Africa (PCEA) School Chapel built in the year 2002 and serves the Secondary Schools on the suit land and occupies about ½ acres of the suit land.
8. Secondly, upon adjudication of Ongata Rongai adjudication Section in 1960s the adjudication committee set apart the suit parcel as public land for school purposes and the freehold title thereto was registered in the name of Olkejuado County Council on 11/1/1966. It remained so until 15/12/1999 when the plaintiff purportedly got registered as owner and a title deed issued. Thirdly, the suit land was not available for alienation to the plaintiff and the registration was fraudulent. The particulars of fraud which are pleaded in paragraph 8 of the counterclaim include the following. Unprocedural and unlawful rectification of Olkejuado County Council as the proprietor; irregularly, unprocedurally and unlawfully attempting to convert the suit land from trust land to private property; failing to make an entry, note or record in the register in respect to the suit parcel stating how the plaintiff came to be registered as the proprietor thereof, failure to file any instrument or relevant documents in the parcel file in respect to the suit parcel supporting the purported transfer to the plaintiff; failure to record in the registration book the application by the plaintiff booking their instruments for registration as proprietors of the suit land; failure to inform or involve the institutions in occupation of the suit land of the process alienating and transferring the suit land to the plaintiff; issuing a document of title to the plaintiff despite knowing that it was occupied by several institutions enumerated herein above and obtaining a document of title to the suit parcel while fully aware of, and without disclosing the fact that the suit parcel was occupied by the several institutions enumerated above. The plaintiff had knowledge of the fraud or mistakes aforesaid or substantially contributed to them by its acts, neglect or defaults.
9. Fourthly, if there was a transfer of the suit parcel from the County Council of Kajiado to the plaintiff, then it was void for the reasons of absence of written contract, lack of payment of consideration; lack of instrument in the prescribed form filled, executed and registered so as to evidence the purported transfer, absence of consent of the Land Control Board and lack of capacity of the County Council of Olkejuado, as trustees to transfer it.

For the above and other reasons, the 1<sup>st</sup> and 2<sup>nd</sup> defendants pray for the dismissal of the plaintiff's suit and for judgment as per the counterclaim.

10. In support of their case, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed the following evidence.
- i. Witness statements by Jacob Mwanto Wangora and Thomas Kionjore Macharia.
  - ii. Copy of certificate of registration for OREDO and its Constitution.
  - iii. Copies of letters by Olkejuado County Council dated 19/6/1970, 28/8/1970, 22/5/1998, 20/8/2010, 26/8/1970 and 12/4/2010.
  - iv. Copies of letters by DC Kajiado dated 17/1/1989 and 5/10/1993.
  - v. Copies of letters by PCEA dated 26/11/2002 and 22/1/2009.
  - vi. Copies of letter by Nakeel Secondary School dated 26/11/2002, 2/7/2003, 28/7/2003 and 6/4/2004.
  - vii. Copy of caution and statutory declaration dated 14/7/2003.
  - viii. Copy of letter by Ministry of Housing dated 31/10/2008.
  - ix. Minutes of Executive Land Committee over the suit land held on 17/2/2010.
  - x. Certificate of registration for Ongata Ronkai and Nakeel Secondary Schools.



- xi. Enrollment summary for Nkaimurunya Secondary School.
  - xii. Copies of letters by District Land Registrar and Chief Land Registrar dated 19/8/2009 and 15/7/2010 respectively.
  - xiii. Photographs showing the various institutions on the suit land.
  - xiv. Copies of judgment in HCCA No. 486/2001, 312 of 2002 and Criminal Appeal No. 352/2011 all of Nairobi.
  - xv. Copy of certificate of registration of the plaintiff, receipt No. 1416606 and PCEA Constitution.
11. Even after a thorough perusal of the record, I did not see any pleadings by the 3<sup>rd</sup> defendant and the interested party. At the trial, counsel led the 3<sup>rd</sup> defendant on his replying affidavit dated 17/3/2017. In the said affidavit, the 3<sup>rd</sup> defendant states as follows. Firstly, the suit land was set aside for education purposes and the title documents registered in the name of Olkejuado County Council as a trustee. Secondly, the suit land accommodates several institutions as stated by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In summary, the third defendant supports the case by the other defendants.
  12. In regard to interested party Save the Children Centre, there is an affidavit by the Director Teruko Kikumoto dated 5/2/2018. In summary form, the deponent states that in March 1986, a proposal to set up the centre was approved by the then DDO Kajiado. However, allocation of land did not materialize and then on 22/11/2009, the interested party received a letter from the plaintiff asking for rent for the use of their land. Annexed to the affidavit are several annexures showing the communication between the interested party, the DO Ngong, the clerk to the County Council and the plaintiff.
  13. The County Clerk, the County Government of Kajiado being a party in *Petition No. 20 of 2017* filed a witness statement by Joshua Lemaikai, County Land Surveyor dated 5/4/2018. He states as follows. Firstly, there must have been a fraudulent and illegal transfer of the suit land to the plaintiff. There was no application by the plaintiff seeking transfer of the suit land by the Planning Committee. There was no full council meeting chaired by the chairman of the County Council. There are no minutes to show the resolutions. Other missing requirements are consent of the Land Control Board, transfer form duly executed by the County Council, no witnessing by an advocate, no photographs of the transfer and transferee. Secondly, if the allocation by the commissioner of lands was done on behalf of the County Council an elaborate process including a full council meeting with a representative from the commissioner of lands with minutes and resolutions was mandatory. Finally, there would be an allotment letter and not a transfer of land.
  14. At the trial on 17/10/2018, 18/10/2018, 26/9/2019, 17/5/2021, 30/11/2021, 13/6/2022, 16/6/2022 and 20/6/2022, a total of eight witnesses testified. They included Geoffrey Kihara Mungai, Josephat Siranga Ole Kiruti, Robert Waihenya Ngugi and Grace Njeri Gichuhi, all for the plaintiff. On the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the first defendant Jacob Mwando Wangora was the only witness. The 3<sup>rd</sup> defendant testified as per his replying affidavit dated 17/3/2017. Joshua Lemaikai, County Land Surveyor testified on behalf of the 1<sup>st</sup> respondent, the County Clerk in *Petition No. 20 of 2017*. Each of the witnesses generally adopted the evidence in their witness statement or affidavit and they did not change their positions even in the face of intense cross-examination by council for the adverse parties. The last witness to testify was John Matheka, Land Registrar Ngong whose evidence is to the effect that the transfer instruments for the suit land from the County Council of Olkejuado to the plaintiff are not available.



15. Counsel for the parties filed written submissions as follows. The 3<sup>rd</sup> defendant on 26/2/2024, the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 14/9/2023 and the plaintiff on 26/7/2024. I did not see any submissions from the County Clerk, County Government of Kajiado, the 1<sup>st</sup> respondent in Petition No. 20/2017. The third defendant identified two issues for determination as follows.

- a. Whether the plaintiff holds a good title to the suit land.
- b. Whether the plaintiff is entitled to the reliefs sought.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants counsel though not identifying the issues for determination submitted on the following issues.

- i. Conversion of Trust Land to Private Land.
- ii. Trespass and Injunction in relation to Trust Land.
- iii. Disposal by fraud, misrepresentation, illegality, non procedure and corrupt means.
- iv. Overriding interest by a person in occupation.

Finally, on the part of the plaintiff, three issues were identified as follows.

- a. Whether registration of the suit land in the name of the plaintiff was done by fraud or mistake on the part of the plaintiff and the County Council of Kajiado.
- b. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have locus to bring a counterclaim on behalf of unspecified residents of Ongata Rongai and the County Council of Olkejuado.
- c. Whether the respondents in the petition, i.e. the County Government of Kajiado violated the plaintiff's constitutional rights.

16. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and testimony at the trial. I have also considered the written sub missions by learned counsel for the parties including the issues identified and the law cited therein. I make the following findings on the issues identified by learned counsel for the parties.

17. On the first of the plaintiff's issues, I find that the registration of the suit land in the name of the plaintiff was fraudulent for the following reasons. Firstly, the letter dated 19/6/1979 by the clerk to Olkejuado County Council to the Parish Minister clearly stated that the suit land was mainly for schools not church activities. It said,

“Churches areas as such are not legally constituted in these areas and you are required to be definite of the area required for churches as 1/3 may not be accepted for example in Ongata Ronkai the total area is 152 acres then 1/3 is 50 acres”

Secondly, in the letter dated 28/8/1970 which is by clerk to council to the Land Registry Kajiado it is stated as follows.

“Parcel No. 528 Ongata Rongai 152 acres.

52 acres - church plot.100 acres- school area.

Thirdly, the copy of the register for the suit land shows that the suit land was reserved for education purposes. There is no explanation from the plaintiff as to why land that was reserved for education



purposes and which accommodates many schools suddenly ceased to be school land. Fourthly, there is overwhelming evidence from the County Land Surveyor that the correct procedure of alienating public land was not followed. There was no meeting of the County Council that should have passed a resolution that public land on which many public institutions including schools, a health centre, a chief's office, children's home among other utilities be transferred to a private entity while the said institutions had been in existence for many years with the Government's approval. The absence of a sale agreement contravenes Section 3 of the *Law of Contract Act*. Other notable contraventions include the *Land Control Act* because there is no evidence of consent of the Land Control Board and there is no valid transfer of the land by an authorized officer of the County Council of Olkejuado. I am persuaded by the submissions of the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the plaintiff's title is under challenge and it is not enough for it to show us the title. It is incumbent upon the Presbyterian Foundation to prove the legality of how it acquired the title and show that the acquisition was proper. See *Munyu Maina –versus- Hiram Gathiba Maina Civil Appeal No. 239 of 2009*. The plaintiff has failed in this regard for the reasons already given.

18. On the second issue of the capacity of the defendants to bring the counterclaim, I find that the two defendants have such capacity. In the case of *Mumo Matemu –versus- Trusted Society of Human Rights Alliance and 5 others* the Supreme Court of Kenya had this to say at paragraph 27 of the judgment.

“...in this broader content, this court cannot fashion or sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of Constitutionalism and we therefore reject the arguments of lacking of standing by counsel for the appellant. We hold that in the absence of showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent has locus to file the petition. Apart from this, we agreed with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*”.

Article 258 of *the Constitution* provides as follows.

- i. Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention”.

Article 259 requires that *the constitution* be interpreted in a manner that –

- a. Promotes its values, purposes and principles,
- b. Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights,
- c. Permits the development of the law, and
- d. Contributes to good governance”.

There is nothing in this case to show any bad faith on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Protecting public land occupied by public institutions from falling into private hands is a good thing. The two defendants are within their constitutional rights in bringing the counterclaim.

In any event, the Attorney General who appears in this suit on behalf of the 3<sup>rd</sup> defendant supports the revocation of the plaintiff's title.



19. Looking now at the third of the plaintiff's issues, I find that the County Government of Kajiado did not violate the plaintiff's constitutional rights to own property as guaranteed under Article 40 of *the Constitution*. The reason for this is simply that under Article 40 (6) of *the Constitution*, it is provided as follows.

(6) "The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

In this case, we have already found that the suit land was not lawfully acquired by the plaintiff because it was designated from the beginning for educational purposes. The procedures laid down by the law for acquisition of the property were never adhered to.

20. The two issues raised by the third defendant have necessarily been decided in deciding the plaintiff's issues. To reiterate them, the plaintiff does not hold a good title to the suit land and it is therefore not entitled to the reliefs sought.

21. As for the issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendant issues, I am persuaded by what learned counsel said about conversion of Trust Land to Private Land, trespass and injunction in relation to Trust Land and the illegality and failure of procedure in the plaintiff's acquisition of the suit land and overriding interest by a person in occupation.

Section 30 (g) of the Registered *Land Act* provides as follows.

30 "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being without their being noted on the register –"

g. the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed"

When the plaintiff was registered as the owner of the suit land, the schools, the water supply, the health centre, the stadium, the children's home, the chief's office and the other social amenities were already in place. This means that these occupiers have a proprietary interest which is superior to the title that the plaintiff holds and this interest need not be noted in the register. In the case of *Isack M' Inanga Kiebia –versus- Isaya Theuri M' Lintari and another* *Petition No. 10 of 2015*, the Supreme Court had this to say about overriding interests at paragraph 58.

56 "...it is now clear that customary trusts, as well as other trusts, are overriding interests. These are not required to be noted in the register..."

The registration of the plaintiff as the proprietor of the suit land, even if it had been lawful, would not have overtaken the superior rights of the parties in possession of the said land.

22. In conclusion and for the reasons set out hereinbefore, I dismiss the plaintiff's suit with costs to the defendants. Further, I enter judgment for the 1<sup>st</sup> and 2<sup>nd</sup> defendants as prayed for in the counterclaim, that is to say,

- a. The register for the suit land being Ngong/Ngong/528 to be rectified by cancelling all entries showing the plaintiff as the proprietor.
- b. The register for the suit land to be amended to reflect the registered owner as the County Government of Kajiado.



It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 26<sup>TH</sup> DAY OF  
SEPTEMBER 2024.**

**M.N. GICHERU**

**JUDGE**

