



**Omboto v Kisii County Government & another (Environment & Land Case 400 of 2014) [2024] KEELC 6901 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6901 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 400 OF 2014**

**M SILA, J  
OCTOBER 23, 2024**

**BETWEEN**

**SIMON ABUKI OMBOTO ..... PLAINTIFF**

**AND**

**KISII COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**EXECUTIVE COMMITTEE MEMBER, LANDS, KISII COUNTY  
GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. (Plaintiff suing the defendant alleging that they have taken possession of his land; defendants filing defence and counterclaim asserting that the disputed land is a Government house which has now been converted into offices for use by the Kisii County Public Service Board; documents of title displayed by the plaintiff being dubious and despite the plaintiff alleging that he bought a vacant plot, obvious that the disputed land has an old typical Government house with a servant quarter; court not persuaded that the plaintiff holds any genuine title; plaintiff's suit dismissed and order made for nullification of the purported title that he holds; judgment entered for the defendants)
2. This suit was commenced through a plaint filed on 21 October 2014. In his plaint, the plaintiff has pleaded that he is the rightful owner of the land parcel Kisii Municipality/Block II/219 (the suit property) He pleaded that he purchased the suit property on 15 September 2014 from the previous proprietor, one Samwel Kenani Omwando, who had in turn purchased the suit property from the first allottee, one Zachary John Ondieki Onchuru. He pleaded that on 4 and 13 October 2014, the defendants entered the property, put up a signage with the words "Public Property, No Entry" and basically took possession of the property. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :
  - i. Declaration that he is the registered and lawful owner of the suit property;



- ii. A permanent injunction to restrain the defendants from the suit property;
  - iii. General damages for trespass;
  - iv. Interest on (iii) above;
  - v. Costs;
  - vi. Such other relief that the court may deem fit to grant.
3. The defendant filed defence and counterclaim. It is denied that the plaintiff is the legitimate proprietor of the suit property and he was put to strict proof thereof specifically on the manner in which he acquired proprietorship. It is pleaded that the suit property is partly Government land. It is further pleaded that the conditions stipulated under the lease have never been met and any transfer is irregular. The defendants plead that the purported holders of the suit property are blood brothers who stage managed the transfer; that no consent was obtained prior to the transfer; and that the plaintiff acquired property which he knew or ought to have known was not meant for private development. In the counterclaim the defendants seek the following orders (slightly paraphrased) :
- a. A declaration that the suit property is public land irregularly acquired by the plaintiff;
  - b. An order directing the Land Registrar, Kisii to revoke/annul/cancel the transfer to the plaintiff and revert the land to public Government land;
  - c. A mandatory injunction directing the plaintiff to vacate the suit property and in default he be evicted;
  - d. Costs;
  - e. Any other relief the court may grant in the interests of justice.
4. I need to mention that together with the plaint, the plaintiff filed an application for injunction to have the defendants restrained from the suit property pending hearing of the suit. The application was heard by Okong'o J, who was not persuaded that the plaintiff had exhibited a prima facie case with a probability of success, and he dismissed it vide a ruling delivered on 13 February 2015. It is therefore the 1<sup>st</sup> defendant who has been in possession and occupation of the suit property while the suit was proceeding.
5. Hearing commenced before me on 15 February 2023. PW – 1 was Zachary John Ondieki Onchuru. He relied on a pre-recorded witness statement and also gave oral evidence in court. He testified that he was previously a police officer and Chief of Kisii Township. He retired as Chief in the year 2005. He testified that while he worked as a Chief, he applied for land from the Municipal Council of Kisii, and his request was accepted. He received an allotment letter dated 12 September 1997 from the Commissioner of Lands for an unsurveyed residential plot in Kisii Municipality. Part of the conditions required him to pay Kshs. 17,572/= as stand premium which he paid. He produced the allotment letter and the said receipt. He stated that there was a Part Development Plan, that the land was surveyed, and the Registry Index Map amended, and it came to be known as Kisii Municipality/Block II/219. He testified that the Physical Planner showed him the land and he was issued with a Lease. He also got a Certificate of Lease on 9 January 2001. He testified that he took over the property and fenced it. He did not keep the land because he exchanged it on 17 January 2011 with a plot owned by one Samwel Kenani Omwando at Nyanchwa area. The title was then transferred to the said Mr. Omwando. He asserted that the land cannot be public land as it was allocated to him by the Council and that he was its first proprietor.



6. Cross-examined, he testified that he did not have the minutes that allocated to him the suit property as he took them to the Commissioner of Lands. He did not make photocopies and had nothing to show that indeed the said minutes were delivered to the Office of the Commissioner of Lands. He acknowledged that one needed to pay rates. He did not have any rates payment receipts. He testified that he got consent to transfer and alleged that there are minutes giving such consent though he did not produce them.
7. PW – 2 was the plaintiff, Simon Abuki Omboto; he is a teacher by profession. He largely relied on a witness statement and gave brief oral evidence in court. In the statement, he stated that in September 2014, Mr. Omwando wished to sell to him the suit property and he conducted an official and physical search, and established that Mr. Omwando owned the suit property. He stated that the land was fenced with cypress trees and barbed wire and the boundaries were well demarcated. They entered into a sale agreement and the property was transferred to him. He stated that on 4 and 13 October 2014, the defendants entered the suit land and erected the sign post alluded to in his plaint and they took possession. They also destroyed the fence. He therefore could not enter the suit property and take possession. In his oral evidence in court he produced the sale agreement between himself and Mr. Omwando dated 23 December 2011. He testified that he sought consent to transfer though I did not see any produced.
8. Cross-examined, he affirmed that Samwel Kenani Omwando is his brother. He also acknowledged that the suit land is currently occupied by the County Government of Kisii and that this is where the offices of the County Public Service Board are located. He testified that the building housing the County Public Service Board was built in 2014 after he was chased out of the land and a wall put round. He denied knowledge that the building was there all along and that it housed the offices of the Clerk. He testified that there is another building behind this one housing the County Public Service Board though he could not tell its parcel number. He refuted that Mr. Omwando never took possession. He asserted that he had a temporary iron sheet structure and a fence which were destroyed. He stated that his brother was paying rates but he did not have receipts thereof. Re-examined, he reiterated that when he bought the land it had no structure and Mr. Omwando was in occupation.
9. With the above evidence, the plaintiff closed his case.
10. DW – 1 was Patrick Bitengo Achoki, the Director Physical Planning, County Government of Kisii. He testified that the suit land is developed with a Government house which has been converted into offices and used by the County Public Service Board. According to him the land is owned by the County Government of Kisii and he has no documents changing its user to private. He produced a report dated 10 March 2020 which was a report that resulted from a visit of the land by the Land Registrar, Kisii, the County Surveyor, and himself as the Physical Planner. The report was signed by all the three officers. Inter alia, that report states that the suit property has a government house Ref No. 37/KSI/1971/01. It further states that there is no amendment of the Registry Index Map to indicate the suit property and it remains a government house. The report states that there is however a survey plan Folio/Register No. 394/20 from Survey of Kenya, showing that the suit property falls on the government land hosting the County Public Service Board which land measures approximately 0.165 Ha and the records in the Kisii Land Registry indicate the plaintiff as proprietor. That report concludes that the lease to the plaintiff was irregularly created on government land with a Government house. He also produced a PDP Ref No. 37/71/1 which he elaborated is the Development Plan for Kisii Town prepared in 1971. That plan indicates land uses and he pointed to it to show that the suit land is within a residential zone for Government housing.



11. Cross-examined he testified that he has worked with the County for 11 years. He did not know who was in possession of the property prior to the year 2014. He acknowledged that public land could be allocated to private individuals but he testified that allocation of land is outside the parameters of his work. He could not confirm a transfer of the suit land to the plaintiff. On the Development [Plan of 1971](#), he testified that if it is amended this would be through replanning vide a Part Development Plan (PDP). He testified that he has no record of change of the Development Plan. He explained that the plan shows the plot as a Government house only that it has now been converted to be an office for the County Public Service Board.
12. DW – 2 was Nyamache Haron, the Director, Land Administration, Kisii County Government. He keeps the land records for the County and records showing allocation of Government land to private individuals. He testified that normally the Government would advertise land for allocation and a person would apply. He testified that he has no allocation for the suit property and the plot is not in their rent system. He had no receipt of any person paying land rents for it and no information regarding the suit plot. Cross-examined, he testified that he had no knowledge of the land being alienated so as to be identified as Block II/219. On the allotment letter his evidence was that it is a forgery as they have no such record.
13. DW -3 was Dickson Okondo Nyabuto, who works with the Department of Lands, Survey, and GIS of the County Government of Kisii. He produced a survey report prepared by one Nicodemus Nyamari whom he testified was out of the country. It is the same report that is dated 10 March 2020 produced by DW-1.
14. The plaintiff applied to introduce additional evidence which I allowed. He recalled PW-1, Mr. Zachary Onchuru. What he produced was a document which he termed as the PDP for the suit land. He testified that the allotment letter came with the said PDP and identifies the suit property as Plot ‘K’. Cross-examined he acknowledged that the said PDP does not have plot numbers and anyone looking at it cannot tell where the property being allotted is located.
15. We visited the land in dispute. I observed that it had what looked to me as a typical old Government house with an old servant quarter. There was also another newer structure behind this old looking Government house. At the site, the plaintiff testified that what he purchased was where the old looking Government house and the newer looking one are situated, but not the land where the old looking servant quarter is located. He also stated that part of the vacant area was not allocated. He refuted that the old looking Government house and old looking servant quarter had been there at least since 1999. His evidence was that the houses were not there as at the year 2014.
16. With the hearing closed, I invited counsel to file written submissions, which they did, and I have taken these into account before arriving at my decision.
17. The plaintiff of course asserts to be the owner of the suit land. He traces the root of his title to the first proprietorship of Zachary Onchuru (Mr. Onchuru) who it is alleged transferred his interest to Mr. Omwando, who in turn sold the suit land to the plaintiff. In his evidence, Mr. Onchuru did of course testify that the suit land was allocated to him and he availed the documentation thereof. He affirmed exchanging it with Mr. Omwando for a plot at Nyanchwa and the plaintiff also affirmed having bought the property from the second owner. The case of the defendants is that where the suit land falls is actually a Government House No. 37/KSI/1971/01, which is now converted to offices used by the Kisii County Public Service Board. They have no history of any allocation of this land and no records of payment of land rates and rents in their system. According to them there is no record of any amendment of the Registry Index Map to reflect a parcel Kisii Municipality/Block II/219 and they assert that where the suit land falls is still Government land.



18. I have assessed the evidence of both parties and gone through the documentation provided. I observe that Mr. Onchuru testified that he applied to be allocated the suit land by the Municipal Council of Kisii and that the Council met and allocated the land to him. He testified that he had minutes of the allocation. I however observe that no such minutes of allocation were ever produced as exhibits. If indeed there were such minutes of allocation that PW-1 delivered to the Commissioner of Lands, so that he can be issued with an allotment letter, there would have been nothing easier than to get an officer from the successor of the office of the Commissioner of Lands to produce such minutes, and/or affirm the allocation of the suit land to the plaintiff, given that this was disputed. I have also had a keen look at the allotment letter. It purports to allocate a Plot No.K to Mr. Onchuru and he is required to pay Kshs. 17,572/=. I saw what was purported to be the PDP indicating the suit plot but even when you look at it, and this was acknowledged by Mr. Onchuru, you cannot tell whether it is for the suit land. I am in fact not persuaded that the said purported PDP indicates the suit property. If it did, you would expect it to clearly show the Kisii-Kilgoris road which abuts the suit property, and the other surrounding plots, but all you have is other plots indicated by letters. This purported PDP cannot be indicative of the suit property. I am not even persuaded that the purported allotment letter and the payment thereof are for the suit property. That allotment letter shows an authority to allocate issued on 14 March 1986, yet Mr. Onchuru testified that he applied for the land in the year 1997. I am certainly not persuaded as to the authenticity of this letter of allotment in relation to the disputed plot.
19. I also see that Mr. Onchuru displayed a purported Lease dated 5 January 2001 and a Certificate of Lease dated 9 January 2001. Curiously, the purported survey of the suit land is of March 2001. I do not see how a Lease and Certificate of Lease could issue before the survey of the land. I am in fact not persuaded that there was any survey of the suit property to lead to a title reading Kisii Municipality/Block II/219. As stated by the defence witnesses, the Registry Index Map does not have any plot identified as Kisii Municipality/Block II/129, and what the records show is that the land is still a Government House. The plaintiff never produced a Registry Index Map showing that the land parcel Kisii Municipality/Block II/219 is recognized in the survey records and/or is recognized as an individually owned private plot.
20. Before I too far, let me go back to my observations at site. It was as clear as day that where the suit property is located was developed with a very old typical Government house with a servant quarter. It was obvious to the eye that this is a very old house and servant quarter that would at least be 40 years old, maybe even 50 years old. It cannot be a development that was done in 2014. What may have been done in 2014 or thereafter is the newer house behind the old typical Government house. It means that as at the time the suit property was purportedly being allocated, it had a Government House in it and indeed that Government house was identified as No.37/KSI/1971/01. The evidence of the plaintiff and his witness that the suit land was vacant in 1997 is a blatant lie. It was also not a vacant plot as at 2014 as claimed by the plaintiff. That again is a terrible lie. There was a very old house therein with a servant quarter and given its design and general look I am not in doubt that it was an old residential Government house and servant quarter. I have no reason to doubt that it is what the defendants identify as House No. 37/KSI/1971/01 which has now been converted for use as offices by the Kisii County Public Service Board. I have already said that I am not persuaded that the allotment letter bearing the Plot 'K' has any bearing to the suit property, but even if it had, it has not been demonstrated to me that there was any process followed to first decommission the suit property as a civil service Government house to private land.
21. In fact, all documents produced by the plaintiff and his witness regarding the purported allocation of the suit property and subsequent transfer are dubious and unsupported by the requisite paper trail. I have already cast aspersions on the purported allotment letter, PDP and the receipt. On top of that, I



have no letter forwarding the lease for registration at the Kisii Land Registry. I also have no evidence of the purported lease being registered, as a cursory look at it shows that it has no registration fees, and no receipt number indicated. I see that Mr. Onchuru displayed a Certificate of Lease purportedly issued on 9 January 2001 with the lessor being the Gusii County Council for a 99 year term starting 1 September 1997, at an annual rent of Kshs. 1,600/= . There is no evidence of any payment of land rent and no evidence of any payment of land rates by Mr. Onchuru or his purported successors in title. Mr. Onchuru did exhibit a transfer of lease to Mr. Samwel Kenani Omwando. I have looked at it. There is absolutely no indication in that document that it was ever received at the Land Registry in Kisii for purposes of registration. The entire registration particulars are missing at the top of that instrument. There is no indication of a presentation number, no indication of the date received for registration, and no indication of the fees paid or the receipt number. This, I am afraid is no transfer of lease instrument. If at all rents and rates were being paid to the Municipal Council of Kisii, you would expect that there be issued a rent and rates clearance certificate but none was displayed. Mr. Onchuru himself never produced any written agreement that he had with Mr. Omwando whereat he exchanged the land with another that Mr. Omwando owned.

22. It will be recalled that the position of the plaintiff is that he purchased the suit property from Mr. Omwando. He displayed a sale agreement dated 23 November 2011 purporting that he is buying the property for Kshs. 5 million. No evidence of payment of this colossal sum was given, and no explanation offered as to why he was taking possession in the year 2014, if he indeed purchased the property in 2011. No transfer instrument was also produced. You would expect the plaintiff to have the receipts showing payment for transfer of the property to him and payment of stamp duty. None was produced. Given the foregoing, I am not persuaded that there was any exchange of the suit property from Mr. Onchuru to Mr. Omwando or any sale of the property from Mr. Omwando to the plaintiff.
23. My conclusion is that the plaintiff somehow managed to create in the Kisii Land Registry a register purporting to show that the suit land was allocated to Mr. Onchuru, then ownership by Mr. Omwando, then ownership by himself. As I have said, there is nothing to support any registration of Mr. Onchuru as proprietor, or any registered document showing transfer to Mr. Omwando and subsequently to the plaintiff. I am not even persuaded that any of these three persons ever took possession of the suit property. The attempts by the plaintiff to take possession were repulsed by the defendants and that is why the plaintiff filed this suit.
24. I am persuaded that this land has never moved from public to private hands and remains registered as a Government house. I am persuaded that there is no genuine title known as Kisii Municipality/Block II/219. That purported title is fraudulent. I will proceed to order the District Land Registrar, Kisii, to nullify, cancel and expunge any records in the Kisii Land Registry indicating a title known as Kisii Municipality/Block II/219. There should be no disposition registered against such a title as it does not exist. The counterclaim of the defendant succeeds to the above extent and also the plaintiff is permanently restrained from any interference with the suit property.
25. The long and short of it is that the plaintiff's case fails and it is hereby dismissed with costs. The counterclaim of the defendant succeeds as I have mentioned above and the defendants will have the costs of the counterclaim.
26. Judgment accordingly.

**DATED AND DELIVERED THIS 23 DAY OF OCTOBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**



**AT KISII**

Delivered in the presence of :

Mr. Wafula h/b for Mr. Mulisa instructed by M/s Oguttu Mboya Ochwal & Partners Advocates;

Mr. Kaburi for the defendants;

Court Assistant – David Ochieng’ .

