

THE COMMISSION ON ADMINISTRATIVE JUSTICE

Office of the Ombudsman



“Hata Mnyonge ana Haki”

A MARKET UNDER SIEGE

AN INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA

ON

**ALLEGED IRREGULAR AND ILLEGAL ACQUISITION OF KISII
MUNICIPAL MARKET LAND BY PRIVATE DEVELOPERS**

October 2014

Foreword

The Commission on Administrative Justice (CAJ) Pursuant to its mandate as stipulated under Section 8 of CAJ Act undertook investigations into alleged irregular acquisition of Kisii Municipal Market Land by private individuals.

The investigations were undertaken based on complaints received from members of the public by CAJ Commissioners while on a county visit in Kisii.

The Commission wrote to the Kisii County Governor informing him of the allegations vide letter, Reference CAJ/IE/6/21 VOL 1 dated 14th February 2014 and notified him of the decision to conduct investigations into the allegations.

This report is a result of interviews held with the Kisii County Land Executive, the Land Registrar, County Surveyor, County Physical Planning Officer, Town Administrator and members of the public within Kisii County. The report was also informed by the examination of documents recovered in the process of investigations.

The Commission has made recommendations to the relevant Government agencies including; the National Land Commission, the County government of Kisii, the Ethics and Anti-Corruption Commission and the Chief Justice.

The Commission is confident that the findings of this investigation will not only help in recovery of Kisii Municipal Market Land but also the repossession of public land which may have been acquired illegally elsewhere in the country.

Signed this.....day of October, 2014

Cmmr. Otiende Amollo, E.B.S
Chairperson of the Commission on Administrative Justice
(Office of the Ombudsman)

Preamble

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission on Administrative Justice (CAJ) has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

In addition to the CAJ's investigative powers under Article 252 (1) (a), Sections 26, 27, 28 and 29 of the CAJ Act gives the Commission powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.


Under Section 31 of its Act, CAJ has power not limited by other provisions to investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.

After undertaking its investigations, the Commission is required under Section 42 of its constitutive Act, to prepare a report to the State organ, public office or organization to which the investigation relates. The report shall include the findings of the investigation, action the Commission considers to be taken and reasons whereof and recommendations the Commission deems appropriate.

CAJ may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the CAJ Act.

Section 8 (g) of the CAJ Act gives the Commission power to recommend compensation or other appropriate remedies against persons or bodies to which the Act applies.

Section 42 (4) states; If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take the appropriate action.



Section 52 (b) and (d) of the CAJ Act 2011, provides that a person who knowingly submits false or misleading information to a member of staff of the Commission commits an offence and is liable on conviction to a fine not exceeding five thousand shillings or imprisonment for a term not exceeding two years or both.

Further, Article 59(2) (j) of the Constitution empowers the Commission to report on complaints investigated under paragraph (h) and (i) and take remedial actions.

The report addresses the following:

- Introduction to the investigation
- Investigations strategy
- Normative framework
- Analysis and Findings
- Conclusions and Recommendations



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Acronyms

HA. HECTARES

KACC KENYA ANTI-CORRUPTION COMMISSION

MUN. MUNICIPALITY

NLC NATIONAL LAND COMMISSION

RIM REGISTER INDEX MAP

Executive Summary

The Commission on Administrative Justice received complaints from members of the public while on a county visit to Kisii County that Kisii Municipal Market Land was irregularly acquired by private individuals. This prompted the Commission to conduct investigations to find out circumstances surrounding the matter.

CAJ wrote to the Governor, Kisii County to notify him of the decision to conduct the investigations. Thereafter, the investigations team visited several offices in Kisii County including Kisii County Governor's Office, Land Executive Office, Land Registry, County Surveyor, Town Engineer and County Physical Planning Officer. The team interviewed a number of officers and recovered several documents relevant to the investigations.

The Commission sought to investigate the irregular acquisition of the Kisii Municipal Market land and abuse of power by public officers involved in the processing of the land transfer documents.

Findings

The following are the findings:

- CAJ established that there was a plot set aside for the Kisii Municipal Market as seen in the Kisii Municipality Approved Master Plan Number N/37/71/1 of 1971. A closer scrutiny of the Approved Master Plan shows that the market land is not registered and therefore has no plot number.
- It was also noted that the Kisii Municipal Market land had been subdivided thereby creating Kisii Municipality/Block III/258, Kisii Municipality/Block III/259, Kisii Municipality/Block III/260, Kisii Municipality/Block III/261, Kisii Municipality/Block III/418, Kisii Municipality/Block III/334 and Kisii Municipality/Block III/376 as clearly seen in the Kisii Register Index Map.
- The above seven plots were hived off from the original land reserved for the Kisii Municipal Market and irregularly acquired by the following individuals:
 - i. Kisii Municipality Block III/258 is registered in the name of Prof. Samson Kegengo Onger. The plot is not developed.
 - ii. Kisii Municipality Block III/259 is registered in the name of Mr. James Gisemba Oriku and is not developed.
 - iii. Kisii Municipality Block III/260 is registered in the name of Mr. Samson Nyambati Nyamweya and is not developed.

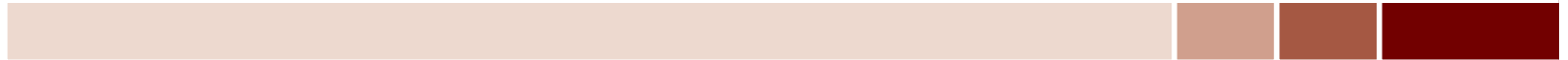
- iv. Kisii Municipality Block III/261 initially registered in the name of Dr. Zachary Theodore Onyonka but it is currently registered in the name of Mr. Samwel Mayienga Openda. On the plot stands a high rise business premises called Sakawa Towers.
- v. Kisii Municipality Block III/334 is registered in the name of Mrs. Esther Kemuma Mogaka. There is a storey building named Ouru Plaza on the plot.
- vi. Kisii Municipality Block III/376 is registered in the name of Mr. James Gisemba Oriku on which butchery has been built.
- vii. Kisii Municipality Block III/418 is registered in the name of Mr. Ashwin R. Gudka and no development has been made on the plot.

Conclusions

- A Copy of Approved Plan Number N/37/71/1 of 1971 shows that there is land reserved for the Kisii Municipal market.
- The above mentioned piece of land set aside for the Kisii Municipal Market was subdivided into eight plots. According to the Register Index Map for Kisii Municipality, the Kisii Municipal Market occupies one of the plots while the other seven plots are occupied by individuals.
- Official searches as well as the Register Index Map confirm that the seven plots were hived off from the Kisii Municipal Market land.
- Documents available confirm that the land in question is public land set aside for the Kisii Municipal Market. For it to have been acquired by private individuals is irregular.
- Three of the irregularly acquired plots of land have since been developed while four plots have make shift stalls occupied by traders selling farm produce.
- It is inferred that Prof. Samson Kegengo Ongeru, Mr. James Gisemba, Mr Samson Nyambati abused power in the acquisition of plot numbers Kisii Municipal/Block III/258, Kisii Municipal/Block III/259&376, and Kisii Municipal/Block III/260 respectively.

Recommendations

- i. The National Land Commission should investigate the illegal acquisition of the seven plots of land with a view to repossess them.
- ii. The County Government of Kisii should survey and register the market land as per the Approved Master Plan of 1971.
- iii. The County Government of Kisii should ensure that public land within the County is surveyed and registered with the Ministry of Lands, Housing and Urban Development.

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- iv. Similarly, other County Governments should survey and register all the public land within their jurisdictions with the Ministry of Lands and acquire Title Documents.
 - v. The Principal Secretary Lands, Housing and Urban Development should seek to establish those public officers who facilitated the illegal acquisition of the seven plots and take appropriate punitive action as provided for by law.
 - vi. Prof. Samson Kegengo Ongeru and Mr. James Gisenja should willingly and unconditionally surrender plots numbers Kisii Municipal/Block III/258, Kisii Municipal/Block III/259&376, which they acquired by virtue of their positions in public service.
 - vii. The plot number Kisii Municipal/Block III/260 which Mr. Samson Nyambati sold to Mr. Charles Mwendia Ombongi should be repossessed. Mr. Samson Nyambati acquired the plot by virtue of his official position as the Kisii Town Clerk.

Introduction to Investigations

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The CAJ has a mandate inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Government authorities and to compel production of such information. The Commission is also mandated to inquire into systemic issues within Governmental bodies, and make recommendations and advisories aimed at improving public service and the administration of justice.

The Commission received complaints about the alleged irregular allocation of Kisii Municipal Market land to private individuals. Pursuant to Section 8 of CAJ Act, 2011, the Commission decided to undertake investigations into the allegations with a view to discovering the circumstances surrounding this matter.

Summary of Issues under Investigation

- Alleged irregular allotment of Kisii Municipal Market Land to private individuals
- Alleged abuse of power by public officers

Investigative Process

Notification

The Commission notified the Governor, Kisii County, vide a letter Ref: CAJ/IE/6/21 VOL.1 dated 14th February, 2014 of its decision to undertake investigations regarding alleged irregular allotment of Kisii Municipal Market Land to private individuals. **(Annexure A1)**

Offices Visited.

The following offices were visited for investigations:

- The Kisii County Governor's Office
- The Land Executive Office
- Land Registry
- County Surveyor office
- Town Engineer's office
- Town Administrator's office
- Physical Planning office
- The Kisii High Court

List of Interviewees

- Deputy Governor, Kisii County
- Kisii County Executive officer for lands
- The Land Registrar
- The County Surveyor
- Kisii Town administrator
- The County Planning Officer
- The Kisii Municipal Surveyor
- Members of the Public

Documents Recovered

The team recovered the following documents in respect of the matter in issue:

a) Documents relating to plot No. Kisii Mun/Block III/258:

- Certificate of Official Search
- Copy of Green card
- Copy of a Demand Notice dated 19th February, 2014
- Copy of payment register

b) Documents relating to plot No. Kisii Mun/Block III/259

- Certificate of Official Search
- Copy of Green card
- Copy of payment register
- Copy of Demand Notice dated 19th February, 2014
- Copy of Certificate of lease dated 24th March, 1980

c) Documents relating to plot No. Kisii Mun/Block III/260

- Certificate of Official Search
- Copy of Green card
- Copy of payment register
- Copy of Demand Notice dated 19th February, 2014
- Copy of Discharge of Charge dated 10th May, 1991
- Copy of Caution dated 21st March, 1991
- Copy of Application to Withdraw Caution dated 24th October, 1991

- Copy of Memorandum of Agreement for Sale of land dated 4th January, 1991.
- Copy of Charge dated 6th February, 1986
- Copy of a Certificate of Lease dated 15th May, 1985
- Copy of Transfer of Lease dated 24th October, 1991

d) Documents relating to plot No. Kisii Mun/Block III/418

- Copy of Payment Register
- Copy of Demand Notice dated 19th February, 2014

e) Documents relating to plot No. Kisii Mun/Block III/334

- Certificate of Official Search
- Copy of Green card
- Copy of Payment Register
- Copy of Demand Notice dated 19th February, 2014
- Copy of further charge dated 12th April, 2011
- Copy of Charge dated 22nd January, 2001
- Copy of Charge dated 30th June, 1998
- Copy of Letter of consent number 106411 dated 3rd February, 2010
- Copy of Loan Charge dated 1st July, 1998
- Copy of Transfer of Lease dated 3rd January, 2002
- Copy of Transfer of Lease dated 28th September, 1993
- Copy of Consent to Lease dated 31st May, 2000
- Copy of letter for Allocation of Alternative Plot dated 30th November, 1992
- Copy of letter from the District Physical Planning Officer dated 16th December, 1992
- Copy of Loan Charge dated 21st February, 2001
- Copy of Certificate of Lease dated 22nd April, 1993
- Copy of Valuation Requisition for Stamp Duty dated 28th September, 1993
- Copy of High Court Order Misc. Civil Appl. Number 1 of 2011
- Copy of Charge dated 13th April, 2010
- Copy of Lease dated 19th July, 2000

f) Documents relating to plot No Kisii Mun/Block III/261

- Certificate of Official Search Copy of Green card
- Copy of Payment Register
- Copy of Demand Notice dated 19th February, 2014
- Copy of Transfer dated 20th July, 1981
- Copy of Clearance certificate dated 20th July, 1981
- Copy of Transfer of Lease dated 21st July, 1981
- Copy of Property Transfers dated 23rd July, 1981
- Copy of Lease dated 17th December, 1979
- Copy of Registry Index Map (RIM), Kisii 16/6
- Copy of Approved Plan Number N/37/71/1 of 1971

Statements recorded

- a. Statement by County Planning Officer.
- b. Statement by Mr. Benjamin Onkoba
- c. Statement by Mr. Jared Osano Atancha
- d. Statement by Mr. Robert Ombasa
- e. Statement by Mr. Stephen Rioba Kambaga
- f. Statement by Mr. Tom Nyagami Gai

Normative Framework

Constitution of Kenya, 2010

Chapter Five—Land and Environment

61. (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

(2) Land in Kenya is classified as public, community or private.

62. (1) Public land is—

(d) Land in respect of which no individual or community ownership can be established by any legal process;

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) Clause (1) (a), (c), (d) or (e); and

(b) Clause (1) (b), other than land held, used or occupied by a national State organ.

Fourth Schedule (Article 185 (2), 186 (1) and 187 (2))

Distribution of Functions between the National Government and the County Governments

Part 2—County Governments

8. County planning and development, including—

(b) land survey and mapping;

Land Act, No. 6 of 2012

8. Management of public land

In managing public land on behalf of the national and county governments, the Commission—

(a) shall identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;

(b) shall evaluate all plots of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning.

12. Allocation of public land

(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—

(f) reserved land.

National Land Commission Act, 2012:

According to section 5 (1) of the National Land Commission Act, 2012 and pursuant to Article 67(2) of the Constitution, the functions of the Commission that address the issue under discussion include:

- (a) to manage public land on behalf of the national and county Governments;*
- (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;*
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*
- (h) to monitor and have oversight responsibilities over land use planning throughout the country.*

5(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—

- (b) monitor the registration of all rights and interests in land;*
- (c) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;*
- (d) develop and maintain an effective land information management system at national and county levels;*
- (e) manage and administer all unregistered trust land and unregistered community land on behalf of the county Government;*

6. (1) The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.

6. (2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—

- (a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ , and to compel the production of such information where it considers necessary;*
- (b) hold inquiries for the purposes of performing its functions under this Act;*
- (c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60 (1) of the Constitution.*

6. (3) In the exercise of its powers and the discharge of its functions, the Commission—

- (a) may inform itself in such manner as it may consider necessary;*

County Governments Act No. 17 of 2012

Functions of county governments

5. (1) A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.

(2) Without prejudice to the generality of subsection (1), a county government shall be responsible for—

(c) functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;

Physical Planning Act, Cap 286 Revised Edition 2012 [2010]

Part IV—Physical Development Plans

A—Regional Physical Development Plans

16. (1) A regional physical development plan may be prepared by the Director with reference to any Government land, trust land or private land within the area of authority of a county council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provision for transportation, public purposes, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purposes.

21. The Minister shall within fourteen days after he has approved the regional physical development plan, cause to be published in the Gazette, by the Director, a notice to the effect that the plan has been approved with or without modifications and may be inspected at the places and times specified in the notice during normal working hours.

(2) An approved regional physical development plan published under subsection (1) shall have full force and effect in the area to which it relates, and every person shall comply with the requirements of the approved plan.

Analysis and Findings

Analysis of Documents Recovered

The CAJ investigations team visited a number of offices and recovered documents that gave insight into the matter under investigations. The following is the analysis of documents obtained from various offices in Kisii County:

a) Copies of Approved Plan Number N/37/71/1 of 1971 and Registry Index Map Kisii 16/6 (Annexure A2 &A3)

The maps indicate that Kisii Municipal Market lies within Kisii Municipality Block III. The maps further indicate that private individual plots Nos. 258, 259, 260, 261, 334, 376, 418 and the present Municipal Market are all found within the original boundary of land set aside for the larger Kisii Municipal market.

b) Documents relating to Plot No. Kisii Mun/Block III/258:

i. Certificate of Official Search and Copy of Green card(Annexures B1 & B2)

The Certificate of Official Search Number 157/2/2014 dated 18th February, 2014 and the respective copy of Green Card reveal that the Plot Number 258 measuring 0.0459 hectares was leased to Prof. Samson Kegengo Ongeri by the County Council of Gusii for a period of 99 years effective 1st March, 1982.

ii. Copy of a Demand Notice dated 19th February, 2014 (Annexure B3)

A Copy of a Demand Notice dated 19th February, 2014 in respect of Kisii Mun/Block III/258 indicates that the total outstanding balance in land rates is Kenya Shillings Two hundred and Eighty Seven Thousand Five hundred and thirty five (KSh 287, 535).

iii. Copy of Payment Register (Annexure B4)

The Kisii Municipal Council Payment Register indicates that on 3rd July, 1990, a payment of Kenya Shillings Seven thousand seven hundred and eighty (KSh 7, 780.80) was made as land rates vide receipt number 41930 for Kisii Mun/Block III/258.

c) Documents relating to Plot No.Kisii Mun/Block III/259

i. Certificate of Official Search and Copy of Green Card (Annexures C1 &C2)

The Certificate of Official Search No.158/2/2014 dated 18th February, 2014 and the respective copy of Green Card reveal that Plot number Kisii Mun/Block III/259 measuring 0.0806 hectares was leased to Mr. James Gisemba by the County Council of Gusii for a period of 99 years effective 1st September, 1978.

ii. Copy of Payment Register (Annexure C3)

The copy of Kisii Municipal Council Payment Register indicates the last payment of land rates was made on 16th November, 2004 for Kenya Shillings Fifteen thousand seven hundred and fifty six (KSh 15, 756) vide receipt number 1091506.

iii. Copy of Demand Notice dated 19th February, 2014 (Annexure C4)

The copy of Demand Notice dated 19th February, 2014 shows that the lessee owes Kisii County Government Kenya shillings Three hundred and Ninety Four Thousand Four hundred and ninety seven (Ksh.394, 497) in land rates.

iv. Copy of Certificate of Lease dated 24th March, 1980 (Annexure C5)

Mr. James Gisemba acquired a lease for 99 years for plot number Kisii Mun/Block III/259 registered in his name with effect from 24th March, 1980.

d) Documents relating to Plot No. Kisii Mun/Block III/260

i. Certificate of Official Search and Copy of Green card (Annexures D1 and D2)

A Certificate of Official Search number 159/2/2014 dated 18th February, 2014 and a respective copy of Green Card reveal that Plot number Kisii Mun/Block III/260 measuring 0.0372 hectares was leased to Mr. Samson Nyambati Nyamweya for a period of 99 years by the County Council of Gusii, effective 1st January, 1985. A certificate of lease was issued in his name on 23rd July, 1985.

ii. Copy of Certificate of Lease dated 15th May, 1985 (Annexure D3)

A copy of Certificate of Lease issued by the County Council of Gusii to Mr. Samson Nyambati Nyamweya indicates that he acquired Kisii Municipality/Block III/260 measuring 0.0372 hectares and issued with lease registered by the Kisii District Land Registrar on 15th May, 1985. The lease is for a period of 99 years, effective 1st January, 1985.

iii. Copy of Transfer of Lease dated 24th October, 1991 (Annexure D4)

Scrutiny of the copy of Transfer of Lease in respect of Kisii Mun/Block III/260 shows that on 24th October, 1991, Mr. Samson Nyambati Nyamweya transferred the same to Mr. Charles Mwendia Ombongi.

iv. Copy of Payment Register (Annexure D5)

A Copy of the Kisii Municipal Council land rates Payment Register indicates that there were payments for Plot No. Kisii Mun/Block III/260 made on 23rd April 2007,

vide receipt numbers 2485571 in respect of site rates, 2485573 in respect of rent while receipt no. 2436897 relates to interests chargeable.

v. Copy of Demand Notice dated 19th February 2014. (Annexure D6)

A copy of Demand Notice by the Kisii County Government dated 19th February 2014 indicates that the outstanding balance of land rates in respect of Kisii Mun/Block III/260 stood at Kenya Shillings Ninety three thousand one hundred and twenty (KSh. 93, 120) as at the date of the Demand Notice.

e) Documents relating to Plot No. Kisii Mun/Block III/418

i. Copy of Payment Register (Annexure E1)

A Copy of the Kisii Municipal Council land rates Payment Register reveals that Mr. Ashwin R. Gudka paid Kenya Shillings Five thousand two hundred and fifty (KSh 5,250) as site rate vide receipt no. 1949816 and Kenya Shillings Three thousand (KSh 3,000) being rent vide receipt no. 1984205.

The payments were made on 8th January, 2007 in respect of plot number Kisii Mun/Block III/418 registered in his name. Mr. Ashwin R. Gudka was also issued with a statement indicating that he had cleared the outstanding rates **(Annexure E2)**

f) Documents relating to Plot No. Kisii Mun/Block III/334

i. Copy of Green Card (Annexure F1)

The scrutiny of a copy of the Green Card for Kisii Mun/Block III/334 reveals that the plot measuring 0.0540 hectares was leased by the County Council of Gusii to Mr. Isaac Atandi Machuka for a period of 99 years effective 1st February, 1993.

According to entries in the Green Card, the Certificate of lease was issued to Mr. Isaac Atandi Machuka on 22nd April 1993. The lease was later transferred to Mrs. Esther Kemuma Mogaka on 28th September, 1993 vide entry no. 3 on the Green Card. Entry no. 4 on the same Green Card indicates that a Certificate of Lease was issued on the 4th October, 1993. **(Annexure F1)**

ii. Copy of Certificate of Official Search (Annexure F2)

iii. Copy of Certificate of Lease dated 22nd April, 1993 (Annexure F3)

CAJ recovered a copy of Certificate of Lease in respect of Kisii Mun/Block III/334 measuring 0.0540 hectares issued to Mr. Isaac Atandi Machuka by the County Council of Gusii for a period of 99 years effective 1st February, 1993.

iv. Transfer of Lease dated 28th September, 1993 (Annexure F4)

It is indicated in the Transfer of Lease dated 28th September, 1993 that Mr. Isaac Atandi Machuka, being the original lessee, transferred the Plot number Kisii Mun/Block III/334 to Mrs. Esther Kemuma Mogaka.

v. Transfer of Lease dated 3rd January, 2002 (Annexure F5)

A copy of Transfer of Lease indicates that Mrs. Esther Kemuma Mogaka transferred the Plot number Kisii Mun/Block III/334 to Ouru Discount Centre Limited on 3rd January, 2002.

It is worth noting that the plot of land appears to have changed hands from Mrs. Esther Kemuma Mogaka to Bank of Africa Kenya Limited as indicated in Certificate of Official Search number 160/2/2014 dated 18th February, 2014. The search revealed that the Plot number Kisii Mun/Block III/334 measuring 0.0540 hectares was leased to Bank of Africa Kenya Limited for a period of 6 years by the County Council of Gusii, effective 1st November, 2010.

The Certificate of Official Search indicates rent payable as Kenya Shillings Two hundred and thirty thousand (KSh230, 000). **(Annexure F2)**

CAJ also noted that there are no records or entry in the Green Card showing how Bank of Africa acquired plot number Kisii Mun/Block III/334 from Mrs. Esther Kemuma Mogaka.

vi. Copy of High Court Order Miscellaneous Civil Application Number 1, of 2011 (Annexure F6)

This is a copy of High Court Order in a Miscellaneous Civil Application Number 1 of 2011, in which, Mrs. Esther Kemuma Mogaka had applied to the High Court to quash a Gazette Notice number 15576 of 26th November, 2010, revoking the title deed for plot no. Kisii Mun/Block III/334 registered in her name.

The High Court granted the order directing the Land Registrar, Kisii District, to restore or reinstate the title instruments in favour of Mrs. Esther Kemuma Mogaka, in particular, the Register and the Green Card in respect of plot no. Kisii Mun/Block III/334.

vii. Copy of Payment Register (Annexure F7)

A copy of Kisii Municipal Council Payment Register reveals that the Plot number Kisii Mun/Block III/334 is registered in the name of Mrs. Esther Kemuma Mogaka. It is clear from the register that the land rate payment was made on 31st July, 2007 vide receipt number 2263150.

viii. Copy of Demand Notice dated 19th February, 2014 (Annexure F8)

A Copy of Demand Notice dated 19th February, 2014 in respect of Plot No. Kisii Mun/Block III/334 indicates that the total outstanding balance is twenty one thousand one hundred and sixteen shillings (KSh 21, 116).

g) Documents relating to Plot No. Kisii Mun/Block III/261

i. Certificate of Official Search (Annexure G1)

The Certificate of Official Search number 161/2/2014 dated 18th February 2014 reveals that Kisii Mun/Block III/261 measuring 0.0363 hectares was leased to Dr. Zachary Theodore Onyonka for a period of 99 years, effective 1st October, 1978.

ii. Copy of Green Card (Annexure G2)

A copy of the Green Card indicates that Kisii Mun/Block III/261 measuring 0.0363 hectares was allocated to Dr. Zachary Theodore Onyonka by the County Council of Gusii at an annual rent of Kenya shillings Nine hundred and twenty (KSh 920) and was effective from 1st October, 1978. A further analysis of the Green Card reveals that Dr. Zachary Theodore Onyonka transferred the said plot to Mr. Samwel Mayienga Openda on 21st July, 1981. The Lease was issued to Mr. Samwel Mayienga Openda on 24th July, 1981.

iii. A Copy of Certificate of Lease dated 27th December, 1979 (Annexure G3)

A copy of the Certificate of Lease for Kisii Town/Block III/261 measuring 0.0363 was issued to Dr. Zachary Theodore Onyonka by the County Council of Gusii in consideration of the sum of Kenya shillings Four thousand six hundred (KSh4,600) for a period of 99 years, effective 1st October, 1978.

iv. Copy of Transfer of Lease dated 21st July, 1981 (Annexure G4)

A copy of Transfer of Lease indicates that Dr. Zachary Theodore Onyonka, the registered lessee of plot no. Kisii Mun/Block III/261 measuring 0.0363 hectares transferred the lease to Mr. Samwel Mayienga Openda.

v. Copy of Transfer letter dated 20th July, 1991 (Annexure G5)

A copy of a Letter of Transfer signed by the Town Clerk, Kisii County Council, and addressed to the Kisii Land Registrar, indicates that the Kisii County Council had no objection in Dr. Zachary Theodore Onyonka transferring his lease to Mr. Samwel Mayienga Openda.

vi. Gazette Notice Number 15576 dated 26th November 2010 (Annexure G6)

The Gazette Notice Number 15576 nullified title deeds for plot Numbers Kisii Municipality/Block 3/258, Kisii Municipality/Block 3/259, Kisii Municipality/Block 3/260, Kisii Municipality/Block 3/376 among others.

vii. Copy of Payment Register (Annexure G7)

The Kisii Municipal Council Payment Register indicates that Mr. Samwel Mayienga Openda paid Kenya Shillings Thirty four thousand (KSh 34, 000) vide receipt number 2263282 in respect of Kisii Mun/Block III/261 on 4th September 2007 as land rates.

viii. Copy of Demand Notice dated 19th February 2014 (Annexure G8)

A copy of Demand Notice dated 19th February, 2014, indicates that Mr. Samwel Mayienga Openda had an outstanding balance of KSh13, 020 owed to Kisii Municipal Council.

ix. Copy of Court order, Miscellaneous Application number 4 of 2011 (Annexure G9)

A copy of Miscellaneous Application number 4 of 2011 indicates that Mr. Samwel Mayienga Openda was granted his plea to have the revocation of his title deed for plot no. Kisii Municipality/Block 3/261 vide Gazette Notice Number 15576 of 26th November 2010 quashed.

h) Documents relating to Plot No. Kisii Mun/Block III/376

i. A copy of certificate of official search (Annexure H1)

It indicates that the plot of land is registered under Mr. James Gisemba.

CAJ was unable to obtain any other documents relating to the ownership of this plot.

i) Other documents

i. Copy of letter requesting for allocation of an alternative plot for the Kisii Municipal Market (Annexure I 1)

A copy of a letter Ref. KMC/LP/APP/GE/II/3/1 dated 30th November, 1992 written by the then Kisii Town Clerk, A. A. M Mutuku to the Commissioner of Lands indicates that the Kisii Municipal Council sought to facilitate an unnamed allottee to acquire an alternative plot in exchange of a plot he had acquired which apparently belonged to the Kisii Municipal Market.

ii. Copy of a letter from District Physical Planning Officer dated 16th December, 1992 (Annexure I 2)

Letter Ref. PPD/KSI/37/Vol. V/(195) dated 16th December 1992 written to the Commissioner of Lands by the District Physical Planning Officer, Kisii District, reinforces the request for alternative plot for the unidentified allottee earlier requested vide letter Ref. KMC/LP/APP/GE/II/3/1 dated 30th November, 1992 by the Kisii Town Clerk.

Findings

The photograph below shows the Kisii Municipal Market operating in a one permanent building and makeshift stalls.

Photograph 1



CAJ established that Kisii Municipal had set aside land for Kisii Municipal Market as per the Kisii Municipality Approved Master Plan Number N/37/71/1 of 1971 (**Annexure A2**).

A closer scrutiny of the above Approved Master Plan shows that the market land has no plot number. It was also noted that on the Approved Master Plan, the Kisii Municipal Market land had been subdivided into eight plots which had not been allocated plot numbers. However, the Kisii Municipal Register Index Map (**Annexure A3**) shows that seven plots created by the sub-division were allocated plot numbers; Kisii Municipality/Block III/258, Kisii Municipality/Block III/259, Kisii Municipality/Block III/260, Kisii Municipality/Block III/261, Kisii Municipality/Block III/334, Kisii Municipality/Block III/376 and Kisii Municipality/Block III/418 while the Kisii Market was not assigned a plot number (**See annexure A3**).

Illegal acquisition of plots

Kisii Mun/Block III/261: The late Dr. Zachary Theodore Onyonka

Late Dr. Onyonka, a former Cabinet Minister, acquired plot no. Kisii Mun/Block III/261 measuring 0.0363 hectares despite the fact that the plot was part of the land set aside for the Kisii Municipal Market. A close scrutiny of the Green Card and Certificate of Official Search in respect of the plot reveals that Dr. Zachary Theodore Onyonka, transferred the plot to Mr. Samwel Mayienga Openda on 21st July, 1981 **(See annexure G1, G2, G3 and G4).**

On the plot stands a five storey building named Sakawa Towers (See photograph below)

Photograph 2



Similarly, the title in respect of the plot number Kisii Mun/Block III/261 was also revoked vide Gazette Notice number 15576 dated 26th November, 2010 **(See annexure G6)** and reinstated vide a court ruling on a Miscellaneous Civil Application Number 4 of 2011 **(See annexure G9).**

Copies of land rates, Demand Notice and Payment Register recovered from the Kisii Municipal Council Revenue Office indicate that Mr. Samwel Mayienga Openda started paying for the rates in 1989. The last payment he made was on 4th September, 2007. There is an outstanding balance of KSh 13, 020 **(See annexure G7 and G8).**

Kisii Mun/Block III/258: Prof. Samson Kegengo Onger

Prof. Samson Kegengo Onger acquired plot no. Kisii Mun/Block III/258 measuring 0.0459 hectares despite the fact that the plot is part of the land set aside for the Kisii Municipal Market. He has not been able to develop the plot due to public resistance. Members of public have constructed makeshift market stalls on the plot. **(See annexures B1 & B2 and photographs 1 and 2)**

Kisii Mun/Block III/259 & III/376: Mr. James Gisemba Oriku

Mr. James Gisemba Oriku, a former Mayor of Kisii Town, acquired plot no. Kisii Mun/Block III/259 and plot no. Kisii Mun/Block III/376 measuring 0.0806 hectares and 0.0382 hectares respectively. The Kisii Mun/Block III/259 has since been occupied by members of public by constructing makeshift stalls while Kisii Mun/Block III/376 has been developed by constructing a butchery. The Mayor, being the custodian of the Kisii Municipality assets, ought to have known that the two plots registered in his name were part of the land set aside for the Kisii Municipal Market. **(See annexures C1 C2 C3 & H I)**

It can be inferred that the former Mayor, Mr. James Gisemba Oriku apparently abused power to influence his illegal acquisition of the plots.

Kisii Mun/Block III/334: Mr. Isaac Atandi Machuka

Mr. Isaac Atandi Machuka acquired plot no. Kisii Mun/Block III/334 measuring 0.0540 hectares. Mr. Atandi sold it after six months to Mrs. Esther Kemuma Mogaka, a prominent business woman in Kisii Town, with several businesses trading in the name of Ouru. Mrs. Kemuma has developed this plot by constructing the Ouru Plaza as shown in the photograph below.

Photograph 3



Kisii Municipality/Block III/418: Mr. Ashwin R. Gudka

The CAJ investigations team did not recover any documents from the Lands Office in Kisii in respect to plot number Kisii Municipality/Block III/418. Its ownership came to light only through the Rates Payment Register found at the Kisii Municipal Council, indicating that the plot is owned by **Mr. Ashwin R. Gudka**. Mr. Gudka has since been unable to develop it because of public resistance. Members of public constructed makeshift market stalls on the plot. (See photographs 1 and 2)

Kisii Municipality/Block III/260: Mr. Charles Mwendia Ombongi

Scrutiny of the Certificate of Official Search indicates that plot number Kisii Municipality Block III/260 had been acquired by Mr. Samson Nyambati Nyamweya, a former Kisii Town Clerk. It can be inferred that Mr. Samson Nyambati Nyamweya apparently abused power to influence his illegal acquisition of the plot.

The plot was transferred to Mr. Charles Mwendia Ombongi on 24th October, 1991 vide Transfer of Lease number 164/10/91. Members of public constructed makeshift market stalls on the plot. **(See annexure D4 & photographs 1 and 2)**

Consequential Observations

Copy of letter requesting for allocation of an alternative plot for the Kisii Municipal Market (Annexure I 1)

A copy of a letter Ref. KMC/LP/APP/GE/II/3/1 dated 30th November, 1992 written by the then Kisii Town Clerk, A. A. M Mutuku to the Commissioner of Lands indicates that the Kisii Municipal Council sought to facilitate an unnamed allottee to acquire an alternative plot in exchange of a plot he had acquired which apparently belonged to the Kisii Municipal Market. The letter shows no specifics as to the particulars of the allottee as well as the plot numbers.

The letter refers to Kisii Municipal Council minutes of a meeting held on 4th August 1992. The Municipal Council, through the letter dated 30th November, 1992 purported to have discovered that the plot had already been allocated and wrote to the Commissioner of Lands requesting that the allottee be allocated an alternative plot.

According to the letter, the land initially identified for Municipal market had already been occupied by some developers who had already been allocated plots in Jogoo area in the outskirts of the Town Centre, measures had to be taken to remedy the situation.

It is noted that this letter is not specific on the particular plot in question and presents a suspicious scenario where the Kisii Municipal Council's minutes and deliberations may have been used to facilitate illegal acquisition of public land. **(See annexure I1)**

Copy of a letter from District Physical Planning Officer dated 16th December, 1992 (Annexure I 2)

Letter Ref. PPD/KSI/37/Vol. V/(195) dated 16th December 1992 written to the Commissioner of Lands by the District Physical Planning Officer, Kisii District, reinforces the request for alternative plot for the unidentified allottee earlier requested vide letter Ref. KMC/LP/APP/GE/II/3/1 dated 30th November, 1992 by the Kisii Town Clerk. **(Annexure I 2)**

While interpreting the Approved Plan the County Physical Planning Officer explained that a public utility such as the Kisii market must have public road access. **(See annexure A4)** Contrary to this assertion, the Kisii Municipal Market is surrounded by private developments without public road access.

The CAJ investigations observed that there are more complaints that other Kisii County public land has also been irregularly and illegally acquired by private individuals.

Conclusions and Recommendations

Conclusions

- A Copy of Approved Plan Number N/37/71/1 of 1971 shows that there is land reserved for the Kisii Municipal market.
- The above mentioned piece of land set aside for the Kisii Municipal Market was subdivided into eight plots. According to the Register Index Map for Kisii Municipality, the Kisii Municipal Market occupies one of the plots while the other seven plots are occupied by individuals.
- Official searches as well as the Register Index Map confirm that the seven plots were hived off from the Kisii Municipal Market land.
- Documents available confirm that the land in question is public land set aside for the Kisii Municipal Market. For it to have been acquired by private individuals is irregular.
- Three of the irregularly acquired plots of land have since been developed while four plots have make shift stalls occupied by traders selling farm produce.

Recommendations

- i. The National Land Commission should investigate the illegal acquisition of the seven plots of land with a view to repossess them.
- ii. The County Government of Kisii should survey and register the market land as per the Approved Plan of 1971.
- iii. The County Government of Kisii should ensure that public land within the County is surveyed and registered with the Ministry of Lands, Housing and Urban Development.
- iv. Similarly, other County Governments should survey and register all the public land within their jurisdictions with the Ministry of Lands and acquire Title Documents.

- v. The Principal Secretary Lands, Housing and Urban Development should seek to establish those public officers who facilitated the illegal acquisition of the seven plots and take appropriate punitive action as provided by law.
- vi. Prof. Samson Kegengo Ongeru and Mr. James Gisenba should willingly and unconditionally surrender plots numbers Kisii Municipal/Block III/258, Kisii Municipal/Block III/259&376, which they acquired by virtue of their positions in public service.
- vii. The plot number Kisii Municipal/Block III/260 which Mr. Samson Nyambati sold to Mr. Charles Mwendia Ombongi should be repossessed. Mr. Samson Nyambati acquired the plot by virtue of his official position as the Kisii Town Clerk.