



**Nderitu & another v County Government of Nakuru (Environment & Land Case 61 of 2019) [2023] KEELC 16936 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16936 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 61 OF 2019  
FM NJOROGE, J  
APRIL 26, 2023**

**BETWEEN**

**SUSAN WANJIRU NDERITU ..... 1<sup>ST</sup> PLAINTIFF**

**CITYKING REALTORS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed the instant suit vide a Plaint dated 24/06/2019 which seeks the following orders:
  - a. A permanent injunction restraining the Defendant from by itself, its agents, representatives, servants and/or employees from demolishing the Plaintiffs' structures or evicting the Plaintiffs from parcel of land known as Residential Plot Block 10/317 -Nakuru Municipality and further from entering, trespassing, selling, transferring, alienating, disposing, leasing, and/or in any way adversely interfering with parcel of land known as Residential Plot Block 10/317-Nakuru Municipality.
  - b. Cost of this suit.

**The Plaintiff**

2. The plaintiffs' case is that the 1<sup>st</sup> plaintiff is the registered owner of the land known as Residential Plot Block 10/317 – Nakuru Municipality measuring 0.1013 Ha. having been allocated the plot on 10/7/1997 by the Commissioner of Lands. The plaintiffs are business partners on the suit premises. The plaintiffs aver that recently the defendant has laid a claim over the suit plot, alleging it was allocated to it by Kenya Railways Corporation for greening purposes. On 20/6/2019 the defendant issued the plaintiff with an eviction notice, hence the present suit.



## **The Defence**

3. The Defendant filed its Statement of Defence dated 12/05/2021 where it averred that the user of the property as indicated in the allotment letter is residential yet it is being used for commercial purposes. It further deposed that it entered into a partnership with Kenya Railways for a green park.
4. It denied all the other allegations.

## **The Plaintiff's Evidence**

5. PW1, Francis Ndiritu Kioni the 1<sup>st</sup> Plaintiff's son testified on 09/02/2023. He stated that he is the director of the 2<sup>nd</sup> Plaintiff and that he was nominated by the 1<sup>st</sup> Plaintiff to give evidence on her behalf.
6. He produced the nomination as PExh.1 and a resolution by the 2<sup>nd</sup> Plaintiff dated 22/6/2019 as PExh.2. He adopted the 1<sup>st</sup> Plaintiff's witness statement as his evidence-in-chief. He testified that the land is within Nakuru Municipality Block 10 being plot No. 317 within that Block. He further stated that in June 2019 they received threatening messages of eviction and that the Council officers came with a bulldozer, wanting the plaintiffs to vacate. The officers claimed that they were given the mandate to plant trees on the land.
7. He testified that in 2016 they had applied to the County Planning Department and they were authorized to put up the structures being a coffee shop and a car wash. He further testified that they were issued with the current trade license under the name of City King. He produced all the copies of documents from his list of documents dated 24/6/2019 as evidence which were admitted by the court and marked as PExh.1(a) – PExh.20.
8. He stated that they had a license and an approved plan that approved the coffee shop and car wash. He further stated that initially the County Government removed the culvert for entrance and took away the coffee machine and carwash machines and they were informed that they must vacate. He stated that he approached a lawyer who drafted PExh.18 and vide their response dated 20/6/2019, (PExh.19) the County government denied any harassment and added that the land was allocated to the County for greening purposes by Kenya Railways.
9. PW1 testified that Kenya Railways was involved in a Survey by order of court and from the report dated 3/12/2019 it concluded that plot No. Nakuru Municipality Block 10/317 was outside the Kenya Railways land boundary. He produced a copy of the report which was marked as PExh.21. He added that a further survey by the County Government of Nakuru had been done on 20/9/2022 and forwarded by letter dated 22/9/2022. He further testified that the County Surveyor's Report dated 20/9/2022 made similar findings where they observed that there was a Folio Number FR 288/107 and 98/42 and that there was no encroachment on Railway Land detected. He produced the report dated 20/9/2022 and the same was marked as PExh.22.
10. He testified that the 1<sup>st</sup> Plaintiff had an allotment letter PExh.1 (a) issued in 1997 and that the property had been identified by way of beacons on the ground. He added that allocation had been done by the County Government and the Commissioner of Lands and that the plot has a Folio Number and a Survey Plan (PExh.2) which shows plot No. 317 and inserted in the RIM, (PExh.3). He testified that rates were paid to the County Government upon allocation as per PExh.6. He urged the court to grant them an order of injunction against the Defendant.
11. Upon cross-examination, he confirmed that he could not trace the application for allotment since her mother had applied for the same. He further confirmed that she was an adult at the time of allotment and that Kshs. 63,150 had to be paid as per the allotment letter. He admitted that he had no document



to show that the said amount was paid. It was PW1's evidence that he was not aware that a plan must be attached to the allotment letter. He added that as per condition No. 5, the land was for residential purposes but confirmed that they are using the land for business purpose. He admitted that they never applied for change of user of the plot. He confirmed that he did not have the title document as it was still being processed; that he was issued with development permission but he did not have an occupation certificate. He averred that the plaintiffs had paid for the trade licenses up to 2022.

12. On re-examination, he stated that the County Government did not take steps to verify that the land is not genuine. He further stated that they never received any letter from the Commissioner of Lands claiming that they have not paid. He added that they had a land rent clearance certificate for the year 2019 and that the only demand letter received was for land rates. He stated that there was no objection for use of the land as business/commercial premises and that they were allowed to set up commercial businesses.
13. The Plaintiffs' case was then marked as closed.

### **The Defendant's Evidence**

14. Justus Mayaka Nyaroo Physical Planner, Nakuru County Government testified as DW1. He adopted his witness statement dated 12/5/2021 as part of his evidence. He testified that the suit property was in the 1<sup>st</sup> Plaintiff's name with no Reference number. He testified that PExh.1(a) was issued for residential purpose and that the defendant had never received any application for change of user from residential to commercial.
15. He testified that the plan that allocated the land would have been useful in stating whether it was proper for the plaintiffs to conduct business on the premises. He further testified that PExh.2 is not a Physical Development Plan but a land survey plan for physical planning. He testified that Business Licenses did not confer ownership and added that the Report from the County Surveyor indicated that plot No. 317 had not encroached on the railway land. He stated that the Plaintiff's documents as exhibited did not establish ownership.
16. Upon cross-examination, DW1 confirmed that there was an agreement for Kenya Railways to do a greening program on the land. He was referred to PExh.8 whereupon he confirmed that the same bore the County Government's logo. He was further referred to PExh.5 where he confirmed that proper forms should have been used for approvals. DW1 also admitted that he could not confirm that a PDP had been made. He further admitted that they had not confirmed form the Director of Surveys that a PDP was never submitted.
17. He averred that the suit property is along Oginga Odinga Avenue and that the Plaintiffs ought to have setup their business once approvals were given. He also stated that there was no report made to the police. He denied having his signature on PExh.7 the County Planner's stamp and stated that there were Urban Development Plans governing users. He added that an allotment letter leads to issuance of a lease when there is a PDP.
18. On re-examination, he stated that a lease reiterates the user named in an allotment letter and added that a change of user application should have been made. He further stated that the Physical Planning Department did not receive revenue; that revenue was normally collected by the Department of Finance through payment of rates. He stated that a standard form from the Government Printer is usually submitted by a planner and that the application is done by a professional on behalf of an applicant. He further stated that the Director of Physical Planning used to give the approval during the time of the Physical Planning Act 1995 but now it is done by the County CEC. He stated that



the official stamps on the plaintiffs' exhibits did not give approval and that he could not confirm that PExh.2 was from the Survey office.

19. The Defendant's case was marked as closed at that juncture.

### **Submissions**

20. The Plaintiffs filed their submissions dated 2/03/2023 on 6/03/2023. They gave a brief background of the case and submitted on two issues, the first issue being whether the court should issue an order for permanent injunction restraining the Defendants from interfering with the Plaintiff's residential plot Block 10/317 Nakuru Municipality. He relied on Order 40 Rule 1 (a) of the Civil Procedure Rules and the case of Kenya Power & Lighting Co. Limited V Sheriff Molana Habib [2018] eKLR and submitted that the Defendant was not able to counter the evidence that the suit property belonged to the Plaintiff. They submitted that the Kenya Railways Boundary Verification Report exonerated the 1<sup>st</sup> Plaintiff from allegations of encroachment.
21. They relied on the case of Patrick Muiru Kamunguna V Kaylift Services Ltd & another [2021] eKLR and Section 107 of the *Evidence Act* and submitted that the Defendant diverted from its defence as it stated that they had been given the suit property by Kenya Railways while its evidence was that the 1<sup>st</sup> Plaintiff's claim to ownership of the suit property was questionable. They urged the court to disregard the Defendant's evidence as the same differed from what had been pleaded in the defence. The Plaintiffs submitted that having proved ownership of the suit property, the court should grant them an order of permanent injunction restraining the Defendant from interfering with the suit property.
22. Regarding the final issue on costs, the Plaintiffs submitted that costs follow the event and being convinced they had successfully proved their case, they urged the court to grant them costs of the suit.
23. The Defendant filed its defence dated 14/03/2023 where it gave a brief summary of both the Plaintiffs' and their case and identified two issues for determination. The first issue being whether an order of permanent injunction should issue where it submitted in the negative and argued that the Plaintiffs' never applied for change of user from residential to commercial use while the Defendant confirmed that no application had been made to the Physical Planning Office. It added that the Plaintiffs could not confirm that the amount on the allotment letter was ever paid.
24. The Defendant relied on Section 30 (1) of the Physical Planning Act and the case of John Njue Nyaga V Nicholas Njiru Nyaga & Another [2013] eKLR and submitted that they had not issued the Plaintiff with development approvals thus they are not entitled to the orders being sought.
25. On the final issue of costs, the Defendant relied on Section 27(1) of the *Civil Procedure Act* and urged the court to grant them costs of the suit.

### **Analysis and Determination**

26. It is this court's view that the main issue for determination is whether the Plaintiff is entitled to orders of permanent injunction restraining the Defendant from interfering with the suit property.
27. In determining the above issue, it is important to first establish whether the Plaintiff was rightfully allocated the suit property. It was the Plaintiffs' evidence that the 1<sup>st</sup> Plaintiff was allotted the suit property by the government in 1997. However, upon cross-examination, PW1 confirmed that Kshs. 63,150 was to be paid as per the conditions in the allotment letter but admitted that he had no document to show that the said amount was paid. It was his evidence that he was not aware that a Part Development Plan must be attached to the allotment letter; he also confirmed that the plaintiffs did not have the title document as it was being processed. In the Court of Appeal case of Mombasa



Technical & Training Institute vs Agnes Nyevu Charo & 106 others, Mombasa Civil Appeal Number 282 of 2010 the court held that one who occupies Government land without permission (or to say proper allocation) remains a squatter on that land irrespective of how long he remains on that land. If the plaintiffs are to be considered as more than squatters, they would have to establish that an allocation was made and accepted and its terms complied with.

28. Applying the above Court of Appeal decision to the facts of the present case, it is certainly evident that the Plaintiffs did not prove that the 1<sup>st</sup> Plaintiff paid the requisite fees of Kshs. 63,150. If indeed the Plaintiffs paid the fees, then they did not produce any evidence to that effect. The condition in the allotment letter stated that upon non-compliance with any of the terms therein the offer would lapse. Without evidence of payment this court can not presume that there was compliance with the terms of the letter of allotment and the fate of the allotment cannot therefore be ascertained. It is this court's view therefore that the Plaintiffs failed to prove that they had met the conditions set in the allotment letter.
29. In the case of Rukaya Ali Mohamed -vs- David Gikonyo Nambachia & another Kisumu HCCA.9/2004 the court held as follows:

“Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest”.
30. The plaintiff's chief witness claimed that title was being processed even as at the time of hearing, and this implied that payment for the allotment had been made to enable title issuance. Production of title, even without more, may have entitled the plaintiffs to the orders sought. However, no title in the names of the plaintiffs was therefore produced as an exhibit at the hearing. Their claim in the plaint that they are the registered owners of the suit land was therefore left unproved. This court should not be left to guesswork as to whether or not the plaintiffs have any proprietary interest in the land. This court is not saying they do not have any interest in the suit land, and it may well be true that title is in the process, but it is to be understood from Section 107 of the Evidence Act that whoever desires the court to rule in his favour in respect of a legal right dependent on the existence of facts which he asserts must prove that those facts exist. In the present case, the plaintiffs have failed to prove such interest due to omission to present the appropriate evidence. The defendant has also failed to establish that the suit land is owned by Kenya Railways Corporation, or that that Corporation had any mandate or interest over the suit land to assign it to them for greening purposes. The defendant's own report dated 14/10/2020 confirmed that the plot claimed by the plaintiff appears in the Survey of Kenya records in a map referred to as FR No 288/107. Besides, the defendant appears to have acknowledged the plaintiffs' possessory interest by granting them some development approvals and the plaintiffs relied on them to erect structures and carry out trade on the suit premises. It also gave them a trade licence. The evidence of all that is there, as clear as day, and it can not be denied.
31. Nevertheless, on the basis of the analysis of the evidence undertaken herein before and particularly on the basis of the conclusion that the plaintiffs failed to exhibit in evidence title to the land registered in their names, I find that the Plaintiffs have failed to prove their case against the Defendant on a balance of probabilities and I hereby dismiss it with no order as to costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup>  
DAY OF APRIL 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

