



**Makandi ((Suing as the legal representative of the Estate of Anita Nkaimura M’Mutungi (Deceased)) v Attorney General & 3 others (Environment & Land Case 16 of 2019) [2023] KEELC 16939 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16939 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 16 OF 2019**

**CK NZILI, J**

**APRIL 19, 2023**

**BETWEEN**

**FLORENCE MAKANDI ..... PLAINTIFF  
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANITA  
NKAIMURA M’MUTUNGI (DECEASED))**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT  
DISTRICT SURVEYOR – MERU ..... 2<sup>ND</sup> DEFENDANT  
DISTRICT LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
COUNTY GOVERNMENT OF MERU ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff who is in person, approached this court through a notice of motion and a plaint both dated 28.3.2019 all seeking similar reliefs. Directions were given on 5.11.2019 marking the application for judicial review as spent paving way for the suit to proceed. In the plaint, the plaintiff is described as the legal representative of the estate of Anita Nkaimura alias Anita Kaimuri M’Mutungi, pursuant to a limited grant ad litem issued in Meru HC Misc. No. 283 of 2019. She averred that the deceased was the registered owner of LR No. Ntima/Igoki/820 measuring 0.12 ha.
2. She claimed that the defendants fraudulently, illegally, unprocedurally, and or abused their powers by altering the original parcel number to read parcel number 302 and subsequently subdivided or registered it as L.R.No. Meru Municipal Block II/882/883 without her notice, consent, approval and or compensation. The plaintiff averred that despite demands to substitute the new numbers into her names, the defendants have been reluctant to do so or supply her with the amended survey maps. The plaintiff averred that she only discovered the fraud after the deceased had passed on.



3. The plaintiff therefore, sought for the cancellation of the new parcel numbers, the land to revert to the original number and for the cancellation of any letters of allotment in parcel number Meru Municipal Block II /882 and 883, and that the suit land to revert to her names.
4. Further to the plaint, the plaintiff in her verifying affidavit averred that vide Kenya Gazette Notice No. 1263 of 1977, her initial LR No. Ntima/Igoki/820 was compulsorily acquired in favor of the 4<sup>th</sup> defendant for the extension of then Meru Municipal old town. However, as per Gazette Notice No. 1264 of 1990, the suit land was not compensated for by the defendants, they did not notify, recall or cancel her parcel number and replace it with the new number parcel number. 302 even though they continue to assert her land was compulsorily acquired and ceased to exist in law. She averred that any attempts to alter her parcel number to give a new number was fraudulent, illegal, un-procedural and amounted to false or unlawful takeover of her land.
5. The plaint was accompanied by a list of documents, a supporting affidavit dated 28.3.2019, an answer to a preliminary objection dated 4.11.2019, witnesses' statements dated 13.11.2019, and a further list of documents dated 27.5.2021.
6. The suit was opposed by the 1<sup>st</sup> to 3<sup>rd</sup> defendants through both a preliminary objection dated 20.9.2019 and a statement of defence dated 5.11.2020. The 1<sup>st</sup> – 3<sup>rd</sup> defendants averred that the suit offends Section 16 (*Government Proceedings Act*) (Cap 40). They denied any alleged fraud and or illegal alteration of the survey maps. In the alternative, the 1<sup>st</sup> – 3<sup>rd</sup> defendants averred that if there were any subdivisions or creation of new parcel numbers to the suit land, the same was done in the performance of the defendant's lawful statutory mandate in a procedural manner and within the limits of both the *Land Adjudication Act* and the *Land Registration Act*.
7. Further, the 1<sup>st</sup> – 3<sup>rd</sup> defendants averred that the suit was time-barred and offensive to both Section 3 (1) of the Public Authorities Limitations Act and Section 13A of the *Government Proceedings Act*. Lastly, the 1<sup>st</sup> to 3<sup>rd</sup> defendants denied being privy to the averments as pleaded in paragraph 6 of the plaint. Additionally, the 1<sup>st</sup> – 3<sup>rd</sup> defendants denied that this court has jurisdiction to hear the suit. The 1<sup>st</sup> -3<sup>rd</sup> defendants' defence was accompanied by a witness statement dated 13.1.2023.
8. On its part, the 4<sup>th</sup> defendant opposed the suit through a defence dated 26.4.2021, averring that the suit was time-barred and bad in law for offending Cap 40. Further, the 4<sup>th</sup> defendant denied the alleged fraud and or illegal alteration of the survey maps.
9. The plaintiff filed a reply dated 27.4.2020 to the 1<sup>st</sup> – 3<sup>rd</sup> defendants' defence insisting that there was fraud, illegality and non-compensation for the illegal takeover of her land.
10. At the trial, PW 1 the plaintiff adopted both her verifying affidavit dated 28.3.2019 and the witness statement as her evidence in chief stating that the land belonged to her late mother but was illegally taken up without notice, consent or compensation. She produced documents in her list of documents namely; a copy of the title for LR No. Ntima/Igoki/820 as P. Exh No. (1), green card as P. Exh No. (2), letter to the land registrar dated 18.1.1994 as P. Exh No. (3), letter to the Municipal Council of Meru dated 18.7.2000 as P. Exh No. (4), survey maps for the area as MFI No. (5) and (6), a letter dated 8.8.2018 to the Hon. Attorney General as P. Exh No. (7). She denied that her claim was time-barred as alleged by the defendants given her earlier pleading in her reply to the defence dated 27.4.2020 and to the preliminary objection dated 4.11.2019, on when she became aware of the alleged fraud.
11. In cross-examination by the 1<sup>st</sup> -3<sup>rd</sup> defendants counsel, the plaintiff insisted that she filed a limited grant ad litem which was granted on 1.10.2015 in Meru H.C Misc. Application No. 283 of 2015, following which she filed this suit after 4 years. She said that the green card showed that the land was compulsorily



- acquired by the government in 1977, but she only came to know about it after her mother had passed on. PW 1 said that her late mother used to live on the suit land till she passed on. She however denied ever getting any communication from the defendants that the suit land had been degazetted.
12. Additionally, PW 1 said that she no longer lived on the suit land since someone else took it over on 1.5.2008, whom she had not known, and who allegedly demolished her houses leading to a report at Meru Police Station. PW 1 admitted that she had not joined the said intruder to this suit, nor did she produce an Occurrence Book police report to that effect since it was the defendants who allegedly acquired her land.
  13. Though the plaintiff has not joined the allottees of the new parcels of her land to the suit, PW 1 insisted that the said acquisition was both irregular and illegal. PW1 could not state the exact developments which may have occurred on the suit land after she was removed from it in 2008. PW 1 denied knowledge of the alleged compulsory acquisition through the Commissioner of Lands, currently succeeded by the National Land Commission. Regarding her police report, PW 1 said that she was not aware if any investigations were ever undertaken and or the outcome, more so after she surrendered her ownership documents to the police on 1.5.2008. PW 1 testified that she sent a lot of letters to government agencies including the Ethics Anti-Corruption Commission at Isiolo, only to be told to engage a lawyer to follow up on her case, which she could not afford.
  14. Cross-examined by the 4<sup>th</sup> defendant, PW 1 said that she used to live on the suit land until the encroachers came in 2008 and issued her with a notice to vacate the land with no reasons. She insisted that the said encroachers to her land were brought by the government which must be held responsible. She admitted that the letter dated 11.2.2014 confirmed that there was a de-gazettement of the plots, among them the suit land.
  15. PW 2 was Kamuku M'Mukindia, a retired officer of the defunct Municipal Council of Meru. His evidence as contained in the witness statement dated 13.11.2019 was that the suit land belonged to the late Anita until one Wilson Muthaura came to cut down trees using a power saw and chased away the plaintiff's mother, who at the time was old and frail. PW2 insisted that other people owning land in the vicinity were compensated for their plots, unlike the plaintiff's late mother. He clarified that the suit land was already developed with storey buildings.
  16. Despite orders for the last adjournment on the part of the defendants, they failed to offer any testimony in this suit in support of their defences, or file written submissions as directed by the court.
  17. The plaintiff in her written submissions dated 13.3.2023 took the view that the defendants colluded and fraudulently substituted the original parcel number with new parcel numbers to wit, LR.No. Meru Municipality Block No.'s 882 and 833 purporting them to have arisen out of Parcel No. 302 which was non-existent in 2005.
  18. It was submitted that the green cards for Parcel No. 882 and 883 indicated the allottees as Marion Muthamia, Edith Mucheche and Patrick Gitonga Kiara as at 29.9.2005, who had no right to be allocated the land by the defendants so as to deprive the plaintiff her land.
  19. The plaintiff submitted that both her evidence and the documentation had shown that there was displacement and an illegal substitution of her parcel, which the defendants have been unable to offer any plausible explanation on what happened to her land.
  20. As to who was the rightful registered proprietor of the suit land, the plaintiff based on Section 26 of the *Land Registration Act*, submitted that even though the land had allegedly been gazetted for compulsory acquisition. Further, that no compensation was paid to her, and no such compulsory acquisition occurred as per the letters produced before the court, since her late mother was not notified



- of the process by the 1<sup>st</sup> -3<sup>rd</sup> defendants as well as the 4<sup>th</sup> defendant that her land was acquired and allotted another number in favor of a third party.
21. The plaintiff submitted that in absence of the relevant documents to show that the allotment/ substitution was procedurally done, it could only be inferred that the same happened without any legal authority. Therefore, the plaintiff urged the court to find that the facts and the evidence tendered was sufficient to prove her claims and entitlement to the prayers for cancellation of the titles. Reliance was placed on *Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 others* (2014) eKLR.
  22. The court has carefully gone through the pleadings, evidence tendered and the written submissions filed herein. The issues calling for the court's determination are:
    - i. Whether the plaintiff pleaded and proved the particulars of illegality, fraud and or collusion on the part of the defendants in the manner L.R No. Nitma/Igoki/820 ceased to exist after it was compulsorily acquired, re-planned, re-surveyed and allocated by the 4<sup>th</sup> defendant to third parties in 1991.
    - ii. If the suit is defective for non-joinder of the affected new title holders.
    - iii. If the claim is time barred and bad in law.
    - iv. If the defendants have given a reasonable defence or justification for the changes to the land ownership.
  23. The plaintiff's claim is that LR No. Ntima/Igoki/820 was owned by her late mother until 2008 when she discovered that it had allegedly been degazetted, re-planned and re-surveyed by the 4<sup>th</sup> defendant and allocated new parcel numbers as LR No. Meru Municipality Block II/882 and 883 in favour of third parties.
  24. The plaintiff averred that no notification was made to her on the intention to acquire the land or compensation paid. Further she averred that the defendants failed to notify her late mother on the changes and the subsequent allocation of the land under new parcels to third parties. She urged the court to find that there were illegalities, irregularities and fraud in the manner that her land was converted and transferred calling for the cancellation of the attendant title deeds and for the reversion of the same to the estate of the deceased.
  25. It is trite law that fraud, illegality and irregularity must be specifically pleaded and proved. In the case of *Jonah Kabugo vs Martin Mbaya & another* (2018) eKLR, the court was dealing with a litigant acting in person whose defence to the claim did not conform to the usual format a defence takes. The court cited with approval *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, where it was held that whereas precision must remain a legal requirement, it demanded neither a formulaic prescription of the factual claims, nor formalistic utterance of the violated rights. The court in admitting the defence as filed said that the whole function of pleadings, hearing, submissions and the judicial decision was to define the issues in litigation.
  26. Further, in *IEBC vs Mutinda Mule* (2014) eKLR, the court held that in an adversarial system, parties are left to formulate their case and subject to rules of pleadings, each party was bound by its own pleadings and as such, once parties set their agendas for trial, the court had no room to entertain any another business not defined by the parties.
  27. In this suit, the plaintiff filed both an application under Order 53 Civil Procedure Rules as well as a normal plaint, which the court found both as raising the same issues. The court marked the application



under Order 53 of the Civil Procedure Rules as spent and directed that all the parties do comply with Order 11 of the Civil Procedure Rules.

28. In this suit, though the specific particulars of fraud, illegality and or impropriety on the part of the defendants were not pleaded with precision, the annexures and witnesses' statements to the plaint were reflective of the key issues before court. The defendants were able to decipher the pleadings and specifically replied to the plaintiff's claim based on fraud, compulsory acquisition and or illegality.
29. The major complaint by the plaintiff is that her land was compulsorily acquired without notice by the 1<sup>st</sup>-3<sup>rd</sup> defendants in favour of the 4<sup>th</sup> defendant who thereafter re-planned, re-surveyed and re-allocated the same to third parties, without compensation, notification and in breach of her right to land ownership.
30. In support of the claim, the plaintiff produced a copy of the title deed as P. Exh No. (1); copy of the green card as P. Exh No. (2) showing the entry of compulsory acquisition on 18.5.1977; letter dated 18.1.1990 from the 3<sup>rd</sup> defendant acknowledging that no compensation for the land was paid and explaining that arrangements were being made to de-gazette the land to revert to her; letter dated 18.7.2000 from the 4<sup>th</sup> defendant confirming that the defunct County Council of Meru was no longer interested in her land and that being the reason, no compensation was paid for her land; a letter dated 11.2.2014 from the 4<sup>th</sup> defendant county executive member for land, environment and physical planning indicating that the suit land was degazetted on 18.7.2000 but the subsequent owner was yet to take vacant possession and lastly; the area maps and a letter to the 1<sup>st</sup> defendant dated 8.8.2018. All these were produced and marked as P. Exh No. 1-7 respectively.
31. In the defences filed by the defendants, none addressed themselves on whether the plaintiff was notified, involved, compensated and or participated in the compulsory acquisition process of the suit land culminating into the repossession of the land by the 4<sup>th</sup> defendant and the re-planning, re-surveying and re-allocation to third parties.
32. The defendants in cross-examination failed to object to the complaints by the plaintiff dated 8.8.2018, which referred to the letters dated 18.1.1990 and 18.7.1990, by the town clerk, admitting that the plaintiff's land was not compensated for and stating that the suit land was no longer necessary for the use by the 4<sup>th</sup> defendant.
33. These letters by the 4<sup>th</sup> defendant created a legitimate expectation on the part of the plaintiff that the land was going to revert to her. Further, the plaintiff raised issues bordering on criminality on the part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the manner the suit land became LR No. 302 and was subdivided into L.R Nos. 882 & 883 by the 4<sup>th</sup> defendant, alongside the 2<sup>nd</sup>-3<sup>rd</sup> defendants.
34. The plaintiff had also sought to be supplied with certain public documents namely Plan No. M. 167/85/5 and M 167/87/1, allegedly approved by the defunct Commissioner of Lands as well as Meru Municipal No. 108/3/24/1 in order for her to verify the alleged re-planning.
35. The defendants in their respective pleadings went silent on these crucial documents and never filed them alongside the pleadings in support of their defences that there was the doctrine of legality and presumption of legality by the 2<sup>nd</sup>-3<sup>rd</sup> defendants in the manner that they undertook their statutory mandate.
36. In the case of *Ocean View Plaza Ltd vs A. G* (2002) eKLR, the court observed that compulsory acquisition would be the only lawful way of taking a piece of land and could only defeat the rights of a lawful owner if done lawfully under the Land Acquisition Act now repealed. Further, in *Power*



- Technics Ltd vs Attorney General & others (2012) eKLR the court held where the property was acquired unlawfully, the unlawful act must be legally established.
37. In the case of A.G vs Zinji Ltd (2021) eKLR, the court held that compulsory acquisition commences with a requisite notice to the interested parties, for a public purpose, followed with prompt compensation, which are mandatory processes, in absence of which, any title deed issued in violation of the owners right would be against Article 40 (3) (a) and (b) of [the Constitution](#).
  38. The defendants have averred that the suit land was acquired under the Land Acquisition Act (Cap 295) (repealed), in 1997. Section 33 (a) of Cap 295 required that a notice be served upon the affected party, either personally or through registered post to the last known address, or upon reasonable inquiry to ascertain the whereabouts or through the occupier of the land, after a gazettement of the notice under Section 9 (1) thereof.
  39. In Commissioner of Land vs Coastal Aquaculture Ltd C.A 256/1996, the court said that unless the notice of the acquisition reflected the necessary ingredients to the certificate, the person interested in the land had no means of knowing. The court also held that a notice under Section 6 of Cap 295 had to disclose the name of the public body and the purpose to which it was acquiring the land.
  40. In the case of Mathatani Ltd vs Commissioner of land & 5 others (2013) eKLR, at issue was whether the petitioner had been served with a notice under Section 3 of Cap 295, to compulsorily acquire its land. The court held that the gazette notice had failed to state the registered owner and hence the same was invalid. Therefore, the court reached a conclusion that the petitioners rights to lawful and administrative action, access to information and land ownership had been violated.
  41. In the case of Elizabeth Wambui Githinji & 29 others -V-KURA & 4 others (2019) eKLR, the court said that other than the gazette notice of the intention to acquire land , the notice of inquiry and the initial survey under Part I of the Land Acquisition Act, which were ordinarily known as the preliminaries to the acquisition, Section 17 of the Act required that the Commissioner of Lands to conduct a final survey so as to ascertain the exact particulars of the land to be acquired, mark out and measure the land under Section 7, prepare a plan and put survey marks under Section 17 of the [Survey Act](#), where after the land registrar was required to cause an entry of that fact in the register recording the acquisition.
  42. Further, the court said that after the government had made an award to compensate the owners of the land acquired, it was required to take possession of the land by serving on every person interested in the land, a notice that on a specified day which would not be later than 60 days after the award had been made, possession of the land and the title to the land would vest in the government under Sections 19 (1) of the Act.
  43. Additionally, the court observed that upon taking possession of land, the Commissioner had to serve upon the registered proprietor of the land and the Land Registrar a notice to the effect that possession of the land had been taken and that the land was now vested in the government. The court said that through the possession, the interest of the public body in whose favor the land was being acquired, was safeguarded and the attention of the general public drawn to the fact that the land was no longer available for alienation.
  44. In this suit, the defendants failed to demonstrate in their defences and or through supporting documents that the plaintiff and the suit land was subjected to the above legal regime before the government took possession on behalf of the 4<sup>th</sup> defendant. No final survey plans or notices to surrender of the original title documents were served upon the plaintiff were and or produced before this court to show that the plaintiff's late mother took part in the acquisition process. No evidence



- was tendered by the defendants to prove that the plaintiff was also compensated for the compulsorily acquired land.
45. The process of compulsory acquisition has to be scrupulously and strictly done as per *the Constitution* and the law as was stated in *Virenda Ramji Gudka & 3 others vs AG*, (2014) eKLR *Mutuma Angaine vs M'Marete M'Muronga...* (2011) eKLR. Tittle deeds which have been issued or acquired out of a faulty process cannot find validity or sanctity under the law as was held in *Chemey Investment Ltd vs AG and 2 others* (2018) eKLR. Such an allottee or title holder cannot be bonafide owner to such land.
  46. As regards the plea of limitation of the claim and legality of the process as raised by the defendants, the court in *Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others* (2018 eKLR) held that, there was a rebuttable presumption of legality or regularity on the part of the government officers as they lawfully execute their lawful duties. The court held that a party cannot plead estoppel, acquiescence or limitation of time in matters regarding a breach of constitutional rights. In this suit, the defendants failed to avail any material or evidence in support of their defences, which remain mere facts lacking support.
  47. On the issue of the role of National Land Commission as raised by the 1<sup>st</sup> – 3<sup>rd</sup> defendants in cross examination, the court in *Tirop* (Supra) held that the jurisdiction of an Environment and Land Court was not ousted by both *the Constitution* and the *National Land Commission Act* to deal with present and historical injustices based on alleged fraud or breach of constitutional rights. The court also held that it was a petitioner's sole right to identify a cause of action, draft the claim and pleadings and that it was not open for the opposite party to say that the claim should have been drafted this way or that way.
  48. In the case of *Mutuma Angaine* (Supra), at issue was whether the land had been compulsorily acquired, compensation paid and lawfully allocated to a third party. The court made a finding that there was non-compliance with Sections 6 & 19 of the Land Acquisition Act hence the land had never been compulsorily acquired or compensated for. On the questions on non-joinder of the current owners of the land and legality of the process, the court held it was the duty of a party to call its witness and that the burden lies on he who alleges illegality to prove, since there was a presumption of legality and formality as captured in maxim 'omnia rite gita preasumatur'.
  49. Applying the foregoing caselaw and principles to the present facts, some of which have been admitted by the defendants and were not challenged by way of oral or documentary evidence, I find that the plaintiff has proved the suit on a balance of probability. This court in exercise of its powers under Section 80 of the *Land Registration Act* finds that the acquisition, transfer, registration, re-survey and re-planning by the defendants over the suit land was un-procedural, irregular, unlawfully undertaken and therefore unconstitutional to the rights of the plaintiff.
  50. The same processes are hereby invalidated. Any resultant title deed issued and registered by the 2<sup>nd</sup> -3<sup>rd</sup> defendants or acquired by the 4<sup>th</sup> defendant are hereby cancelled. The suit land shall revert to the names of the estate of the late Anita Nkaimura M'Mutungi to be dealt otherwise under law of succession. Costs to the plaintiff.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19<sup>TH</sup> DAY OF APRIL, 2023.**

**In presence of:**

**C/A: John Paul**

**Florence Makandi in person**

**Miss Mbakyatta for 1<sup>st</sup> – 3<sup>rd</sup> defendant**



**HON. C.K. NZILI**  
**ELC JUDGE**

