



Shah & another v Nakuru County Government & 11 others (Environment & Land Case 88 of 2019) [2023] KEELC 17593 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 88 OF 2019**

FM NJOROGE, J

MAY 29, 2023

BETWEEN

TSANDRAKANT VIRCHAND SHAH 1ST PLAINTIFF

KAMLESH VIRCHAND SHAH 2ND PLAINTIFF

AND

NAKURU COUNTY GOVERNMENT 1ST DEFENDANT

WILSON WACHIRA MWANGI 2ND DEFENDANT

MAINA NYAITUGA 3RD DEFENDANT

SIMON NJUGUNA 4TH DEFENDANT

LABAN NANZUSHI 5TH DEFENDANT

JOHN MUTHONI 6TH DEFENDANT

DENNIS NJOROGE 7TH DEFENDANT

KENNEDY MAINA 8TH DEFENDANT

FRANCIS WAITITU 9TH DEFENDANT

JACKLINE CHEGE 10TH DEFENDANT

JOYCE WANJIRU 11TH DEFENDANT

ERICK MBURU 12TH DEFENDANT

JUDGMENT

1. The plaintiffs filed the plaint dated July 29, 2019 that was amended on January 29, 2021 where they sought the following prayers:



- a. General damages for trespass.
 - b. A permanent injunction restraining the defendants, by themselves, their officers, servants, agents and any other persons acting under their directions, from entering, remaining thereon, interfering with the plaintiffs' ownership and possession of all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.
 - c. A permanent injunction restraining the defendants their officers, servants, agents and any other persons acting under their direction from; convening, disseminating, participating or inviting participation, any process intended for the entry, remaining thereon, interference of the plaintiffs' ownership and possession of all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.
 - d. A declaration that the plaintiffs have clean title to the suit property.
 - e. Special damages of Kshs 1,700,587.84 being the cost of reconstructing the perimeter wall.
 - f. Costs of this suit.
 - g. Interest on (a) and (e)above.
 - h. Any other further relief as this honorable court deems fit to grant.
2. The plaintiffs averred that they are the registered owners of parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65. They also averred that on 19/08/2018, the defendants unlawfully destroyed the perimeter wall surrounding the suit properties and thereby planned to interfere with the proprietary rights of the plaintiffs. On 9/07/2019 the first defendant convened a meeting designated as a public baraza that was held at Menengai Teachers Social Hall in Nakuru. One of the agenda items at the meeting was the issue of 'markets'. The second defendant being a member of County Assembly for Menengai East Ward Nakuru stated that the suit property was intended for the upcoming 'New Menengai Market'. The third, fourth and fifth defendants were administrators of the 'Menengai Bunge' WhatsApp group where they disseminated information by what they called live pictures and discussions from the meeting. On July 11, 2019 at 8:57 PM the 1st defendant in its official Facebook page "Nakuru County Government – Official" posted a summary of the minutes of the meeting held on July 9, 2019 where it was stated that 24 acres of public land that had been grabbed had been repossessed and would be used to set up public utilities including a market. On July 12, 2019, the defendants entered the suit property alleging that it was public property until they were evicted by the police. On July 22, 2019 the defendants again entered the suit property claiming that it was public land. The seventh to twelfth defendants mentioned the 2nd plaintiff and claimed that he had grabbed public land and that they would occupy the suit property forcefully and set up a market. The 5th and 6th defendants also claimed that the suit property was public land and that the plaintiffs stand to suffer substantial loss and damage if the defendants are not restrained from interfering with their peaceful possession. The plaintiffs averred that the cost of repairing the destroyed wall was Kshs 1,700,587.84 based on a quotation by MBA Construction Limited.
 3. Midway in the proceedings all the claims against the other defendants except the 1st and 6th defendants were withdrawn. The present proceedings are therefore only between the plaintiffs and the 1st defendant and there is no need therefore to address the documents that had been filed by the other defendants.



The 1st Defendant's Defence.

4. The 1st defendant filed its statement of defence dated March 12, 2021 on the same date. It stated that it held a public baraza but it denied that it authorized any of its agents to enter the suit property. The 1st defendant averred that land reference number 12570/188 was reserved for a service station and that the plaintiffs unlawfully procured the title; that land reference number 12570/188 formed part of public utility plots that were surrendered from original farm lands between the years 1970 and 1980. The 1st defendant also averred that LR No's 12570/183, 12570/184, 12570/185, 12570/186, 12570/187, 12570/188, 12570/189, 12783/38 and 13542/80 were to be surrendered as public utility plots. The 1st defendant also averred that despite the plaintiffs knowing that Land reference number 12570/188 was public land, they fenced it off. The 1st defendant stated that the said land should be relinquished to serve the public purpose it was to serve and prayed that the plaintiffs' suit be dismissed with costs.

The 6th defendant's defence

5. The 6th defendant filed his statement of defence dated March 8, 2021 where he denied all the averments in the plaint and sought that the plaintiffs' suit be dismissed with costs.

Plaintiffs' Evidence

6. Tsandrakant Virchand Shah testified as PW1. He relied on his witness statement dated July 28, 2019 as part of his evidence-in-chief as well as, the bundle of documents filed on July 29, 2019 and a further affidavit sworn on 9/12/2019. In PW1's witness statement, he stated that he and his brother are the registered owners of Land Reference Numbers 12570/188, 12570/64 and 12570/65. He also stated that they bought the said properties in the year 1988 after subdivision of a large parcel of land owned by Nageria Estates Limited owned by their maternal uncles. He further stated that they have enjoyed peaceful possession until the year 2019 when the property was invaded. The dates upon which the invasion occurred were July 12, 2019 and July 22, 2019. He stated that he was called by one of his neighbors who informed him that a group of around 300 people had entered the suit properties and claimed that it was public land and that they wanted to put up market stalls. He also stated that he had earlier read a message on social media stating that on July 9, 2019 a public meeting was to be held at Menengai Teachers Social Hall where officials of the County Government indicated that they were going to put up market stalls in the plot next to Nakuru Mediheal Hospital. He reported to the police who upon arriving on the suit properties dispersed the crowd. On July 22, 2019 a similar incident took place and the people in the mob claimed that they wanted their land back. He reported to the authorities and the mob was dispersed and that the said incidents have led him and his family to fear for their safety. He concluded his statement by indicating that he wishes that the illegal actions of invasion and trespass be stopped so that they can live in peace.
7. Upon cross-examination by Ms. Litunda, PW1 stated that he produced the titles to the suit properties. He also stated that IR No 45577 is about 4 acres and that he had bought three plots from Nageria Estates Ltd. He said that the land was family property which he bought from his uncle and that LR No 12570/88 was reserved for a service station but was not a public utility. He confirmed that he never attended any public baraza and that he was also not present in the year 2018 when the chairman of NLC visited the land. He reiterated that the whole land is private land and that a wall had been destroyed. He confirmed that PExh.10(a) was addressed to Nakuru Industries and that he does not know why they wrote to the National Land Commission about his property in the year 1988. He admitted that apart from the receipt dated 27/3/2019, he had nothing to show that he has been paying land rates; that PExh.10(c) was the reply to application for approval of perimeter wall and that it has condition No 2



- stating the plot should not form part of any public utility; that the letter produced as PExh.10(g) was from the County Government of Nakuru to the Chief Officer Nakuru while the letter produced as PExh.10(h) was addressed to County Secretary and that neither of the said letters was addressed to him.
8. Upon cross-examination by Mr. Laban, PW1 admitted that he could not tell whether he was in any of the pictures he had produced and also admitted that he did not know whether the meeting that had been convened was legal or illegal. PW1 averred that Mr. Laban was present on the land on both July 12, 2019 and July 22, 2019.
 9. Upon cross-examination by the 6th defendant, he admitted that he had never seen him before and neither was he in the pictures that he had produced in court. He admitted that he did not know whether he attended the meeting at Menengai as all the information he had, he obtained from social media.
 10. Upon re-examination, PW1 averred that he had a valid title for the two parcels and that his ownership has not been challenged by anyone. He also stated that a service station is a business and the property user can be changed. He stated that he does not know how Nakuru Industries obtained PExh.10(a) and that PExh.10(b) referred to by the plaintiffs and that PExh.10(j) was evidence of approval of development permission.
 11. On February 2, 2022 the suit against the 5th defendant was withdrawn with no order as to costs and subsequently the suit against the 4th defendant was also withdrawn.
 12. Hansal Shah testified as PW2. He adopted his witness statement filed on 2/2/2021 as his evidence-in-chief and produced the documents in his bundle attached to the supplementary list dated 29/1/2021 together with the CCTV footage. They were marked as PExh.11(a) – (c).
 13. In his witness statement, PW2 stated that on 19/08/2018 the defendants unlawfully entered suit properties and destroyed a perimeter wall which incident was captured by CCTV camera whose video recording he produced. He also stated that at the time of the incident he was in Nairobi but he travelled the next day on August 20, 2018 to Nakuru to take stock of the damage caused. He further stated that he took pictures of the said damage of the perimeter wall which made it easier for the defendants to re-invade the suit property on July 12, 2019 and July 22, 2019. He stated that there is need to reconstruct the wall and so they received a quotation for the reconstruction of the perimeter wall from MBA Construction Limited.
 14. Upon cross-examination he confirmed that he was specialized in Computer Science and Business Studies but failed to produce his degree certificates. He also confirmed that he was able to verify from the video footage that the attack occurred but he could not verify that the attackers were from the 1st defendant. He reiterated that he went to the property a day after the attack but he did not engage the people he found there. He admitted that the quotation he exhibited was in respect of three properties while the suit relates to just one property.
 15. Upon re-examination, he stated that all the three properties were attacked and that the wall covered the three properties and if it was to be rebuilt, then it would cover the three properties. The plaintiff's case was then closed at this juncture.
 16. Justine Mayaka Nyaroo testified as DW1. He stated that he was a physical planner working with the County Government of Nakuru and adopted his witness statement dated 12/3/2021 as part of his evidence. He produced the documents attached to the list dated 12/3/2021 which were marked as DExh.1 – 3. It was his evidence that the suit property is public land as per the letter written by the defunct Municipal Council of Nakuru dated October 18, 2005. It was also his evidence that the initial owner was Nakuru Industries Ltd who surrendered public utilities plots to be used as service



stations. He testified that a service station is where services would be offered to the community who would settle within the area after subdivision. When referred to PExh.10(d) he admitted that it was approval for development which is on condition that the property is not public property. The approval was given in 2013 and could be withdrawn at any time. When he was referred to DExh.3 he stated that the National Land Commission highlighted the suit land as a public utility in the letter dated 2/10/2018. He admitted that they did not receive PExh.10 as it was not copied to them and stated that they were not involved in the demolition of the wall as there are standard procedures that are to be followed.

17. Upon cross-examination, he confirmed that proof of ownership is through a title which has to be authenticated. He was referred to PExh.1 and he confirmed that it is a title for LR 12570/188 that was issued on 16/8/1988; that PExh.4(a), was authenticated by the Registrar on 12/7/2019. Regarding DExh.2, he stated that a “service station” is not a “petrol station” and that it is for common services to the public. He admitted that DExh.3 is dated 2/10/2018 and authored by the County Coordinator NLC – Kibelekenya; that the said letter indicated that the parcels were to be surrendered for public use. Regarding PExh.10(a) he stated that it referred to the letter dated 2/10/2018 which stated that the inclusion of the properties among public utilities was erroneous. When he was referred to PExh.10(d) he admitted that they couldn’t grant approval if there was evidence that it was a public utility.
18. Upon re-examination, he stated that it was not his mandate to authenticate the title and that records of public utilities are with the National Land Commission. He also stated that PExh.10(a) was not copied to the Nakuru County Government and as per DExh-2, they have commenced the process to recover the public utility land. The defendants case was then marked as closed.

Submissions

19. The plaintiffs filed their submissions dated February 27, 2023 on the same date while the 1st defendant filed its submissions dated March 21, 2023 on the same date. The plaintiffs in their submissions identified the following issues for determination:
 - a. Whether the plaintiffs are the proprietors of LR No 12570/188;
 - b. Whether the defendants (other than the 5th and 6th defendants) are liable for trespass on and damage to the plaintiffs’ property; and
 - c. What remedies, if any, the plaintiffs are entitled to.
20. On the first issue, the plaintiffs submitted that their ownership of the suit property is not disputed even though the 1st defendant claimed that LR No 12570/188 is a public utility plot. The plaintiffs relied on Section 26 of the *Land Registration Act*, the case of *Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR and submitted that the defendants have not produced any evidence to show that they acquired the certificate of title issued in the year 1988 unprocedurally. The plaintiffs then delved in depth on the documents that were produced during the hearing and submitted that they have proved that they are the owners of the suit properties and that the defendants did not produce any credible evidence to defeat their title.
21. On the second issue, the plaintiffs relied on Order 2 Rule 10(1)(a) of the *Civil Procedure Rules* and submitted that the defendants did not plead particulars of fraud in the acquisition of the suit property and that the 1st defendant merely alleged that the property was a “public utility land”. The plaintiffs relied on Article 40(2) of the *Constitution of Kenya*, the cases of *Republic v Land Registrar Taita Taveta District & another* [2015] eKLR, *Charles Munge v Nairobi City County Government & 3 Others* [2022]



- eKLR and reiterated that there is no evidence to support the defendant's allegations that the plaintiffs acquired the suit property illegally.
22. The plaintiffs then reiterated their averments in the plaint, relied on Section 3(1) of the *Trespass Act*, the case of *Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] and submitted that the defendants trespassed onto the suit properties and so they sought that the prayers sought in the plaint be granted. On the claim for general damages for trespass, the plaintiffs relied on among other cases, the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR and sought that they be granted Kshs15,000,000/=. The plaintiffs also sought that that the court makes a declaration that the plaintiffs have a clean title to the suit property, issue a permanent injunction, special damages in the sum of Kshs 1,700,587.84/= and costs of the suit.
23. The 1st defendant in its submissions identified the following issues for determination:
- a. Whether an order of permanent injunction should issue;
 - b. Whether the plaintiffs are entitled to damages;
 - c. Whether a declaration that the plaintiffs have clean title to the suit property should issue;
 - d. Who should bear the costs of the suit.
24. On the first issue, the 1st defendant relied on the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR and submitted that DEXh.2 shows that the suit property was among the properties that were set aside for public utilities. The 1st defendant also submitted that its witness confirmed that the suit property had been set aside for public utilities and relied on the case of *Adan Abdirabani Hassan & 2 Others v Registrar of Titles, Ministry of Lands & 2 Others* [2013] eKLR before submitting that courts are quick to protect public interest where there is evidence that public land has been reserved for a specified public purpose. The 1st defendant also submitted that if the plaintiffs acquired the suit property they ought to have followed the due process and relied on Article 62(4) of the Constitution of Kenya.
25. On the second issue, the 1st defendant relied on the case of *Entick v Carrington* [1965] and submitted that it was the plaintiffs' evidence that they could not identify the people who trespassed onto the suit properties to be persons from the County Government of Nakuru. The 1st defendant also submitted that it did not instruct anyone to demolish the wall and the plaintiffs should therefore claim for special damages on the persons they identified to have demolished the wall.
26. On the third issue, the 1st defendant submitted that the law dictates that any property acquired through fraudulent means can be challenged and revoked. It relied on Article 40(6) of the *Constitution*, Section 26(1) of the *Land Registration Act*, the case of *Pharis Ndung'u Chege & 4 Others v Attorney General & 4 Others* [2018] eKLR among other cases and reiterated that its witness had indicated that the suit property had been set aside as a service station for the benefit of the community. The 1st defendant concluded its submissions by relying on Section 27(1) of the *Civil Procedure Act* and submitted that the plaintiffs suit should be dismissed and costs awarded to it.

Analysis and determination

27. Apart from the 1st, 5th and 6th defendants, the other defendants did not enter appearance. During the course of the hearing the suit against the 4th and 5th Defendants was withdrawn leaving all the other defendants in the suit. It must be remembered that the 1st defendant is a County Government established under the provisions of Article 176 of the *Constitution of Kenya 2010* which provides that there shall be a county government for each county, consisting of a County Assembly and a County



Executive. The multiple functions of the county government are set out in the 4th schedule to the constitution and they include markets. I have referred to the functions of county governments because the plaintiffs' claim to title over the suit property can not be divorced from the 1st defendant's claim that the suit land is public land. It would appear that there is a simmering dispute as to whether the suit land has been set aside as a service plot. Allegations that have arisen in the present proceedings that the suit land is being sought for the purpose of establishment of a public market. From the exhibits presented to court in evidence by the 1st defendant and the plaintiffs themselves, it is quite clear that the issue of illegal and irregular acquisition by private entities and individuals of public land reserved for public utilities including markets in the Nakuru east ward is a live issue. Dispensaries, residential houses for Nakuru county council, water reservoirs, markets, waste disposal, bus parks and water tanks.

28. The plaintiffs have presented their evidence of certificates of title to the suit land as well as official searches. The 1st defendant on the other hand, argues that Land Reference Number 12570/188 was set aside as public land upon surrender by Nakuru Industries and was to be used as a service station. The 1st defendant defines a Service station to be a parcel of land where services would be issued to the community that would settle within the area after subdivision; it states that that term does not refer to a petrol station.
29. When a title is challenged as irregularly acquired, it is for the holder thereof to demonstrate that the process vide which they acquired it was legal and proper as it is only him who has interest in it and who can demonstrate by way of evidence in an adversarial case as to how he obtained it. Some time ago in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR it was held as follows:

“Under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the respondent acquired title to the suit property is a fact within the personal knowledge of the respondent and it was incumbent upon the respondent to dislodge the notion that their deceased father was beneficial owner of the suit property and to explain how he appellant came to be in possession of a portion of the property.”

30. In the case of *Elizabeth Wambui Gitinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR it was held as follows:

“It is only those titles that are capable of being protected under Article 40 that cannot be taken away except in accordance with the Constitution and the law.”

31. Article 40 of the *Constitution* provides as follows:

“40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—



- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

.....

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

32. That would mean that where title is tainted with illegality it can not be protected. These provisions inform the position that where a title has been challenged as illegally or irregularly issued then the holder is expected to establish that he or she obtained the title legally.

33. This court can not shut its eyes to the list in DExh.1 and DExh.3 and especially the contents of DExh.3 which state as follows:

“All the parcels above (including the suit land) are under Nakuru Industries Limited and were supposed to have been surrendered for public use as indicated against each parcel.”

34. From the above letter written by the County Coordinator for Nakuru County, it would appear that the plaintiffs however never bothered to demonstrate by way of evidence at the hearing how they acquired the title to the suit land. The evidence of the plaintiffs leaves a lot to be desired regarding the issue of whether they should be declared to be having clean title to the land in this case where such prayers are sought. There is no evidence of what survey exercise gave rise to the suit land and the surrenders that resulted from any subdivision that gave rise to it. Though the land is alleged to have been purchased from the plaintiff’s uncles, no transfers were exhibited, and it is not shown that all the proper procedures for its acquisition were followed, yet all those records must be somewhere.

35. It is not surprising to discover that a title which is under challenge can yield an official search that mirrors its exact contents. It is not disputed that the plaintiffs’ names appear in the registered purportedly as owners of the suit properties. However, it is also not disputed by the plaintiffs that Land Reference Number 12570/188 falls under the category of a “service plot”. During the hearing, the 1st defendant in its evidence focused on Land reference number 12570/188 and no other though it later emerged that the perimeter wall had extended to others. While the 1st defendant denied that it had authorized the demolition of the plaintiffs’ perimeter wall, the plaintiffs admitted that they cannot tell whether the persons whose images were captured in the CCTV footage that shows the act of demolition of the wall that happened on August 19, 2018 were agents of the 1st defendant.

36. In the circumstances of this case where the suit land is claimed to be for public use and the plaintiffs have conceded that it is a “service plot”, a mere official search at the land registry is insufficient to establish the root of title, or that the title document bearing the plaintiffs’ names was properly acquired. More is needed. The Court of Appeal in the Munyu Maina case (supra) proceeded to state further as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that



is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

37. As aforesaid, the plaintiffs' case is that they are the registered owners of Land Reference Numbers 12570/188, 12570/64 and 12570/65. They aver that the defendants trespassed onto the said properties without any colour of right and demolished the wall that had been put up while claiming that it was public land. The Plaintiffs sought that the court awards them general damages for trespass, issues an injunction restraining them from interfering with their ownership and possession of the suit properties, issues a declaration that they have a clean title to the suit property and awards them special damages of Kshs 1,700,587.84 being the cost of reconstruction of the wall together with the costs of the suit.
38. There is no doubt that there was a wall constructed around the suit premises and there is photographic evidence showing that the wall was partially demolished. The 1st defendant denies that was involved in the demolition of the plaintiffs wall. Nevertheless, in the circumstance outlined above where proof of clean title was not established, this court finds that the plaintiffs are unable to recover anything. In any event, even the plaintiffs in their evidence conceded that they could not link any of the persons involved in the said demolition to the office of the 1st defendant. Consequently, even if proof of clean title had been presented, damages for the destruction of the wall could not be recovered by the plaintiffs from the 1st defendant or the rest of the defendants.
39. On whether the court can issue a declaration that the plaintiffs have a clean title to the suit property, it is not disputed by the plaintiffs that the suit property is a service plot and the court cannot make such a declaration given the plaintiffs' admission.
40. The plaintiffs are seeking general damages for trespass. It is my view that trespass on the suit property is predicated upon proof that the plaintiffs owned the land. The plaintiffs also failed to prove that it was the defendants who had trespassed on the suit property. A permanent injunction then cannot issue in the circumstances against the defendants as sought.
41. As I have found as above that the plaintiffs have not established in the current suit that the title to the suit land was properly acquired, it is my view that the plaintiffs have not laid basis for the grant of the said orders sought in their amended plaint. Consequently, the plaintiffs have failed to prove their case on a balance of probabilities and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 29TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

