



**Aden & 2 others v Telkom (K) Limited & 3 others (Environment & Land  
Case 746 of 2017) [2023] KEELC 18360 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18360 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 746 OF 2017**

**MN KULLOW, J**

**MAY 25, 2023**

**BETWEEN**

**OMAR MARWAB ADEN ..... 1<sup>ST</sup> PLAINTIFF**

**LUCIA MATINDE ..... 2<sup>ND</sup> PLAINTIFF**

**THOMAS MARWA NYAMOHANGA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TELKOM (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER FOR LANDS ..... 3<sup>RD</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF KEHANCHA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein commenced this suit by way of a Plaint dated 25.01.2005 and Amended on 13<sup>th</sup> November, 2007 against the Defendants; seeking the following Orders: -
  - i. A declaration that the acquisition by the 1<sup>st</sup> Defendant of the Plaintiffs' parcel Nos. Bukira/ Buhirimonono/1987, 1988, 446 and 419 is unlawful and illegal.
  - ii. A declaration that the survey, demarcation, physical planning and subsequent registration as Parcel No. Isebania Market/37 is illegal and unlawful.
  - iii. An order directing the District Land Registrar Kuria to cancel the registration of Land Parcel No. Isebania Market/ 37.



- iv. A Permanent Injunction restraining the 1<sup>st</sup> Defendant, its servants, agents or anybody under its directions from entering, fencing, evicting or in any manner whatsoever interfering with all those parcels of land Nos. Bukira/ Buhirimono/ 1987, 1988, 446 & 419.
- v. Costs of this suit.
- vi. Interest on costs.
- vii. Any other relief this Honourable Court may deem fit to grant in the circumstances.

### **Plaintiffs' Case**

2. The Plaintiffs aver that at all material times relevant to the suit, they were the registered owner of suit parcel Nos. Bukira/ Buhirimono/ 1987, 1988, 446 and 419 respectively.
3. It is their claim that sometimes on 24/01/2005; the 1<sup>st</sup> Defendant without notice, unlawfully entered into their parcels and started fencing the same using a chain link wire, forcefully threatened to evict them and demolish any developments thereon. The 1<sup>st</sup> defendant's reasons for the forceful entry was that the said parcels had been alienated and allocated to it on 19/03/2003 through the 4<sup>th</sup> defendant and was now referred to as Isebania Township/ 37. It was further their contention that the 4<sup>th</sup> defendant had drawn plans and surveys and set apart the suit parcels for use by the 1<sup>st</sup> defendant.
4. The Plaintiffs now contend that the 1<sup>st</sup> defendant cannot lawfully acquire a lease title to their parcels of land and maintained that the whole process through which the defendants acquired the suit parcels was unlawful and fraudulent and they outlined the particulars of fraud thereof.
5. Matter proceeded for the Plaintiff's case on 16/6/2011. The 1<sup>st</sup> plaintiff testified as PW1. It was his testimony that he was allocated land by the then local council, South Nyanza County Council at Nyamohanga Market Plot No. 2 (previously known as plot no. 15), vide minute No. 23/76 of 25/05 and 20/07/1976. He was thereafter issued with an allotment letter and he has since developed the said plot by building permanent commercial building. In addition, he has been paying rates to the Kehancha Municipal Council yearly in respect to the said plot.
6. His claim against the 1<sup>st</sup> defendant was that sometimes on 24/1/2005, the 1<sup>st</sup> defendant entered his parcel of land and fenced it off, claiming the plot to be theirs and relied on a certificate of lease as proof of the proprietorship thereof. The said certificate of lease showed that the 1<sup>st</sup> defendant's plot was No. Isebania Town/ 37 and which encompassed his plot and several other plots.
7. Even though he confirmed that his plot No. 2 (previously no. 15) was included in the part development plan for Isebania town and fell within section 42 which was reserved/ earmarked for the Post Office, it was his contention that by the time the part development plan was being drawn, he already had developments on his plot, hence the need for compensation before the construction of the Post Office. In conclusion he maintained that the 1<sup>st</sup> defendant should compensate him if they want his land. He marked the documents he wished to rely on as PMFI 1-9 which he later produced as exhibits in further support of his claim.
8. On cross-examination by counsel for the 1<sup>st</sup> defendant, he confirmed that Isebania Town/37 was purportedly leased to the 1<sup>st</sup> defendant but they have never taken possession because they (plaintiffs) are still in occupation of the plot despite the 1<sup>st</sup> defendant fencing off the said land.
9. When cross-examined by counsel for the 4<sup>th</sup> defendant, it was his testimony that the building plan marked as PMFI 3 was signed by the Ministry of Housing and the Part Development Plan was approved



- by the Commissioner of Lands. He however conceded that he had not applied for title deed since the Municipal Council do not issue titles but reiterated that he has been paying all the land rates.
10. The 3<sup>rd</sup> plaintiff testified as PW2, he produced the grant of representation in relation to the estate of his late father Samuel Marwa Nyamohanga as Pexh. 1. He stated that his father owned plot Nos.12,14(currently plot no. 1),68A and 74, which were all allocated to him by the then South Nyanza County Council. It was also his testimony that he has been paying rates and rent to the Kehancha Municipal Council over the years.
  11. It was his claim that the 1<sup>st</sup> defendant entered into his parcels on 24/01/2005 and fenced off the said plots on allegation that the said parcels belonged to them. That despite his plots being part of the parcels earmarked for the Post Office, he stated that he had never received any compensation for the 2 plots; No. 12 and 14 (currently No. 1).
  12. Further, it was his testimony that by the time the plot was allocated to the 1<sup>st</sup> defendant and a Certificate of Lease issued to that effect, they had already developed their respective parcels. He thus urged the court to direct that they be compensated for the said plots according to the constitution and in the alternative they be allowed to remain in their plots.
  13. He produced the Plot Card for Plot No. 12, which was allocated to his father on 03/03/1970 as Pexh. 2, receipt dated 7/12/1998 in respect to Plot No.14 as Pexh. 3, Building Plan for plot No. 12 as Pexh. 4, Building Plan for Plot No. 1 as Pexh. 5, Certificate of Compliance as Pexh. 6, Demand Notice for Plot No. 1 dated 5/1/2010 as Pexh. 7 and copy of receipt dated 24/2/2011 as Pexh. 8 in further support of his case.
  14. On cross-examination by counsel for the 1<sup>st</sup> defendant, he reiterated that his father was legally allocated the suit plots by the then South Nyanza County Council and was therefore entitled to occupy and use the land. He further argued that if the right procedure including compensation had been followed then he would have no complaint against the defendants.
  15. When cross-examined by counsel for the 4<sup>th</sup> defendant; he reiterated that they occupy government land and he is aware that government can do anything with land upon following the laid out procedures. He maintained that having been compensated for Plot No. 68A and 74, his claim remained on Plot No. 1 and 12.
  16. Chamberi Mwita testified as PW3, it was his testimony that he has title deeds for L.R. No. Bukira/ Buhirimonono/ 2278 which he produced as Pexh. 12 and No. 1987 which he produced as Pexh. 13. It was his claim that the 1<sup>st</sup> defendant entered the said parcels sometimes in January 2005 and fenced off and upon inquiry, the 1<sup>st</sup> defendant's officials claimed that the said parcel of lands belonged to them. He however stated that he has never been compensated for the two parcels of land and urged the court to grant the orders sought in the plaint.
  17. On cross-examination by counsel for the 1<sup>st</sup> defendant, he reiterated that despite being the registered proprietor of parcels Nos. 2278 and 1987 and holder of title deed thereto, the 1<sup>st</sup> Defendant invaded the suit land and begun developing the same, fenced the land and stopped his developments.
  18. On cross-examination by counsel for the 4<sup>th</sup> defendant, he stated that he had no complaint against the 4<sup>th</sup> defendant.
  19. PW1 was recalled to the stand for purposes of producing the marked documents and he produced MFI 1 - 9 as PExhibits 13- 21 in further support of their case. After the testimony of PW4, the Plaintiffs closed their case.



## 1st Defendant's Case

20. The 1<sup>st</sup> Defendant filed a Statement of Defence and Counter-claim dated 23/02/2005 and Amended on 7<sup>th</sup> December, 2009, wherein they denied the allegations made against it in the Amended Plaintiff, particularly the allegations of fraud. In response to the allegations raised in paragraphs 10 of the Amended Plaintiff, it is its claim that it is the registered proprietor of the leasehold interest in land parcel No. Isebania Township/37 and a Certificate of Lease was issued to that effect on 19/03/2003.
21. The 1<sup>st</sup> defendant thus contends that as a result of the said registration, it has the right to enter and exercise its rights on the said parcel of land and denied plaintiffs' proprietary rights over the said parcel. They further argued that the plaintiffs are in wrongful occupation and possession of the suit land.
22. In its Counter-claim, it was its claim that the plaintiffs have remained in wrongful occupation and possession of its parcel of land No. Isebania Township/37 without its consent. As a result of the said illegal occupation, it urged the court to vacate the plaintiffs from the said parcel and to issue an order of permanent injunction restraining them from the continued occupation, mesne profits and costs of the suit.
23. Godfrey Theuri testified on behalf of the 1<sup>st</sup> Defendant as DW1 on 11/02/2021. It was his testimony that the 1<sup>st</sup> defendant applied for land from the local authority and he was thereafter issued with a lease dated 01/06/2001 and an allotment letter on 21/05/2001. Consequently, they were issued with the Certificate of Lease for Plot No. Isebania Township/ 37 on 19/03/2003. Survey plans were thereafter prepared and which showed the 1<sup>st</sup> defendant's plot marked in red.
24. He further stated that the plaintiffs were not occupants of the land or neighbors thereof and therefore there was no need to issue them with the requisite notices. He maintained that the 1<sup>st</sup> defendant is in full occupation and use of the said property.
25. He also produced the following documents as exhibits in support of their case; Allotment letter dated 21/05/2001 as Dexh. 1, lease dated 01/06/2001 as Dexh. 2, certificate of lease for plot No. Isebania Township/ 37 as Dexh. 3, Survey plans as Dexh. 4.
26. On cross-examination by the plaintiff's counsel, he stated that there was communication with the 4<sup>th</sup> defendant for the purchase of the said parcel in 1982, there was also a letter between the 1<sup>st</sup> defendant and the Commissioner of lands in 1986 and 1987 regarding suit land for public utility. He however conceded that he was not aware if any compensation had been paid in respect of the suit parcels. He also confirmed that the land was allocated to them by the south nyanza county council.
27. Cross- examination by the 4<sup>th</sup> defendant's counsel, he stated that the Application for allotment was approved by the Commissioner of Lands and the same was meant for public use. He maintained that Dexh. 2 is a valid lease and the same has never been challenged on grounds of fraud or the procedure used by the 4<sup>th</sup> defendant in granting the said lease. The 1<sup>st</sup> Defence thereafter closed their case.

## 2nd Defendant's Case

28. The 2<sup>nd</sup> Defendant filed a Statement of Defence dated 23/04/2010, wherein she denied all the allegations made in the Amended Plaintiff and put the plaintiffs to strict proof thereof.
29. It was her contention that that the plaintiffs' suit is bad in law and incompetent for the reason that no intention to sue was served upon them in accordance to section 13A (2) of the [Government Proceedings Act](#) and consequently urged the court to dismiss the same with costs.



#### **4th Defendant's Case**

30. The 4<sup>th</sup> Defendant filed a Statement of Defence dated 04/03/2010, wherein it denied the claims made against it. He particularly denied alienating and giving parts of the plaintiffs' plot to the 1<sup>st</sup> defendant or drawing plans and surveys and put the plaintiffs to strict proof thereof.
31. It was his contention that the acquisition of Plot No. Isebania Market/ 37 was done lawfully and followed the outlined procedure in law. He maintained that the plaintiffs' suit did not disclose any reasonable cause of action and urged the court to strike out the same with costs.
32. Joseph Gesukuta testified on behalf of the 4<sup>th</sup> defendant as DW2 on 16/11/2022; it was his testimony that plot no. 1,2,12 and 13 belongs to the municipal council of Migori and are public property. He stated that the said plots were amalgamated into Isebania Township/ 37 and the same was registered in the name of the 1<sup>st</sup> defendant which is a public entity. The said lease was issued by the Commissioner of Lands.
33. He further stated parcel Nos. 1987, 1988 and 419 do not form part of the amalgamated plot No. 37 but the same also belong to the 1<sup>st</sup> defendant.
34. It was his contention that the plot cards that the plaintiffs possess/ hold are invalid in the face of the lease title that was issued to the 1<sup>st</sup> defendant Telkom Kenya. On the issue of compensation, it was his testimony that the Allottee which is the 1<sup>st</sup> defendant should compensate the plaintiffs for the buildings that are on the suit land.
35. On cross-examination by the plaintiff's counsel; he confirmed that at the time when the amalgamation was taking place to create plot No. 37, there were buildings on the land. It was also his testimony that the government needed the land and hence reserved the right to revoke the earlier allocation. He further confirmed that in the instant case, the amalgamation of plot No. 37 was of plots that had earlier been allocated. He however conceded that he did not have copies of the minutes for the amalgamation. He produced a copy of the Survey Plan as DExh. 4.
36. Upon close of the Defence case; parties were directed to file their final submissions. Both parties filed their rival submissions which I have read and taken into account in arriving at my decision as hereunder;

#### **Analysis and Determination**

37. It is this court's considered view that the following issues arise for determination: -
  - a. Whether the acquisition of the Plot No. Isebania Township/ 37 was lawful and procedural.
  - b. Whether the Plaintiffs are entitled to the reliefs sought.

#### **A. Whether the acquisition of the Plot No. Isebania Township/ 37 was lawful and procedural.**

38. The main issue in dispute in the instant case is the ownership of the suit parcels. The Plaintiffs contend that they are the legal owners/ proprietors of the suit parcels to wit; Plot No. 2, 12, 1, 2278 and 1987 respectively. The 1<sup>st</sup> Defendant on the other hand contends that it is the registered proprietor of the suit lands which were amalgamated to form one parcel No. Isebania Township/ 37.
39. It is common ground that the parcels of land subject to this suit were previously allotted and owned by the Plaintiffs herein. The Plaintiffs adduced in evidence copies of the Plot Cards and title deeds as Pexh. 2 and 14 and copies of the title deed in respect to title No. 2278 and 1987 as Pexh. 12 and 13 respectively. The said title documents have not been challenged by the defendants as having been obtained by way of



fraud, misrepresentation or a corrupt scheme. Therefore, their validity and rights & privileges accruing therefrom remain valid. Further, it is clear from the evidence adduced in support of the rival ownership claims that the Plaintiffs' title documents preceded the Certificate of Lease (Dexh.3) issued to the 1<sup>st</sup> Defendant.

40. The 1<sup>st</sup> Defendant on the other hand maintained that they are the lawful proprietors of the Isebania Market No. 37, that the same was lawfully allotted to them and subsequently a Certificate of Lease was duly issued in their favor and which they produced as Dexh. 3. It was further their contention that the plaintiffs did not challenge the validity of the said Certificate of Lease on grounds of misrepresentation or fraud as provided under section 26 of the *Land Registration Act*. According to the 1<sup>st</sup> Defendant, they hold a valid title document which grants them the rights and privileges over the suit land to the exclusion of everyone.
41. The question that follows from the rival position by the parties herein is whether the said amalgamated parcels of land which collectively formed Isebania Township/ 37 was an unalienated government land and hence available for allocation to the 1<sup>st</sup> Defendant herein. Section 3 of the Physical Planning Act and Section 2 of the Government Lands Act (Repealed), defines unalienated land as follows;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment
42. DW2 who testified on behalf of the 4<sup>th</sup> defendant confirmed that the said parcels of land were previously allocated to the plaintiffs. However, it was his contention that since the subject land parcels belongs to the government and by extension the Municipal Council of Migori, the then local authority had the powers to re-allocate the subject parcels to the 1<sup>st</sup> defendant pursuant to the statutory provisions governing the said re-allocation.
43. When asked about compensation, it was the testimony of DW4 that the burden was on the allottee to pay the requisite compensation. He however did not confirm whether the same compensation was indeed paid for the amalgamated parcels of land which were previously allocated to the plaintiffs.
44. From the evidence adduced by the Plaintiffs and the 1<sup>st</sup> Defendant and the testimony of DW2; it is not in dispute that the said land parcels which were amalgamated to form Isebania Township / 37 were not unalienated government land. The said parcels had legally been allotted to the Plaintiffs.
45. It is not in question that all land belongs to the government. However, it is trite that where a land has been allotted to a private citizen and the necessary documentations thereto issued, before reallocating the same parcels, the defendants were under a duty to strictly follow the outlined procedure governing compulsory acquisition.
46. Part VIII of the *Land Act* on Compulsory Acquisition of interests in land from sections 107 – 133, provides an elaborate procedure for the process of compulsory acquisition and the obligations thereof to be complied with. This procedure must strictly be complied with for the rights of acquisition to crystallize. In the instant case, both the Plaintiffs and the Defendant have documents evidencing the ownership/ proprietorship in respect to the parcels of land. However, without complying with the constitutional and statutory provisions, the process of acquisition cannot be said to have crystallized and thus certificate of lease issued in favor of the 1<sup>st</sup> Defendant cannot be validated at the expense of the title documents held by the Plaintiffs.
47. The 1<sup>st</sup> defendant in its defence heavily relied on the Certificate of Lease (Dexh. 3) and maintained that the validity of the said lease had never been challenged on account of fraud and thus the said title



document conferred upon it the exclusive rights over the said Plot No. Isebania Township/ 37. He did not go beyond the certificate of title to prove the process of allocation of the said parcel Isebania Township/ 37 despite being aware that the said land was previously allocated to the Plaintiffs and who were still in occupation thereof. No minutes for the reallocation was adduced, no notices of intention to repossess or compulsorily take over the property or reasons for the failure to pay compensation was given by the defendants.

48. To this end, I am guided by the decision of the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held that where an instrument of title is challenged, such proprietor must go beyond the instrument to prove legality:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

49. All the Plaintiffs in their testimonies in court confirmed that they had never received any compensation for the subject parcels of land. PW1 stated that he should be properly compensated for his land, PW2 also reiterated that he should be properly compensated for his parcels of land taking into account the developments thereon. PW3 & 4 on the other hand also stated the need for the 1<sup>st</sup> defendant to vacate their properties unless they are paid proper compensation.

50. From the evidence and testimony in court, it is clear that even though the subject parcels were amalgamated and reallocated to 1<sup>st</sup> Defendant, the proper procedure was not followed to justify the said re-allocation. No documents were adduced either by the 1<sup>st</sup> defendant, 2<sup>nd</sup> Defendant or the 4<sup>th</sup> defendant outlining the process followed before Dexh. 2 was issued in favor of the 1<sup>st</sup> defendant. As has been held time and again, it is not enough for the 1<sup>st</sup> defendant to fly its title document in the air. The onus was on him to demonstrate the process followed in acquiring the same after establishing that the land was acquired compulsorily having been previously allotted to the plaintiffs.

51. In *Ocean View Plaza Ltd v Attorney General*(Mombasa HCCC No.527 of 2001 ‘B’) Onyancha Judge held that-

“The allotment of land to a citizen or others protected under *the constitution* which action is symbolized by title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act”.

(See also *Isaac Gathungu Wanjohi v Attorney General & 6 Others* [2012] eKLR.)

52. Section 110(1) of the *Land Act*, 2012 provides as follows:

“Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfillment of the stated public purpose.”

53. From the survey plans adduced in court, it is common ground that the said Plot No. 37 is required for public purposes, the construction of a Post Office. Rule 3 of The Land (Assessment of Just



Compensation) Rules, 2017 further provides the factors to be considered in the assessment of compensation as follows: -

3. The Commission shall consider the following factors when assessing compensation;
  - (a) .....
  - (b) the market value of the land; damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land;
  - (c) damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable, in any other manner or his or her actual earnings;
  - (d) reasonable expenses incidental to the relocation any of the persons interested or who will be compelled to change residence or place of business as a consequence of the acquisition; and
  - (e) damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land.

54. In view of the foregoing, while I do acknowledge that the need for the said Plot No. Isebania Township/ 37 having been set aside for public purposes, I do also acknowledge the Plaintiffs' equal right to be properly compensated for the said parcels of land and the developments thereon. It is therefore my finding that the process used in acquiring the said land Isebania Township/ 37 was unprocedural and there is need to for the outlined procedure for compulsory acquisition to be strictly complied with.

#### **B. Whether the Plaintiffs are entitled to the Reliefs sought \_\_**

55. Having held that process used in the acquisition was not procedural, I consequently find that the plaintiffs have partly proved their case and are partly entitled to the reliefs sought.
56. I have also noted that the Plaintiffs in their testimonies stated their willingness to be properly compensated for the said parcels of land taking into account the developments thereon.

#### **Costs**

57. Costs generally follow the event, and in this instant case, since the Plaintiff has proved that there was trespass onto the Road Access, I find that it is entitled to costs of the suit.

#### **Conclusion**

58. The upshot of the above is that the Plaintiffs have partially proved their case to the required threshold and I partially enter judgement for the Plaintiffs against the Defendants in the following terms: -
  - a. A declaration be and is hereby made that the acquisition by the 1st Defendant of the Plaintiffs' parcel Nos. Bukira/ Buhirimonono/1987, 1988, 446 and 419 was unlawful and unprocedural.



b. The 1st, 3rd and 4th Defendants in consultation with the relevant government departments to initiate and strictly comply with the outlined procedure for compulsory acquisition as provided under the Land Act as read with Rule 3 of the Land (Assessment of Just Compensation) Rules, 2017 within 90days.

c. In default of prayer No. (b) above, the Certificate of Lease issued in favor of the 1st Defendant shall be deemed cancelled and further an Order of Permanent Injunction will be deemed to have been issued against the 1st Defendant.

d. Costs of the suit to be borne by the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 25<sup>TH</sup> DAY OF MAY, 2023.**

**MOHAMMED KULLOW**

**JUDGE**

**In presence of;-**

.....**Plaintiffs**

.....**Defendants**

**Court Assistant - Tom Maurice/ Victor**

