



**Akumu & another v Nairobi City County Government & another; Mwangi (Interested Party)  
(Environment & Land Case 489 of 2010) [2023] KEELC 18327 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18327 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 489 OF 2010**

**MD MWANGI, J  
JUNE 15, 2023**

**BETWEEN**

**JOANES OOKO AKUMU ..... 1<sup>ST</sup> PLAINTIFF**

**PHILISTER AOR OKUMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**IRENE W KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**DUNCAN MAINA MWANGI ..... INTERESTED PARTY**

**JUDGMENT**

1. On October 13, 2010, through a plaint dated October 12, 2020, the Plaintiffs brought this suit seeking the following orders.
  - a) An order canceling the allotment of LR No34/2 & 34/4 Umoja Inner-core (Plot No A.163) by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, and the subsequent sale of the plot by the 2<sup>nd</sup> defendant to the Interested Party.
  - b) Permanent injunction to restrain the 1<sup>st</sup> defendant, its servants, employees, agents or whosoever from interfering in any way with the deceased estate's ownership of LR No 34/2 & 34/4 Umoja Inner Core (plot no A.163)
  - c) Permanent injunction to restrain the interested party, his servants, employees, agents or whosoever from trespassing into LR No 34/2 & 34/4 – Umoja Inner Core(Plot no A163) and carrying out construction or continuing with construction thereon and or remaining thereon in anyway dealing with the



said plot or interfering with the deceased's estate's ownership and the plaintiff's possession and occupation of the said land.

d) Costs of this suit

2. The Plaintiffs in this suit are the administrators of the Estate of the late Wilson Okumu Mambla (the deceased). The 2<sup>nd</sup> Plaintiff passed on during the subsistence of this case. The Plaintiffs contended that on August 12, 1981, the deceased entered into a tenant purchase agreement with the 1<sup>st</sup> defendant for purchase of land known as LR No 34/2 & 34/4 Umoja Inner-core (Plot no A163), hereinafter referred to as 'the suit property'. They asserted that all the requisite payments were made and the deceased became the lawful owner of the suit property.
3. It was the Plaintiffs' case that sometime in June 2010, they realized that the 2<sup>nd</sup> defendant had trespassed onto the suit property and was carrying out construction works on the property. On investigations at the offices of the 1<sup>st</sup> defendant, it was established that the 2<sup>nd</sup> defendant was also making payments for the suit property. The Plaintiff's claim was that it was illegal and unlawful for the 1<sup>st</sup> defendant to allocate to someone else the deceased's property. The 2<sup>nd</sup> defendant sold the suit property to the interested party in 2008. The Plaintiffs termed the sale null and void ab initio.
4. The 1<sup>st</sup> defendant filed its defence on May 13, 2011. It was its case that when the property was allocated to the deceased, one of the conditions was that the plot was to be completely developed within two years. It contended that the deceased failed to develop the property and the property was consequently repossessed and allocated to the 2<sup>nd</sup> defendant. It further contended that the reallocation was legal and that it had not issued the deceased with a title deed. It added that the deceased lost any legitimate claim to the suit property when he breached the terms of the agreement.
5. The 2<sup>nd</sup> defendant's case was that she was allocated the suit property by the 1<sup>st</sup> defendant after it was repossessed and advertised vide a public notice on July 12, 2002. She contended that she was in possession of the suit property until 2008 when she subsequently sold it to the interested party for a consideration of Kshs 1,100,000. She sold and gave vacant possession of the suit property to the interested party who commenced construction works thereon. She further contended that she had been paying rates to the 1<sup>st</sup> defendant before she sold the property.
6. The interested party filed a defence on November 13, 2015. He donated a power of attorney to Naomi Murugu Mwangi to represent him. It was his case that he bought the suit property from the 2<sup>nd</sup> defendant for a consideration of Kshs 1,100,000. He had after acquiring the suit property carried out developments thereon with the approval of the 1<sup>st</sup> defendant.
7. At the hearing, only the 1<sup>st</sup> Defendant was represented in court. The 2<sup>nd</sup> Defendant and the Interested party were not in court. PW1, Judith Achieng Okumu testified on behalf of the Plaintiffs. The 1<sup>st</sup> Defendant did not present a witness though. Counsel for the 1<sup>st</sup> Defendant nevertheless cross-examined the Plaintiff's witness.

#### **Evidence adduced on behalf of the Plaintiffs**

8. The Plaintiff's witness was one Judith Achieng Okumu who adopted her witness statement dated November 1, 2011 as her evidence in chief. She further produced the 11 documents on the Plaintiff's list of documents of the same date as exhibits in support of her case.
9. The witness testified that she is the daughter of the late Wilson Okumu Mambla and a beneficiary of his estate, more specifically the suit property being LR No 34/2 & 34/4 Umoja Inner Core (Plot No A163). She alleged that the deceased had purchased the suit property from the predecessor in title of



- the 1<sup>st</sup> Defendant – the City Council of Nairobi, through a tenant- purchase agreement dated August 12, 1981.
10. PW1 alleged that her late father had made all the requisite payments to the 1<sup>st</sup> Defendant and had possession of the plot. Further payments were also made after the demise of her father.
  11. PW1 testified that she came to learn that the 1<sup>st</sup> Defendant allotted the suit property to the 2<sup>nd</sup> Defendant after purportedly repossessing the same. She however alleged that the 1<sup>st</sup> Defendant's advertisement notice of August 12, 2002 was not specific to the suit property, neither to the estate of her deceased father.
  12. PW1 allegedly learnt that the 2<sup>nd</sup> Defendant was making payments for the same plot at the Umoja Offices of the 1<sup>st</sup> Defendant; after conducting a search. The Interested Party's claim according to PW1 was that he bought the suit property from the 2<sup>nd</sup> Defendant. He had further developed the suit property.
  13. The Plaintiffs' witness asserted that the 1<sup>st</sup> Defendant no longer had ownership of the suit property at the time it allegedly allotted the plot to the 2<sup>nd</sup> Defendant hence the 2<sup>nd</sup> Defendant could not have acquired legal ownership of the suit property. Subsequently, the transfer to the Interested Party did not confer good title.
  14. In cross-examination by the Advocate for the 1<sup>st</sup> Defendant, PW1 stated that her late father passed on in 1992. She confirmed that her father had not put up/made any developments on the suit property. He had merely put a mabati fence around the plot. Under clause 6(a) of the agreement with the 1<sup>st</sup> Defendant he was required to have erected and completed a building ready for occupation in accordance with the plan approved by the council within 2 years of issuance of the letters of allotment.
  15. PW1 stated that the schedule she had produced as proof of payment of the consideration to the 1<sup>st</sup> Defendant was made by her late father. He had written on it that he had completed payment. The receipts attached and produced as exhibits in support of the Plaintiff's case however, did not amount to Kshs 36,600/= which was the consideration payable for the suit property.
  16. Though the witness had in her statement made reference to an advertisement by the 1<sup>st</sup> Defendant of August 12, 2002, she asserted that she had not seen it previously or at the time it was put up in the newspaper. She stated that when they realized that the mabati fence around the suit property had been removed by unknown persons, they went to the offices of the City Council of Nairobi at Umoja and discovered that there was someone else who was making payments for the plot. By then, there was a construction going on, in the suit property. The plot is occupied by Duncan Maina Mwangi, the Interested Party.
  17. In re-examination, the witness reiterated that the City Council of Nairobi had no right to repossess the suit property from her late father. She was not aware of the advertisement by the City Council of Nairobi that culminated into the repossession of the suit property.
  18. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant called a witness. The Interested Party too did not call a witness in the case.

### **Court's directions**

19. The court's directions were that the parties file written submissions. The Plaintiff and the 1<sup>st</sup> Defendant complied and filed their respective submissions. They form part of the record of this court. I have had the opportunity to read the submissions.



## Issues for Determination

20. From the Plaintiff's witness testimony, it is clear that the current owner and occupant of the suit property is the Interested Party who has also extensively developed it. The Plaintiffs however, despite having knowledge of that fact chose to join him in the suit as an Interested Party. This poses a critical legal issue which this court must address before delving into the merits of the case.
21. The 1<sup>st</sup> prayer that the Plaintiffs seek in accordance with the amended plaint is for: -

' An order canceling the allotment of LR No 34/2 & 34/4- Umoja Innercore (Plot No A.163) by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, and the subsequent sale by the 2<sup>nd</sup> Defendant to the Interested Party.'
22. The Plaintiffs further pray for an order of, 'permanent injunction to restrain the interested party, his servants, employees, agents or whosoever from trespassing into LR No 34/2 & 34/4- Umoja Inner Core (Plot No A163) and carrying out construction or continuing with construction thereon and or remaining thereon or in any way dealing with the said plot or interfering with the deceased's estate ownership and the Plaintiff's possession and occupation of the said land.'
23. From the fore-going, the Plaintiffs' case is principally against the Interested Party, the current occupant and owner of the suit property.
24. The issue then is whether such drastic and final orders can issue against an Interested Party.
25. Under Order 7 Rule 1 of the [Civil Procedure Rules](#), only a defendant in a suit can file a Statement of defence. The rule provides that: -

' Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service'
26. An Interested Party is not a defendant and cannot therefore even file a Statement of defence under the Civil Procedure Rules. I agree with my brother Justice Munyao Sila's position in [Luka Kiplelei Kotut vs Joseph Chebii & Another \[2013\] eKLR](#) that a person who is not a defendant cannot therefore simply walk into the proceedings and file a Statement of Defence.
27. The contest in a suit is between Plaintiffs and Defendants who are the principal parties. This court is guided by the holding of the Supreme Court in [Francis Karioko Muruatetu & Another v Republic & 5 Others \[2016\] eKLR](#) where the court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows;

' Any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the



principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court.'

28. The Plaintiff herein by suing the so called interested part in that capacity essentially denied him the opportunity to participate in the suit and present his claim. This was absolutely necessary and proceeding in any other way violates the rules of natural justice and would amount to condemning a party unheard.
29. The orders sought cannot issue against an interested party who has not had the opportunity to defend the suit and present his case. It was fatal for the Plaintiff to sue the owner of the suit property as an interested party while they indeed knew that he was actually the owner of the property as pleaded in their plaint.
30. Accordingly, I would strike out the Plaintiff's suit for being fatally defective on that point alone.
31. As good practice demands however, and in spite of my finding above, I will still go ahead to consider the merits of the case.
32. In their submissions, the Plaintiffs insist that they had a contract with the 1<sup>st</sup> Defendant in view of the tenant- purchase agreement of August 12, 1981. They therefore accused the 1<sup>st</sup> Defendant of breach of contract – unlawful termination of the contract, repossession of the suit property and purporting to re-allocate the same to the 2<sup>nd</sup> Defendant who thereafter sold it to the Interested Party.
33. The Plaintiffs argue that their fathers' rights over the suit property had crystallized and it was not therefore available for repossession by the 1<sup>st</sup> Defendant. In the plaint and in the testimony by PW1, the Plaintiffs allege that they had on their part fulfilled all the terms and conditions of the agreement with the 1<sup>st</sup> Defendant including payment of the full consideration.
34. However, in cross-examination, PW1 did not bring the proof of payment of the full consideration. What she was relying on was a schedule purportedly made by her late father confirming completion of payment. No proof was presented before the court to the effect that it was actually made by the deceased. The receipts presented in support of the payments do not add up to the figure of Kshs 36,600/- The 1<sup>st</sup> Defendant's defence was that full payment was not made.
35. 2ndly, it was a condition of the agreement between the deceased and the 1<sup>st</sup> Defendant that the deceased was to put up a structure/building in the suit premises ready for occupation within 2 years. The said structure was to be a structure approved by the 1<sup>st</sup> Defendant in her testimony, PW1 during cross-examination stated that her late father merely put up a mabati structure around the suit property. It was expressly stated that the buildings were to be erected without the consent of the 1<sup>st</sup> Defendant.
36. From the evidence presented before the court therefore, the late Wilson Okumu did not fully comply with the terms and conditions of the agreement with the 1<sup>st</sup> Defendant as alleged in the Plaintiffs' plaint. Accordingly, the 1<sup>st</sup> Defendant was justified upon issuance of a Notice to repossess the suit property.
37. A notice was duly issued to defaulters including the late Wilson Okumu through an advertisement in the newspaper. Upon failing to comply the 1<sup>st</sup> Defendant proceeded to repossess the suit property. The agreement relied upon by the Plaintiffs was not explicit on a personal notice, as the Plaintiffs intimate in their submissions. A notice by way of an advertisement in a newspaper of nationwide circulation by a public entity like the 1<sup>st</sup> Defendant would suffice.



38. The issue of time-bar though not canvassed by either of the parties too arise under the *Public Authorities Limitation Act*, a claim cannot be brought against the government or a local authority after the date from which the cause of action arose.
39. The alleged breach of contract through repossession happened in the year 2002. By the time the Plaintiffs suit was filed, the statutory period had long expired.
40. The *Public Authorities Limitation Act*, Cap 39 Laws of Kenya, is an Act of parliament that provides for the 'limitation of proceedings against the Government and a local authority and for purposes incidental to and connected with the foregoing.'
41. The Act at section 3(a) prohibits the filing of any proceedings against the government or a local authority founded on tort after the end of 12 months from the date on which the cause of action accrued.
42. Section 3(b) of the Act on the other hand prohibits the filing of any proceedings against the government or a local authority founded on contract after the end of three (3) years from the date on which the cause of action accrued.
43. Lady Justice Florence Muchemi in the case of *Josephat Gathee Kibuchi vs Kirinyanga County Council (2015) eKLR* held that a county government is part of the State or Government. The *Constitution* of Kenya establishes two levels of Government being the National and the County Governments. The Learned Judge therefore concluded that the provision of *Government Proceedings Act* are applicable to proceedings against a county government.
44. Likewise, the provisions of section 3 of the *Public Authorities Limitation Act* ought to and do actually apply in respect of proceedings against a County Government in the same manner as they apply to proceedings against the National Government.
45. Justice Odunga was more explicit on the issue in the case of *Republic v AG & another, Ex-Parte Stephen Wanyee Roki [2016] eKLR*, when he stated that: -
- ' Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to the *Constitution* (Transitional and Consequential Provisions) provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
- It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the *Constitution*.
- One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the *Constitution* requires that the constitutional status and institutions of government both at the national and county levels be respected.
- In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution of proceedings.'
46. This court has adopted the same reasoning in regard to the application of the provisions of the Public Authorities Act and held that they are applicable in respect of proceedings against County Governments.
47. I dismiss the Plaintiffs case with costs against the 1<sup>st</sup> Defendant.



It is so ordered.

**Dated, Signed and Delivered at Nairobi this 15th day of June 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Mr. Ogutu for the Plaintiffs.**

**Ms. Mose for the 1<sup>st</sup> Defendant.**

**No appearance for the 2<sup>nd</sup> Defendant and Interested Party.**

**Court Assistant – Yvette.**

**M.D. MWANGI**

**JUDGE**

