



**Abdalla v Mombasa County Government (Environment & Land Case 498 of 2011) [2025] KEELC 1344 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1344 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 498 OF 2011**

**SM KIBUNJA, J  
MARCH 19, 2025**

**BETWEEN**

**SAID MOHAMED ABDALLA ..... PLAINTIFF**

**AND**

**MOMBASA COUNTY GOVERNMENT ..... DEFENDANT**

**JUDGMENT**

1. Through the amended plaint dated 12th September 2014, the plaintiff sued the defendant averring that he is the lawful registered proprietor of 10336/II/MN, suit property, and that sometime in August or September 2009 he applied to the defendant for change of user of the suit property from residential to commercial/petrol and service station. He avers that he complied with all the requirements for change of user, but the defendant refused to grant the same. He preferred an appeal to the District/ Municipal Physical Planning Liason Committee on 24th November 2009, which was heard and ruled in his favour. That the defendant was notified of the decision vide a letter dated 3rd September 2010 and subsequent letters to the same effect, but the defendant still refused to grant the change of user. That as a result, the plaintiff has been unable to use the suit property as a petrol station since 2009 with daily average loss of earnings of Kshs. 50,000. Furthermore, the plaintiff had secured a buyer of the suit property for Kshs. 12,000,000, but the transaction failed for the reason of failure to get change of user. That he has therefore suffered anxiety, embarrassment, mental torture and anguish, and filed this suit seeking for the following:
  - a. A declaration that the defendant's refusal to grant the change of user was unlawful.
  - b. General and Aggravated damages.
  - c. Costs and Interest.
2. The defendant opposed the plaintiff's claim through the amended statement of defence dated 22nd September 2014, denying all the averments of the plaintiff. It averred that it could not allow change of



user for reasons that the suit property is in a densely and highly populated residential area and the user applied for would be incompatible to the neighbourhood. That setting up a petrol station on the suit property would pose as a fire threat to the neighbourhood as, the plot has no proper access road and its size is too small for setting a petrol station.

3. During the hearing, the plaintiff testified as PW1, and inter alia adopted the contents of his statement and list of documents dated 9th September 2011 as his evidence in chief. He stated that when he decided to put up a petrol station on the suit property, he put an advertisement for any complaints against change of user. He waited three months before he received the defendant's decision declining to approve the change of user. He approached the Liaison Committee on appeal, which upon confirming the plot was not on a road reserve, and there were no water pipes passing through it, had no objections to him proceeding with the project. The Liaison Committee referred him back to the defendant to be issued with a change of user letter, but defendant verbally declined. He went back to the Liaison Committee who wrote a letter requesting the Town Clerk to give reasons for their refusal, and he engaged an advocate who wrote to the defendant but no reasons were given. PW1 told the court he had entered into sale agreement over the suit property with National Oil Corporation for Kshs.12 Million that he lost after failing to get the change of user. On cross-examination, the witness stated that he was not aware of why the defendant had refused to give him the change of user for the suit property, other than being told the plot was too small. He admitted that he did not engage any valuer to do an assessment for the plot. That although he had fulfilled all conditions for change of user to be given, he was not told in writing why its was not granted by the defendant.
4. In defence Paul Manyala, director of Physical Planning, testified as DW1, and adopted his statement dated 14th December 2012, as his evidence in chief. He testified that the Municipal council's refusal to allow change of user was because first, the plot was in a residential area and it could not allow change of user to light industry to allow a petrol station being constructed there; secondly the plot size and shape was inadequate for that the kind of development the plaintiff wanted. That a petrol station that abuts a major road requires an accelerating and decelerating lane allowing motor vehicles to enter and leave petrol station without affecting other vehicles and causing blockage. He added that the suit property was a sixteenth of an acre and not adequate to provide the safety requirements, service roads, pumps and complementary activities like lube bay and service bay. He further expounded that the suit property's proximity to the residential premises and without buffers made the project unsuitable. DW1 explained the procedures of appealing decisions such as was made by the Municipal council, up to the High Court, under the Physical Planning Act. He testified that the plaintiff had appealed the decision to the District Physical Planning Liaison Committee, which approved the change of user application to be granted, but the decision was not complied with. He added that if the Municipal council was not satisfied with the decision, it should have appealed to the National Physical Planning Liaison Committee but he could not confirm whether that was done. He testified that parties could only come to the court over the decision of National Physical Planning Liaison Committee. In cross-examination, DW1 admitted that he had seen the conditional approval for the plaintiff's project from NEMA, and the planning brief by one Abubakar, a planner, in the plaintiff's list of documents that indicated the suit property had a long frontage allowing deceleration and acceleration access. He was however, of the opinion that the size of the suit property does not have that ability, but agreed he did not prepare and file any drawing or document to support his position. He explained that an applicant for change of user was expected to prepare and submit a planning brief with supporting documents, and agreed the plaintiff had complied with. He told the court that he was aware the Liaison Committee had made visits to the suit property when it was considering the appeal, and that it allowed the approval of change of user. He agreed that as the Municipal Council of Mombasa did not file any appeal, it was expected adhere to the decision of the Liaison Committee but they did not do so.



5. The learned counsel for the plaintiff and defendant filed their submissions dated the 30<sup>th</sup> September 2024 and 26<sup>th</sup> November 2024 respectively, which the court has considered.
6. The following are the issues for the court's determinations:
  - a. Whether the plaintiff is entitled to the declaratory order sought.
  - b. Whether the plaintiff is entitled to general and or aggregated damages and if so, how much should be adequate.
  - c. Who bears the costs?
7. The court has carefully considered the pleadings, the documentary and oral evidence tendered, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
  - a. From the amended plaint, the plaintiff is seeking for a declaration that the defendant's refusal to grant him the change of user was unlawful; general and aggravated damages; costs and interest. There is no specific prayer, like a mandatory injunction, to compel the defendant to grant the approval as decided by the District/Municipal Physical Planning Liaison Committee. It is therefore apparent that the plaintiff seeks for the defendant to be penalised for failing to approve his change of user application, through an award of damages. The applicable statute in 2009 to 2011, when the plaintiff's change of user application was presented and rejected by the defendant was the Physical Planning [Act No. 6 of 1996](#) chapter 286 of the Laws of Kenya, repealed. The plaintiff has presented documentary exhibits and proved that he made an application for change of user to the defendant, which according to him, was rejected verbally. He preferred an appeal under section 13 of the repealed Act and in its decision the District/Municipal Physical Planning Liaison Committee, through one Mutua J.K, held that change of user be issued to the plaintiff, by the defendant but subject to some conditions. The plaintiff has pleaded and testified that the approval for change of user was not granted, and the defendant has through the testimony of DW1 confirmed it. Under the repealed Act, the next step to be taken by the party not satisfied with the decision of District/Municipal Physical Planning Liaison Committee was to file an appeal to the National Physical Planning Liaison Committee under section 15 of the said Act. It is apparent the defendant did obey or comply with the District/Municipal Physical Planning Liaison Committee's decision even though it did not file or lodge any appeal against that decision.
  - b. Upon the enactment of the current [Physical and Land Use Planning Act](#), 2019, it provided at section 93 that:

“ All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.”

The court's purposive interpretation of this provision is that, as the National Physical Planning Liaison Committee was not in operation at the time in question, despite it having been established under the repealed Act, any appeal emanating from the decision of Mombasa Municipal/District Physical Planning Liaison Committee was to be filed before the court. In the case of Samson Chembe Vuko versus Nelson Kilumo & 2 others [2016] KECA 541 (KLR) the Court of Appeal dismissed an appeal from a ruling on a preliminary objection in which this court had dismissed a suit where the subject matter was a physical development plan dispute



in the old Act. The court had held that it should have been referred to the National Liaison Committee unless it could be proved that the body did not exist.

- c. By the time Mombasa District/Municipal Physical Planning Liaison Committee, made its decision in 2010, the National Physical Liaison Committee was not operational, and the forum open for the defendant if it was not satisfied, as it appears it was not by its failure to approve the change of user, was only to go to the High Court and appeal the decision. However, the defendant has not in its defence and evidence, tendered any explanation as to why it did not follow the said procedure. It is surprising that even after being served with the suit papers on the plaintiff's claim, the defendant did not find it necessary to include a counterclaim in its defence seeking for example, to overturn the District/Municipal Physical Planning Liaison Committee's decision to approve the change of user. Again, it is strange that the statement and testimony of DW1, was more or less reiterating the contents of Mr. Tubman Otieno's statement dated 12th October 2011, while admitting that the defendant did not appeal the decision of the District/Municipal Physical Planning Liaison Committee, and despite being aware of all the conditional approvals issued by NEMA, the Municipal Physical Liaison Committee and an absolute approval by the Ministry of Water and Irrigation to the plaintiff's application for change of user. Again, though the defendant appear to suggest through their submissions that there is a possibility the defendant never received a formal communication of the decision of the District/Municipal Physical Planning Liaison Committee, the court has noted that DW1 did not deny that a letter was written to the defendant informing it of the decision. He also did not dispute that the follow up letters were written to the defendant without any formal response or acknowledgement. The defendant's silence can only be termed as simply contemptuous despite the District/Municipal Physical Planning Liaison Committee, being an organ under the obtaining legal statute. The defendant's failure to approve the plaintiff's application for change of user was therefore, unlawful.
- d. The court has perused the plaintiff's pleadings and it is clear the general damages sought would seem to be from estimated daily losses from using the suit property as a petrol station. The only evidence provided of such a business on the suit property were two letters dated 21st March 2011 and 22<sup>nd</sup> August 2011, through which the National Oil Corporation of Kenya, accepted the plaintiff's offer to purchase the plot at Kshs.12 million and terminating the offer for logistical reasons respectively. There is nothing connecting the National Oil Corporation of Kenya offer to be conditional to the plaintiff obtaining a change of user for the plot, giving the defendant's failure to grant it as the reason for the subsequent cancellation. It would be presumptuous of the plaintiff to expect the court to conclude that the said termination of the offer to purchase the plot by National Oil Corporation of Kenya was because the defendant declined to grant him the change of user for the suit property. That needed to be proved and it was not. The plaintiff has therefore failed to establish that he is entitled to general damages.
- e. In the case of Godfrey Julius Ndumba Mbogori & Another versus Nairobi City County [2018] KECA 702 (KLR) the court cited with approval the decision in the case of Rookes versus Barnard [1964] AC 1129 and held that:  

“.....Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

  - i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,



- ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.”

Having considered the tribulations of the plaintiff in the hands of the defendant who declined and or neglected to grant him the change of user approval, despite the decision of the District/ Municipal Physical Planning Liaison Committee, being in his favour, together with the approvals from NEMA and Ministry of Water and Irrigation, the court finds he is entitled to aggravated damages under the first category above. Going to the amount to be awarded to him, the court has been guided by the awards made in other superior courts decisions including A S T/A Business 2000 versus Lakhamshi Virpal Shah & Others [2016] eKLR and Pampa Grill Limited & Another versus North Lake Limited & Another [2021] eKLR among others, and found Kshs.2,000,000 to be a fair and just.

- f. Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where the court for good reasons directs otherwise. In this suit, I find no cause to deviate from that edict of the statute, and as the plaintiff has successfully prosecuted his claim, he is entitled to costs and interests at courts rates.
8. Flowing from the foregoing conclusions on the issues for determinations, the court finds the plaintiff has proved his case against the defendant on a balance of probabilities. The court enters judgment for the plaintiff and against the defendant in the following terms:
- a. That a declaration is hereby issued that the defendant's refusal to grant the plaintiff the change of user in respect of the suit property was unlawful.
  - b. That the plaintiff is awarded aggravated damages of Kshs.2,000,000, [two million], against the defendant.
  - c. The plaintiff is awarded costs to be borne by the defendant.
  - d. The defendant is to pay the plaintiff interest on aggravated damages and costs at courts rates.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF MARCH 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : M/s Kembo For Bosire

Defendant : No Appearance

Shitemi – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

