



**Mount Kenya Investment Limited v Ng’ethe & 2 others (Environment & Land  
Case 697 of 2017) [2023] KEELC 19283 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19283 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 697 OF 2017**

**LN MBUGUA, J  
JULY 27, 2023**

**BETWEEN**

**MOUNT KENYA INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**ALLAN NG’ETHE ..... 1<sup>ST</sup> DEFENDANT**

**MWANGI GAI THO ..... 2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This is a painfully old matter, the same having been filed vide a plaint dated July 5, 1996 and amended on February 22, 2005. The plaintiff claims to be the allottee/beneficial owner of an un-surveyed industrial plot No 10 “A” Kahawa West Industrial area comprising of 10 acres under an allotment dated August 21, 1978. It is further averred that in July 1996, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants unlawfully trespassed onto the suit land and purported to subdivide it and started to offer sub-plots to various people who started fencing off the said subplots. Upon inquiries, the plaintiff discovered that the 3<sup>rd</sup> Defendant at the behest of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had indeed alienated the suit land.
2. The plaintiff prays for judgement against the Defendants jointly and severally for;
  - a. Damages for trespass.
  - b. Eviction therefrom.
  - c. Alternatively, compensation by payment of the full open market value of the suit premises and damages for loss of user/income from 1996 until either vacant possession is delivered or full compensation is paid.



3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered appearance dated June 5, 2008 but failed to file a statement of defence.
4. The suit is opposed by the 3<sup>rd</sup> Defendant vide its statement of defence dated August 24, 2016. It denies the allegations leveled against it by the Plaintiff and avers that the Plaintiff did not meet the conditions of the letter of allotment dated August 21, 1978 thus the suit property was repossessed.
5. During the trial, plaintiff's case was advanced by two witnesses. PW1 Eliud Matu Wamae adopted his witness statement dated March 8, 2017 as his evidence. He also produced documents contained at pages 23-75 of the Plaintiff's bundle dated June 11, 2019 as their Exhibits.
6. In his witness statement, PW1 identified himself as the Chairman and Director of the plaintiff. He avers that they were allotted an unsurveyed Plot Number 'A' Kahawa West Industrial Estate measuring approximately 10 acres by the 3<sup>rd</sup> defendant vide an allotment letter dated August 21, 1978. The Plaintiff accepted the terms and conditions thereof and paid Ksh 141,917/= being stand premium and rent. The letter of acceptance is dated September 4, 1978.
7. The Plaintiff expected to receive a title deed in respect of the suit land from the 3<sup>rd</sup> Defendant but despite the 3<sup>rd</sup> Defendant's repeated promises to complete its part of the transaction, it did not discharge its obligations as required of it to do. He also stated that vide correspondences dated April 10, 1981, May 13, 1982 and April 2, 1986, the Plaintiff demanded its title from the 3<sup>rd</sup> Defendant and by a letter dated April 17, 1986, the 3<sup>rd</sup> Defendant wrote to the Plaintiff assuring it that survey work had commenced and that the Plaintiff would be informed as soon as the title was ready yet the 3<sup>rd</sup> Defendant had nothing to show the Plaintiff that it had surveyed or was surveying the suit property to pave way for the issuance of title to the Plaintiff.
8. Consequently, the Plaintiff commissioned a private surveyor to do the survey and informed the 3<sup>rd</sup> Defendant that it had done so vide a letter dated April 17, 1989 and by a letter dated May 10, 1989, the 3<sup>rd</sup> Defendant wrote to the Plaintiff assuring it that survey work had already commenced and that there was no need of engaging a private surveyor.
9. PW1 contended that on July 2, 1996 or thereabout, the Plaintiff learnt with shock that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants allegedly being officials of Soweto Resettlement Scheme had, together with its members, trespassed onto the suit property, whereby they fenced off the land. Consequently, the Plaintiff wrote a letter to the District Officer and complained about the said illegal acts of trespass by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
10. The aforementioned events triggered the filing of this suit on July 5, 1996. PW1 stated that it is through the 2<sup>nd</sup> Defendant's replying affidavit dated July 18, 1996 that he came to learn about how the Defendants unlawfully entered the Plaintiff's property which claim is anchored on the 3<sup>rd</sup> Defendant's Water and Sewerage Committee meeting held on August 13, 1992 which meeting resolved to supply the residents of Kahawa Soweto Resettlement Scheme with water at a fee of Ksh 4,000/=
11. PW1 also stated that on July 30, 1996, this Court ordered the 3<sup>rd</sup> Defendants surveyor to point out to the parties their respective plots on LR No 71/7/1 Kahawa West. In compliance with the orders, the then acting Chief Land Surveyor of the 3<sup>rd</sup> Defendant, Mr. A.M Kariuki visited the suit property in the company of all parties in the suit and prepared a report dated September 4, 1996 which was submitted before this Court whose particulars are as follows;
  - i. An approved P.D.P of the said scheme does not exist.



- ii. The area supposedly belonging to Mt. Kenya Investment is the same area Soweto has settled and are claiming.
  - iii. No instructions were issued to Nairobi City Council surveyors to carry out any work at the said site.
  - iv. No title survey was carried out for purposes of issue of any subplots title on the scheme under reference. Record received from the properties section also indicate that Mt. Kenya Investment Limited PO Box 40485, Nairobi were offered the above plot No A vide letter Ref CV516/S/70/6 on August 21, 1987 subject to the terms and conditions stated in the letter.
  - v. One of the conditions of the offer was the payment of stand premium and annual rent amounting to Ksh 141,917.00 within 30 days of the date of offer.
  - vi. There has been no trace of any payment on the transaction.
  - vii. Regarding M/S A Ng'ethe and another, information available indicates that the present residents were allowed/transferred to the same site and vide minute 29 of the Water and Sewerage Committee of August 13, 1992 page 186, the City Council went further and allowed supply of water to the settlement on payment of kshs 400.00 by each of the residents.
12. PW1 also states that although the 3<sup>rd</sup> Defendant has maintained that the suit property was re-allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it received a demand note from the 3<sup>rd</sup> Defendant dated April 28, 2005 for rent arrears in the sum of Ksh 11,032 which the Plaintiff paid on May 18, 2005.
  13. He further stated that the Plaintiff commissioned a valuation report dated October 10, 2009 and another one dated March 13, 2017 which gives an estimate of loss suffered by the plaintiff at Ksh 380 Million. He adds that the Plaintiff has also suffered loss of user and investment of the land thus the Plaintiff claims damages.
  14. Upon cross-examination, PW1 stated that he complied with the conditions of the letter of allotment and that he is not aware that the 3<sup>rd</sup> Defendant repossessed the suit land.
  15. PW2, one Timothy Saruni Parsaloi introduced himself as licensed and registered valuer. He produced the valuation report at page 91-100 of the Plaintiff's consolidated bundle of documents filed on June 11, 2019. Adding that the same represents the value of the land as at March 13, 2017.
  16. PW2 was recalled on February 27, 2023, when he produced a current valuation report dated April 27, 2022 as an update of the one dated March 13, 2017. Therein, the value of the suit property is indicated as Ksh 420 000 000.
  17. Upon cross-examination, PW2 stated that he used market comparison analysis to compile the report as is evident at page 8 of his report. He had noted that it is difficult to get big chunks of land in that area as most land has been subdivided.
  18. PW3's evidence is that of John Musyoka Annan. The same was admitted without calling him following the Plaintiff's application dated December 4, 2020 which was allowed on October 13, 2021 unopposed. The said evidence is captured in an undated and unsigned witness statement. He avers that from August 21, 1978 to about June 9, 1994, the Plaintiff had made efforts to have the title to the suit plot issued in its favour. PW3 also states that while his firm was instructed to obtain title on behalf of the Plaintiff from the 3<sup>rd</sup> Defendant, it did not get the title since the land was unlawfully allotted to another entity by the 3<sup>rd</sup> Defendant.



19. The 3<sup>rd</sup> Defendant called 1 witness, DW1, Abwao Eric Odhiambo who introduced himself as an Assistant Director of Legal Affairs at the County of Nairobi. He adopted his witness statement dated August 24, 2016 as his evidence. He also produced the 8 documents at page 87-110 of the consolidated bundle as D. Exhibits 1-8.
20. In his witness statement, DW1 states that he is aware that an allotment letter was issued by the 3<sup>rd</sup> Defendant to the Plaintiff on August 21, 1978, but was conditional upon among other things, issuance of a document of title, prompt payment of rates and development of the suit land which conditions the Plaintiff did not comply with, including failure to pay what was due within 30 days.
21. This prompted the 3<sup>rd</sup> Defendant to repossess the suit property, subsequently, the suit land was alienated through a resolution of the council and allotted to residents of Soweto/Kahawa West. He added that the 3<sup>rd</sup> Defendant's revocation of the letter of allotment was duly communicated to the Plaintiff.
22. Upon cross-examination, DW1 reiterated that the Plaintiff did not fulfill some conditions in the letter of allotment dated August 21, 1978.
23. DW1 stated that the condition to develop the suit land within 2 years is not in the letter of allotment. He added that a notice to revoke the Plaintiff's letter of allotment was forwarded to him and it is dated April 11, 2005 and that the reason for revocation was due to arrears. That the Plaintiff had been given 30 days to pay but he failed to comply.
24. He stated that as at April 11, 2005, the suit property was in the Plaintiff's hand but the allotment letter is only an offer subject to acceptance. He further stated that there are council minutes of August 13, 1992 to show how the suit land was allocated to Kahawa Soweto Resettlement scheme who must have made proposals to the council, but he is not aware whether they attended. He added that the council recommended them for allotment subject to availability which happened after the expiry of the notice of 2005.
25. On re-examination, DW1 gave an account of the process of allocation; That when council wants to allocate land, it presents 2 Part Development Plans which was a requirement under the Physical Planning Act. One PDP is submitted to the Director of Surveys and the other is posted at City Hall or within the vicinity of the concerned area for the public to forward their objections towards what is to be developed.
26. If there are no objections, the PDP is remitted back to City Hall which does balloting to people who wish to be allocated that piece of land. The successful allottees are given allotment letters subject to payment of requisite premiums. After such payments, the council would welcome allottees to pay for beacon certificate and upon payment, allottees are accompanied by a surveyor appointed by council to point out the beacons of the land; Then the surveyors issue beacon certificates which are submitted to the Director of survey who issues deed plans which bears Land Reference numbers and size of the land. From there, the allottee can actually request the council to prepare for him a lease and the terms of the lease varies depending on the area but it is usually a term of 99.
27. DW1 also stated that the Plaintiff ought to have paid Ksh 141,917/= within 30 days from August 21, 1978, so by 20.9 1978, the payments ought to have been paid, but he has not seen anything to show that such payments were made as per the terms. The amounts were usually paid at the cashiers office and receipt were generated.



28. He stated that when someone doesn't comply with the terms of allotment, the property is repossessed and a repossession letter is sent to the allottee. He added that in the letter of April 11, 2005, the 3<sup>rd</sup> Defendant is giving the Plaintiff a grace period to pay, but it did not comply.
29. The submissions of the plaintiff are dated April 10, 2023, where it is averred that it complied with all conditions set out in the letter of allotment dated August 21, 1978 and that all legal procedures set out in the case of *Ali Moamed Dagane v Hakar Absbir & 3 others* [2021] eKLR were followed to enable the 3<sup>rd</sup> Defendant facilitate the issuance of title.
30. It further submits that the 3<sup>rd</sup> Defendant is estopped from claiming that it failed to comply with the conditions in the letter of allotment because the 3<sup>rd</sup> Defendant confirmed through 2 letters dated April 17, 1986 and May 10, 1989 that the Plaintiff had complied with the said conditions and should be issued with title. It relies on the case of *African Line Transport Co. Limited v Attorney General* [2007] eKLR and the case of *Mbau Saw Mills Limited v Attorney General & Another* [2015] eKLR.
31. The Plaintiff also submits that once it was allotted the suit property, it was not available for allotment to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or to Kahawa Soweto Resettlement scheme. It adds that there is no evidence showing that the 3<sup>rd</sup> Defendant communicated to the Plaintiff to cancel the letter of allotment.
32. It also argues that the demand notice for rates in the sum of Ksh 11,032 dated April 11, 2005 cannot be the notice informing the Plaintiff of cancellation of its letter of allotment and at the time it was issued, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Kahawa Soweto Resettlement scheme had already been purportedly allotted the suit property on August 13, 1992 vide a resolution of the 3<sup>rd</sup> Defendant's water and Sewerage Committee. It also argues that the said demand acknowledged it as owner of the suit land and that it paid the said rates. It cites the case of *M'kunya v Mbijiwe* [1984] KLR, 761, *Ali Gadaffi & Another v Francis Mubia Mutungu & 2 others* [2017] eKLR as well as the case of *Joseph Tobiko Kelemu v Co-operative Management Committee of Emparnat Farmers & Another* [2021] eKLR.
33. The Plaintiff also submits that even if the Plaintiff was in breach of any conditions in the lease, there is no evidence that the 3<sup>rd</sup> Defendant brought proceedings against the Plaintiff for the recovery of the suit property before the land could be free for re-allotment. For the said submission, the Plaintiff relies on the case of *John Muchiri Mbutia v Rebecca Were Mutanda & Another* [2015] eKLR as well as the case of *Joseph Tobiko Kelemu v Co-operative Management Committee of Emparnat Farmers & another* [2021] eKLR (supra).
34. The Plaintiff avers that they are seeking eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants together with any other purported allottees of Kahawa Soweto Resettlement Scheme from the suit property. It adds that it is alive to the fact that the prayer for eviction may not be a practicable remedy considering that the suit property was illegally occupied in 1996 and the trespassers have since put up permanent residential properties thereon. It urges the court to order compensation by payment of the full market value of the suit property which was valued at khs.420 million according to the valuation report dated April 27, 2022. To this end, the Plaintiff relies on the cases of *The Institute of the Virgin Mary, Kenya [Registered Trustees] v The Commissioner of Lands* [1980] KLR, 5, *Attorney General v Zinj Limited* [2021] eKLR, *Dick Omondi Ndiewo T/a Ditech Engineering Service v Cell Care Electronics* [2015] eKLR as well as the case of *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR.
35. The submissions of the 3<sup>rd</sup> defendant are dated May 5, 2023 and address the following issues;
  - a. Whether the terms and conditions for allotment were met.
  - b. Whether the current occupants of the land should be evicted.



- c. Whether the Plaintiff has a claim on compensation.
36. The 3<sup>rd</sup> Defendant relies on the case of *Philma Farm Produce & Supplies & 4 others v The Attorney General & 6 others* [2012] eKLR, the case of *Shiva Mombasa Ltd v Kenya Revenue Authority* [2005] eKLR as well as the case of *Marcus Mutua Muluvi & Another v Philip Tonui & Another* [2012] eKLR to submit that a letter of allotment does not confer title thus upon receipt, a party ought to meet the conditions attached thereto for such ownership to crystallize. It points out that the Plaintiff never complied with the conditions set in the allotment letter issued to it and that the demand for rates dated April 11, 2005 is a clear demonstration that the Plaintiff was not careful to abide by the conditions thus the 3<sup>rd</sup> Defendant reserved the right to revoke allocation.
37. It is also submitted that the Plaintiff is before this Court with unclean hands by being a serial defaulter in the payment of rates and failing to put the land allotted into industrial usage. Reliance was placed on the case of *Lilian Waithera Gachubi v David Shikuku Mzee* [2005] eKLR.
38. On the 2<sup>nd</sup> issue, the 3<sup>rd</sup> Defendant submits that a prayer for eviction is impracticable in the circumstances surrounding this case and that the Plaintiff has admitted the same.
39. On the 3<sup>rd</sup> issue, the 3<sup>rd</sup> Defendant submits that compensation cannot arise in a case where a party has breached the terms of allotment and further that the Plaintiff has not demonstrated any usage of the suit property that is in consonance with the allotment letter. It relies on the case of *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* [2022] eKLR.
40. It is also submitted that the claim for loss of user/income is in the nature of special damages and thus should have been specifically pleaded and proven. To this end, the case of *Swalleh C Kariuki & Another v Violet Owiso Okuyu* [2021] eKLR was cited.
41. The 3<sup>rd</sup> Defendant also submits that it is outrageous for the Plaintiff to seek compensation while relying on the current market value of the property which it has not occupied since 1996. It relies on the case of *Francis Mwaura v Bernard Muceke & another* [2017] eKLR.
42. It argues that should this court consider the question of compensation, the value of the land to be relied on should be that which existed when it became clear that the Plaintiff could not stake a claim on the suit property and not the current market value.

### Determination

43. The question for determination is whether the Plaintiff's claim over the property described as un-surveyed Plot Number 'A' Kahawa West Industrial Estate is merited.
44. The Constitution of Kenya protects ownership of land as stipulated under Article 40 (3). The Supreme Court of Kenya had this to say on the issue of property rights in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR;

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.



45. Seeing that the suit land is not titled, the Court has to wade through the evidence to determine the rights and interests of the plaintiff in the said land. In *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR, the court held that;
- “Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.”
46. The claim of the plaintiff is anchored on the letter of allotment dated August 21, 1978 where the land is referred to as “unsurveyed Plot No A Kahawa West Industrial Estate”. At this juncture, it is pertinent to pose the question; What is the nature or bundle of rights and interests acquired by the plaintiff pursuant to the aforementioned letter of allotment? Are such rights and interests capable of being protected by this court?
47. In the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullabi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR (cited by the plaintiff) the court gave minute details of the steps which had to be followed in the alienation of government land. In particular, the land had to be identified through an approved Part Development Plan (PDP) and this position was reiterated in the case of *Wilson Masila Muema v County Government of Machakos* [2020] eKLR.
48. The 1<sup>st</sup> paragraph of the letter of allotment reads as follows;
- “Following your recent discussions with His Worship the Mayor, regarding the above, I am pleased to enclose herewith drawing No EA/K/1/78 showing edged in green unsurveyed plot No ‘A’ measuring approx. 10 acres which is being offered to you for industrial purposes.
49. Dw1 has given an account of how the process of allotment is undertaken. That Part Development plans (PDPs) are prepared in tandem with the then applicable law (the Physical Planning Act) and forwarded to Director of survey, they are also posted at city hall and at the area in question. If there are no objections, the balloting is done and the successful applicants are issued with allotment letters.
50. The proposed PDP (not approved) touching on the suit land availed by the plaintiff bears the date of June 15, 1979, one year after the plaintiff was issued with the letter of allotment
51. Even the alleged surveyor’s report dated September 4, 1996 mentioned in PW1’s statement indicates that there were no PDP’s of that land. There is no evidence to indicate that the allotting authority had followed the laid down processes to allocate the land. A discussion with the mayor was certainly not a known procedure in law to give rise to acquisition of rights and or interests in land.
52. Further, from the time the land was apparently allocated to the plaintiff in 1978, all the way to when the suit was filed in 1996, there is no evidence that the plaintiff was shown the dimensions of the land on the ground at any one time. There is no evidence that he ever took possession of the said land.
53. What resonates from the foregoing analysis is that the plaintiff has never enjoyed any kind of rights and or interests in the “suit property” because what was offered to them was unknown land. Thus the plaintiff did not acquire any rights and or interests in the “suit property” capable of being protected.
54. It is therefore immaterial as to whether the plaintiff complied with the terms of the allotment or not. There being no lawful procedure of the allotment, and there being no evidence of identification of the suit property, then the plaintiff is estopped from claiming a particular parcel of land or compensation there of.



55. In the case of *Samson S. Maitai & another v African Safari Club Limited & Another* [2010] eKLR, the court stated that.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

56. In the case at hand, I find that the plaintiff has not proved its case on a balance of probabilities. The case is dismissed and each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:**

**Wawire for the Plaintiff**

**Court Assistant: Eddele**

