



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND COURT CASE NO.64 OF 2004

GEOFFREY K. IMATHIU

WILFRED KIRIMA

STANELY MBAABU IKIARA

ELIJAH MBAABU MUKIIRA

JOSEPH GIKUNDA MUGAMBI

JASON MUTWIRIA ERASTUS

FRANCIS KIAMBIA RINTARI

MURITHI MWITHIMBU

HARRON KOME RIMBERE

SHADRACK GIKUNDA KIIRINYA

JULIUS MBAABU RINTARI.....PLAINTIFFS

VERSUS

MERU COUNTY GOVERNMENT..... DEFENDANT

JUDGMENT

INTRODUCTION

1. The suit herein was initially filed on 19th January 2004 In Meru Chief Magistrate Court Civil case No. 28 of 2004, where plaintiffs were seeking for a permanent injunction restraining the defendant from demolishing, entering, repossessing, or in any other way interfering with plaintiffs' user and occupation of their plots. The following day on 20.1.2004, the prayer for injunction was granted by the court. However, defendant still went ahead to demolish the buildings owned by plaintiffs on 6.2.2004. This prompted the plaintiffs to file an amend plaint on 23/11/05 to include the prayer for compensation for the demolished structures, general damages, costs and interest. The case was transferred to High Court vide High court misc. application no. 54 of 2004 on 13.7.2004.

2. A statement of defence was filed on 2/4/2004. It was never amended. The defence claim that the owners of plots number 39, 59, 60, 46, 58A, 58B, 37, 44 and 50 had trespassed on public utility land.

3. This case has been in the corridors of justice a record 14 years!. The first to fifth plaintiff witnesses testified 10 years ago in year 2008 and 2009! while the last witness for the plaintiff testified on 16.7.1018. These plaintiffs are;

- **GEOFFREY K.IMATHIU, 1ST Plaintiff PW1.**
- **STANLEY MBAABU IKIARA, 3rd Plaintiff PW2.**
- **SHADRACK GIKUNDA KIRIINYA, 10th Plaintiff PW3.**

· FRANCIS KIAMBA RINTARI, 7th Plaintiff, PW4.

· JOSEPH GIKUNDA MUGAMBI, 5th Plaintiff PW5.

· JASON MUTWIRIA ERASTUS 6th Plaintiff, testimony given through a power of Attorney via DIBORAH NTINYARI MUTWIRIA, PW6.

4. On 5/6/2008, the court was informed that three plaintiffs namely **Wilfred Kirima (2nd plaintiff)**, **Elijah Mbaabu Mukira (4th plaintiff)** and **Muriithi Mwithimba (8th plaintiff)** had withdrawn their claim. Thus their claim were marked as withdrawn.

5. No evidence was tendered to support the claims of 9th plaintiff **HARRON KOME RIMBERE** and 11th plaintiff, **JULIUS MBAABU RINTARI**.

6. The defence did not call any witnesses in support of their case.

Plaintiffs Case

7. The plaintiff's case is anchored on the amended plaint of 23.11.2005. The plaintiffs claim that they are allottees of Plot Nos. 39, 59, 45, 60, 46, 58A, 58B, 40, 56, 39, 44 and 50A respectively at **THEGE MARKET MERU CENTRAL DISTRICT**. The plaintiffs had developed their respective plots and on 6th February the defendant in breach of the court order dated 20th January 2004 demolished the Plaintiffs permanent structures. The Plaintiffs structures were valued as follows;

Plot No. 50 A Thege Market Centre - Kshs. 610,000 /=

Plot No. 39 Thege Market Centre - Kshs 1,473,000 /=

Plot No. 46 Thege Market Centre - Kshs 1,117,000/=

Plot No. 58B Thege Market Centre - Kshs 1,070,000/=

Plot No. 45 Thege Market Centre - Kshs 1,624,000/=

Plot No. 58A Thege Market Centre - Kshs 1,070,000 /=

Plot No. 44 Thege Market Centre - Kshs 1,654,000/=

Plot No. 56 Thege Market Centre - Kshs 1,115,000/=

8. The plaintiffs have averred that defendant had allocated the plots to the plaintiffs, whereby, defendant had approved their development plans and received rents and rates.

9. **PW1 GEOFFREY K. IMATHIU** testified that when he was paid his retirement benefits, he bought the plot **No. 39** from Mr. Julius Kinyua who gave him the minutes allotting to him (Julius) the plot, (MIN/14/15/OL.XX71 of 22nd December 1996). In support of his case, PW1 produced as exhibits the original letter from the clerk to the county council issued to Julius Kinyua (P-Exhibit 1), boundary indication document (P- Exhibit.2) and a receipt for plot rent dated 5th February 1997 (P- Exhibit. 3). PW1 paid Ksh.70,000 for the plot as indicated in the sale agreement with the vendor (P-Exhibit 4). The change was effected following a council meeting and PW1 paid Ksh. 100 for the Health Inspector to inspect the plot before construction (P-Exhibit 6-7). After complaints from some people the council wrote a letter to confirm that he was the owner of the said plot (P - Exhibit 9) PW1 went ahead to build and obtained a business permit (P-Exhibit 10).

10. PW1 further told the court that on or about 6th January 2004 the council officers marked his shops in **red (X)** which as explained to him by the council chairman, his building was to be demolished after 7 days. The plaintiff sought legal redress where he obtained an injunction against the said demolition (P Exhibit 12). They served the council who ignored the order and demolished the buildings. PW1 nevertheless had conducted a valuation done by S.K. Mburu Associates (P-Exhibits 13). PW1 told the court that his building had 2 shops, hotel, bar and 3 small rooms in between and was valued at Kshs. 1,473,000/=.

11. PW1 had taken photographs of his demolished buildings which are P Exhibit 14 (a) (b) (c) and (d). He further testified that a local newspaper known as the eye published a list of council rent defaulters, and he was in that list (P-Exhibit 15).

12. **PW2 STANLEY MBAABU IKIARA** testified that he has sued the council for compensation for **plot No. 45** at Thege Market. He bought the said plot from 3 people Kuura, Kirima and Kiogora, who then paid for the rent arrears between the years 1994 to 2001(P exhibit. 17-18). PW2's building plans were approved by the council and he paid the requisite fees of sh. 1000/=. The approval was done by the council clerk, health officer and physical planner. The building plans were produced as his Exhibit 19, while receipts from the council were Exhibit 20. The rate payment receipts were Exhibit 21, while the valuation report was marked for identification as MF1 22. He avers that the value of his damaged buildings is Ksh.1,624 000.

13. **PW3 SHADRACK GIKUNDA KIRINYA** testified that his plot is **No. 44** at Thege Market. He got his plot by applying for allocation

from the council, see (P-Exhibit 23). After the application, he paid for checking of the allocation. Thereafter, he paid Kshs. 360 and 500 for plot rent (P-Exhibit 24 A&B). He also paid for a building plan and approval, see receipt P Exhibit 25-27, while the building plan is P. Exhibit 28. When the building was completed he applied for a business permit from the county council of Meru (P Exhibit No 29-32). He subsequently acquired other business permits.

14. PW3's buildings were demolished by defendant (photos are Ex 35), so he got a valuer and the property was valued at shs. 1,654,000 (P - Exhibit 34).

15. **PW4 FRANCIS KIAMBI RINTARI** testified that his plot was No. **58 (b)**. That he bought it from Erastus M'Thinji M'Mwiti in 1989 as per the agreement P Exhibits No. 36-38. He then started to pay council rent as per receipts P Exhibit 39-42. He managed to value his property before it was demolished and the figure given was Kshs. 1 070 000

16. **PW5 JOSEPH GIKUNDA MUGAMBI** testified that his plot is **No. 46** and he bought it from Jennifer K Muna for 80,000 (P- Exhibit 45 a & b). They applied to change the plot name in an application dated 11th January 2001 (P- Exhibit No. 46), and the minutes approving the transfer plus receipts are P- Exhibit 47-50. PW5 constructed a building on the plot and rented out some of the premises, while he kept one where he put up a bar. He added that his records of the rent he got from his tenants were destroyed when the demolition was done. He also valued his property before the demolition was done. It was worth sh.1 117 000.

17. **PW6 DEBORAH NTINYARI** testified that she is the wife to Jason Mutwiri, the 6th Plaintiff. She availed a power of Attorney from her husband which is P Exhibit 51. Her husband bought Plot No. 58 A from M'Ituigi Kiragu at Kshs. 90,0000 (P Exh.52). Thereafter, they took possession of the plot and built a shop, a bar and rental rooms. They acquired a business permit for the year 2003 which was given by the county council of Meru (P Exhibit 53), while the business permit to run a bar was P Exhibit. 54. Other documents issued by the defendant were produced as P Exhibit 56 (a)- (d), 57 and 58 respectively.

18. **PW6** added that they obtained a building plan and it was approved by the district physical planning officer (P Exhibit 55). Similarly like their co-plaintiffs, their building was marked **X** and demolished without any notice. A valuation was done in respect of the damaged property and the assessment was pegged at sh. 1 070 000, (see valuation report P Exhibit 59). This witness also produced the newspaper publication (P Exhibit 60), which contained a list of alleged rate defaulter. Their plot and the plots of fellow plaintiffs were in that list.

19. All the witnesses herein have stated that they have suffered loss as there was no justice in the demolitions and they lost their income too.

The Submissions

20. The plaintiffs submitted that defendants did not bring any witnesses and therefore their evidence remained uncontroverted by the defendant. They relied on the following cases;

- **Mwangi & Another vs. Wambugu (1983)2 KCA 100 (cited in Ndiritu vs. Ropkoi EALR (205) 1.**
- **Departed Asians Property Custodian Board v Issa Bukunya t/a New Mars Ware House, CA No. 26 of 1992.**
- **Karugi & Another v. Kabiya & 3 Others [1987] KLR 347**

21. For the defendants, it was submitted that the documents provided by the plaintiffs lacked the councils stamp and therefore were not authentic. It was also submitted that the injunctive orders issued by the court were not served upon the defendant. Finally, defendant has pointed out that only PW6 has produced a valuation report.

Analysis and Determination

22. I have carefully perused the pleadings, the evidence adduced and the submissions and I proceed to frame the issues for determination as follows;

- I. Whether the plaintiffs are the owners of Plots 50A, 39, 46, 58B, 45, 58A, 44, 56 at These Market?**
- II. Whether the demolition of the structures by the defendant was lawful?**
- III. What damages should be awarded?**
- IV. Who should pay the costs of this suit?**

Whether the plaintiffs are the owners of Plots 50A, 39, 46, 58B, 45, 58A, 44, 56 at These Market?

23. I will first determine who the present claimants are and which plots are being claimed. In paragraph 2 of the plaint, the plots in question are nos. 39, 59, 45, 60, 46, 58A, 58B, 40, 56, 44, 50A and the plaintiffs are claiming the plots in that chronological order. Since **2nd, 4th, and 8th plaintiffs** withdrew their claims herein, it means that their respective plots nos. **59, 60 and 40** are no longer in issue for determination. The 9th plaintiff **Harron Koome**, alleged owner of **plot 56** and 10th plaintiff **Julius Mbaabu** (who is deceased) alleged owner of **plot 50A** did not testify, hence the court will also not deal with their plots. The plots in question therefore are **nos. 39, 45, 44, 58B, 46 and 58A.**

24. I find that the plaintiffs have given a plausible and consistent account of how they came to own the plots in question. Although all the plaintiffs except 6th one testified almost a decade ago in year 2008 and 2009, their exhibits produced in court are intact, save the valuation reports and some of the photographs referred to which are not in the court file altogether.

25. The summary of how the plaintiffs acquired their plots is as follows; A prospective applicant would apply to the then council for the allocation of the plot in a format similar to P Exhibit 1. The purpose of the allocation would be indicated i.e General Shop. The application would be deliberated by the council where they would give their remarks as “**was approved**”. The minute detail form was signed by the clerk of the county council. Thereafter, the allocation was done and the particulars of the plot were given i.e., the plot number, the area measurement and this is captured in P Exhibit 2. The clerk of the council would sign the document.

26. After allocation, the plaintiffs would apply to the council for the necessary approval, including submissions of building plans. The plaintiffs availed various receipts for the approvals. The plaintiffs commenced their various businesses on the suit plots. They would pay rent to the council and they availed receipts to that effect. For the businesses requiring permits like those of **PW2 (Shadrack)**, and **PW6 (Mutwiria)**, the said plaintiffs would obtain the requisite permits –see **P Exhibit 30, 31, and 32 for Shadrack** and **P Exhibit 53 for Mutwiria**.

27. The defence have submitted that these documents are not authenticated. The defence side had all these years, from 2004 to bring forth their evidence to controvert what has been stated by the plaintiffs. The defence cannot purport to challenge the evidence through submissions. For instance, defence could have given their version of how plots were being allocated in such a market like Thege.

28. I have also perused the defence statement of 2.4.2004 which was never amended. What defendant was averring is that plaintiffs had trespassed on the public utility land. No evidence was adduced to support this averment.

29. In the case of **MOTE KNITWEAR LIMITED VS GOPITEX KNITWEAR LIMITED (MILIMANI) HCCC No 384 of 2002** Justice Lesiit citing the case of **AUTHA SINGH BAHRA AND ANOTHER VS RAJU GOVINDJU HCCC. No 548 of 1998** stated that;

“Although the defendant has denied liability in an amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged, but also that the claim made by the defendant in his defence and counter claim must fail.”

30. The plaintiffs have stated that after the demolition, the council did not do anything with the land. That the land is still bare. Since the demolition was carried out so swiftly, within a month from the time the **red X** mark was put, then how comes the land was not utilized thereafter for the alleged public utilities. 14 years down the line, defendant does not seem to be keen to say anything regarding the ownership of the land, and the demolitions carried out at Thege Market.

31. I am inclined to find that plaintiffs were the owners of the plots in question.

Whether the demolition of the structures by the defendant was lawful?

32. This is a situation whereby the council approved the development plans submitted by the plaintiffs. Defendant must have been satisfied that the said plots were not for public utility. Further during the course of development up till when the developments were completed the defendant did not raise any objection. The plot allocations appear to have occurred sometime in 1996, and by year 2000 the businesses of the plaintiffs were thriving. The question is, where was the council all these years from 1996 to 2004. What is the mystery with the dawn of **January 2004**?

33. I have read the document identified “**the Eye newspaper**” produced as P- exhibit 15 and 60 by PW 1 & PW 6 respectively. It is a publication of **13.1.2004**, which bears a PUBLIC NOTICE with the following information;

“Notice is hereby given to all rate payers with plots within the jurisdiction of the Meru County Council and whose names and rate arrears appear hereunder, that they are required to pay all the outstanding rates due to the council within 30 days from the date of this publication, failure to which the council shall institute a legal proceedings against individual defaulters, repossess the relevant plots and dispose them off through public auction, attach rent in distress, attach movable properties in rateable premises until the unpaid amount is recovered in full as provided in the Rating Act and Valuation for Rating act. The cost of this publication shall be loaded to the defaulting rate payers accounts on a pro-rata basis”

34. The defendant has not rebutted this evidence. The council did not even wait for the 30 days’ notice to lapse since the demolition occurred on 6.2.2004, which was 7 days short of the lapse of the notice. Further, the council was not raising an issue of ownership of the plots or any trespass thereof. The council was having an issue with rate defaulters and the action they undertook to follow was to be anchored under the Rating Act and the Valuation Act. There was nothing about demolition mentioned in this notice. The plaintiffs were however listed as rate defaulters **under the Thege market category**.

35. I have tried to interrogate this demolition issue since defendant has opted to remain mute. The answer appears to be captured in the same newspaper publication of 13.1.2004 (P-Exhibit 15) which bears a big head line on page 14 stating “**DEMOLITIONS AND REPOSSESSIONS IN MERU**”. I find it necessary re-capture some of the contents thereof;

“Already confusion and anxiety has gripped the plot owners in the market centers after word spread that about 12 and 10 permanent houses have been brought down by bulldozers in Kibirichia and Tutua Markets respectively. The demolition work was supervised by the area councilors. Anxious house owners in some market centers accused the councilors of being motivated by jealous and malice while identifying the houses to be demolished.

..... *These councilors are targeting the people who never voted for them during the last general elections. But I promise you this sadism and terrorism which will invite retaliations and counter retaliations that might last for many generations.*

Many house owners continued to express their fear of losing their life's savings after investing heavily in land and houses. Investigations by the Eye revealed that majority bought the properties innocently from the initial allottees who mostly happen to be former councilors and barons who were well connected during the Kanu regime. A former district commissioner Joseph Korir also sold most of the public lands to unsuspecting Wananchi.

I have all the legal documents that one needs to have to own a plot, including papers with the coat of arms issued by the government. Therefore, I cannot understand how my land is said to be grabbed, another landowner from Katheri whose land is also targeted for repossession told the eye. We are determined in repossessing the grabbed public lands and plan our market centers properly, Meru County Council Chairman, Francis Mwongera asserted while stating that the exercise will be done without fear or favour”.

36. What emerges from this extract is that a wave of terror was unleashed on the citizen by some unscrupulous, ill motivated persons in the council, with the councilors being adversely mentioned as the culprits. The threats were actually carried out in a record of 24 or so DAYS!!

37. In the case of **OCEAN VIEW PLAZA LTD – VS- 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”.

38. Therefore the act of the defendants descending on the Plaintiffs plots and destroying their buildings had no justification at all. It is my finding that the council’s actions in demolishing the structures on the plaintiff’s plots was unlawful and that the defendant is liable to the plaintiffs in damages.

39. Section 13(7) of the Environment and Land Court Act NO. 19 of 2011 provides as follows:-

“ In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including-

- (a) Interim or permanent preservation orders including injunctions,**
- (b) Prerogative orders,**
- (c) Award of damages,**
- (d) Compensation,**
- (e) Specific performance,**
- (f) Restitution,**
- (g) Declaration or,**
- (h) Costs.”**

What damages should be awarded?

40. In awarding damages, the court has taken into account the fact that defendant did not try to mitigate the situation during the lifespan of this suit. Even when the political regime changed and the county government took over from the county council, defendant continued to slumber on this dispute.

41. I have noted that when plaintiff’s case was closed on 16.7.2018, defence counsel applied for adjournment to call the physical planner. The court indulged them and the matter was given the date of 1.11.2018, when by consent defence hearing was rescheduled to 6.11.2018. However, on 6.11.2018, neither defence counsel nor their witnesses were in court and their case was marked as closed.

42. The only valuation report that is on record is for plot 58A. However, the court has taken into account that this is the only plaintiff who testified less than a year ago. For the other plaintiffs they gave their testimony in year 2008 and 2009. This court is not in a position to know what could have happened to the other reports in the intervening period. However, their valuation was still done by the same valuer S.K. Mburu. It appears the valuation was done at the same time. The figures mentioned in the plaint have never been varied. They also don’t appear to be exaggerated when compared to the report submitted by PW6. I will therefore consider that the figures mentioned in the plaint is what the plaintiffs deserve.

43. Further, in view of the fact that defendant failed to mitigate the situation throughout the odyssey of this file, then I will direct that interest shall run from the time the suit was filed. I must point out that the damages are in respect of the demolitions of plaintiff's building. Plaintiff are still considered as the owners of the suit plots.

Final orders;

44. I enter Judgment for the plaintiffs against the defendant, the County Government of Meru in the following terms;

I. The following six plaintiffs are awarded damages for the demolition of their buildings,

- a. Godfrey K. Imathiu – 1st plaintiff for plot no. 39 Kshs.1,473,000**
- b. Stanley Mbaabu Ikiara – 3rd plaintiff for plot no. 45 Kshs.1,624,000.**
- c. Joseph Gikunda Mugambi – 5th plaintiff plot no.46 Kshs.1,117,000.**
- d. Jason Mutwiria Rintari – 6th plaintiff plot no.58A Kshs.1,070,000.**
- e. Francis Kiambi Rintari – 7th plaintiff for plot no. 58B Kshs.1,070,000.**
- f. Shadrack Gikundi Kiriinya – 10th plaintiff plot no. 44 Kshs.1,654,000.**

II. The defendant is condemned to pay costs of the suit plus interest at court rates.

III. The interest is to be computed from February 2004.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28TH MARCH, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kithinji holding brief C. Kariuki for plaintiffs

Mutegi for defendant

3rd plaintiff

6th plaintiff

7th plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE