



REPUBLIC OF KENYA



Kionga v Inspector General of Police & another (Environment & Land Case 1529 of 2016) [2023] KEELC 19971 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1529 OF 2016
AA OMOLLO, J
SEPTEMBER 21, 2023**

BETWEEN

DUNCAN KIONGA PLAINTIFF

AND

INSPECTOR GENERAL OF POLICE 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought the suit vide the plaint dated November 30, 2016 seeking the following reliefs:
 - a. A permanent injunction order restraining both the defendants either themselves or through their agents, servants or workmen from doing any of the following acts, that is, laying claim, asserting ownership, entering or trespassing claiming by anyone related to them and/or in any other manner whatsoever interfering with the plaintiff's right of ownership, possession, use and enjoyment of property known as plot no 8285/1021 Kariobangi North infill.
 - b. Vacant possession
 - c. General damages for trespass to land
 - d. Costs of the suit
 - e. Any other relief the Court deems fit to grant.
2. The plaintiff pleaded that he was allocated the plot on January 9, 2002 by the City Council of Nairobi and paid for the stand premium of Kshs 9600 receipt of which was acknowledged by the City Council of Nairobi. He stated that after acquiring the plot, he fenced it and as such, the plot became unavailable for re-allocation



3. The plaintiff pleaded further that despite the finalisation of CMCC 9041 of 2006 filed against the City Council and another in 2015, he was not able to develop the suit plot as he was looking for capital. That he subsequently got money in December 2015 and when he went to the plot, he found it unlawfully occupied by the 1st defendant necessitating the filing of this suit.
4. The defendants filed a statement of defence dated February 22, 2017 denying the claim and stating that the defendants were not parties to CMCC 9041 of 2006. The defendants pleaded that if the plaintiff was allocated the plot, the said allocation was fraudulent as the plot has always been public land. The defendants put the plaintiff to strict proof and urged the court to dismiss the suit with costs.
5. The hearing commenced with the plaintiff giving his testimony on July 17, 2019 stating inter alia, that he is a resident of Park road Nairobi and is also a businessman. He asserted that the defendants had taken his plot measuring 60 ft by 40 ft by force and built a police post on it. He produced the documents filed vide the list dated November 30, 2016 and referred the court to Pex1 which receipt confirming payment of the stand premium.
6. PW stated that he paid for the rates and rents and also fenced of the suit plot as a way of taking possession but the area councillor demolished his structures. He therefore sued the Councillor and the City Council of Nairobi in 2006 and got judgement in his favour. It is the plaintiff's evidence that the Police station was built in 2015. He asked them to vacate by they declined. He concluded his testimony by saying he acquired the land lawfully and urged the court to issue eviction orders prayed for.
7. During cross-exam, PW stated that the reference number for his letter of allotment is CPD/2268. That Kariobangi North Police station is built on the open space in the survey plan Folio 279/84. It is his evidence that plot no 1022 is owned by someone else and he has built a toilet that is used by people who come to visit the police station. The plaintiff was not aware if the toilet is owned by the defendants. He added that the defendants have planted trees on his plot and are also using the suit plot for parking. That the Police station is built in front of his plot.
8. The defendants also gave oral evidence through the testimony of Willis Juma Olal on October 19, 2022. He adopted his witness statement dated July 7, 2020 where he stated that he started living in Kariobangi in 1992. DW also produced the documents in the list dated March 7, 2022 which were marked for identification pending provision of certified copies. According to the witness, the plot the plaintiff is claiming has a public toilet on it. That the map produced by the plaintiff as no 2 refers to Kariobangi – Marura and the suit plot does not appear in the area map (DMFI-3). The witness also criticized PEx10 stating it was not signed by the survey nor entries made on the transaction part.
9. In cross-exam, DW said he was made a village elder in 2002 and is still the village elder to date although there was no letter of appointment. He admitted there were no minutes resolving for the building of the police post. That the public toilet was built on the remainder of the parcel 8285/R. DW stated that he got the maps he has filed in Court from City Hall and the Survey of Kenya. He did not know how the plaintiff acquired his title. In re-exam, DW said that where the toilet is has no number and that the plaintiff's plot does not appear in their maps they produced.
10. In his written submissions dated March 8, 2023, the plaintiff picked five issues for determination. He submitted that he is a bonafide legal owner of the suit property having followed due process and was allocated the plot. He referred this court to the judgement in CMCC 9041 of 2006 which also confirmed that he was the legal owner thereof. The plaintiff stated that the evidence of the defendants' witness was a sham since Mr Juma did not produce any letter authorizing him to give evidence.
11. The plaintiff submitted that the defence witness did not produce minutes authorising the building of the police station on the suit plot. He argues that although the defendants pleaded fraud in paragraph 7



of the defence, the fraud alleged was not proved. It is submitted further that there were no documents availed to show the land belonged to the 1st defendant and prayed that his claim be allowed as presented.

12. The defendants filed their submissions dated April 17, 2023 and submitted that before being allocated a plot, there must be an application made which application is missing in the plaintiff's list of documents produced. They cited the decision of Angote J in the case of *Moses Okatch Owuor and another versus the Attorney General and another* (2017) eKLR which restated the case of African Line Transport Co. Ltd...Vs...The Hon. Attorney General, Mombasa HCCC No.276 of 2013, where Njagi J held as follows:-

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertakes the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot”.

13. The defendants submit that the survey map produced by the plaintiff was registered on December 16, 1997 and authenticated on May 11, 1998 but it was not approved by the Director of Surveys. That it is curious that the time the allotment letter was issued, the land already had a reference number, hence their submission that the land was not procedurally allocated and they urged the court to dismiss the suit with costs.
14. Having analysed the pleadings, the evidence and the submissions, I frame two questions for determination of this dispute:
- i. Whether the plaintiff has a good title to the suit plot
 - ii. Whether the defendants should be evicted from the suit plot
 - iii. Who bears the costs of the suit?
15. The plaintiff wants this court to issue an order for vacant possession against the defendants and subsequently permanently bar them from interfering with his plot 8285/1021 Kariobangi North In-fill. The defendants denied that the plaintiff rightfully owns the suit plot and pleaded that the suit plot was un-procedurally acquired. It is trite that the burden rested on the plaintiff to prove that he owns the plot and that the defendants have trespassed on it.
16. In adducing evidence in support of his case, the plaintiff produced several documents inter alia, a letter of allotment issued to him by the City Council of Nairobi dated January 9, 2002. The defendants took issue with the allocation on two parts, first that there was no application made to the City Council, neither was there an acceptance of the offer as required in the letter of allotment. It is true that no application letter was produced however, the plaintiff produced a letter from the Town Clerk to Chief Revenue Officer to accept payment of the stand premium and a receipt dated January 21, 2003 for payment of stand premium. The fact of payment is a sign that the plaintiff accepted the offer.
17. The question is whether the absence of the application to be allocated the plot made the allotment un-procedural. I will look at this vis- vi the deed plan (PeX 6) and the maps that were filed by the defendants. I am alive to the fact that the maps were objected to by the plaintiff because they were not certified. Item 10 in the plaintiff's list refer to ground plan of Land reference 8285/1021 but a copy was not available to the court.



18. The allotment letter refers to plot no 8285/1021 Kariobangi In-fill Scheme but the letter did not enclose a map of the scheme to confirm that the Plot indeed existed and was available for allocation. Pex 6 which is the deed plan for the suit plot has a date of 18th May 2006 which is post the allocation thus does not support the ground position of the plot as at the time of its allotment.
19. The plaintiff relied on the judgement rendered in CMCC 9041 of 2006 on February 10, 2015 where the court found for him. On the face of that judgement, the present defendants were not parties and there is no nexus shown by the plaintiff between the previous defendants and in particular the 1st defendant who is in occupation of the suit premises. Relating the issue of evidence of ground position of the suit plot and the evidence adduced, the plaintiff stated that the police station is built in front of the plot but the defendants have fenced and planted trees on suit plot. There was no survey report or surveyor called to corroborate this averment.
20. In the particulars of trespass, the plaintiff pleaded in the plaint that the 1st defendant fenced and planted trees on the suit plot without his authority. In his written statement, he did not give the particulars of trespass, only stating that he approached the 1st defendant through a demand letter. In his evidence in chief, he referred to a councillor who had demolished his structures and who he sued in CMCC 9041 OF 2006.
21. However, the plaintiff stated that the defendants encroached on his land without giving details of the extent of the encroachment. During cross-exam, he said he saw the policemen planting the trees on the land. There is no supporting evidence of the trees allegedly planted on his plot nor a survey report to confirm that the trees that were planted are on the suit plot 8285/1021. I find the plaintiff's evidence as generalities and lacks substance to prove that indeed the defendants have encroached on his plot.
22. Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See Clerk & Lindsell on Torts, 18th Edition at page 923. The onus was on the plaintiff to prove that he is the owner of the suit property and that the defendant had invaded and occupied the same without any justifiable cause. There is no evidence presented to the court that the 1st defendant authorised the 2nd defendant to enter the suit property. Secondly, the plaintiff led at paragraphs 11 that the Kariobangi North Police station entered and occupied the suit property but in his evidence, he stated that the Police station is built in front of the plot. As I have stated, there was no proof that indeed the defendants have planted trees on the suit plot.
23. In view of the above analysis, I find the claim brought by the plaintiff has not been produced and it is hereby dismissed with costs

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2023

A. OMOLLO

JUDGE

In the Presences of

No appearance for plaintiff

No appearance for defendants

Court Assistant: Valentine

