



**Gilani & 2 others v Kenya Railways Corporation & another (Environment & Land Case 302 of 2018) [2023] KEELC 21049 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21049 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 302 OF 2018  
FM NJOROGE, J  
OCTOBER 26, 2023**

**BETWEEN**

**FAIZ ZAHIR GILANI ..... 1<sup>ST</sup> PLAINTIFF**

**SHAMSHER GULAMHUSSEIN GILANI ..... 2<sup>ND</sup> PLAINTIFF**

**ZAHIR GULAMHUSSEIN GILANI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs through the originating summons dated 19/10/2018 and amended on 24/10/2022 which is expressed to be brought under Order 8 Rule 1, Order 37 Rules 3 & 8 of the [Civil Procedure Rules](#), Section 26 and 30 of the [Land Registration Act](#) pray for judgement against the defendants for:
  1. A declaration do issue that the proprietary rights pertaining to the property known as Nakuru Municipality Block 8/83 belong to the applicants exclusively.
  2. A permanent injunction do issue against the 1<sup>st</sup> defendant by itself, its agents, servants and/ or any other person from occupying, trespassing, encroaching, utilizing, interfering with the plaintiffs quiet possession or in any other way dealing with the land parcel number Nakuru Municipality Block 8/83.
  3. This honorable court be pleased to grant orders compelling the Chief Land Registrar, the 2<sup>nd</sup> defendant herein, to correct, register and re-issue the amended title for land parcel number Nakuru Municipal Block 8/83 to the plaintiffs in accordance with the joint survey report dated 2/06/2020.



4. The Plaintiffs are entitled to special damages as quantified.
  5. Costs of this application be provided for.
2. The amended originating summons is supported by the affidavit of Faiz Zahir Gilani which was sworn on 1/11/2022. He deposed that sometime in April 2018 he purchased land parcel No. Nakuru Municipality Block 8/83 from Pius Abuki Bwongeri after conducting a search on 17/04/2018 which confirmed that he was the registered owner; that the search also revealed that the land had been charged to K-Rep Bank for Kshs. 7,700,000/= on 27/09/2013; that he obtained a consent to transfer from the Commissioner of Lands, the land rent and rate clearance certificates together with the discharge of charge; that after obtaining the said documents a transfer was prepared which was lodged at the Nakuru Lands Registry; that the suit property was then registered in the names of the plaintiffs on 25/07/2018; that they embarked fencing the property in August 2018 and contracted East African Earth Movers and paid Kshs. 574,432; that while the fencing of the property was ongoing, officers of Kenya Railways Corporation together with the police showed up and begun destroying the erected fencing structure; that no charges were preferred against the contractors and so they reported the matter to the police station and were given OB number 23/22/8/18; that they have been continuously summoned by the Directorate of Criminal Investigations based at the railway station to confirm their position with regard to acquisition of the property; that the continuous harassment by the respondent and its agents have caused unnecessary anguish despite their ownership of the property and that their right to ownership of the property is being violated by the 1<sup>st</sup> defendant; that on 2/03/2020 parties agreed by consent to conduct a joint survey within 30 days and file a joint report; that the joint survey report dated 2/06/2020 concluded that the suit property encroached on the railway reserve by approximately 0.08 Ha; that the suit property also encroached on the existing building belonging to the Railway Gang Camp No.1113; that on 10/12/2020 the court gave directions that the details on the suit property be corrected based on the joint survey report and a new title be generated; that the Chief Land Registrar has taken a long time to re-issue a new title as per the court order dated 10/12/2020 and that it is in the interest of justice that the Chief Land Registrar be compelled to correct, register and re-issue the amended title to facilitate proper and effectual determination of the dispute.
3. The plaintiffs also filed a supplementary affidavit on 19/12/2022 sworn on 14/12/2022 by the 1<sup>st</sup> plaintiff. He reiterated the contents of his supporting affidavit sworn on 1/11/2022 and deposed that pursuant to the court order issued on 10/12/2020, the plaintiffs commissioned a surveyor and instructed him to correct the details of the suit property in accordance with the joint survey report; that the surveyor conducted a re-survey and submitted the documents on 26/07/2021; that a letter dated 5/02/2022 was written by the firm of Mugendi & Associates to the Ministry of Lands and Physical Planning requesting that a new lease certificate be issued but there was no response; that despite other correspondences sent to the 2<sup>nd</sup> defendant, it has failed to issue a new certificate of lease; that despite service of the amended originating summons on the 2<sup>nd</sup> defendant, the orders issued by the court have not been complied with and that it is in the interest of justice that that the orders sought be granted.
4. In response to the amended originating summons, the 1<sup>st</sup> defendant filed a replying affidavit on 20/01/2023 sworn by Nathaniel Ochieng on 10/01/2023. He reiterated the contents of his replying affidavit sworn on 16/05/2019 and deposed that the joint surveyor's report recommended that the certificate of lease of Nakuru Municipality Block 8/83 be cancelled and the land register rectified as per the report dated 2/06/2020.
5. The defendant in the replying affidavit sworn on 16/05/2019 and filed on 29/05/2019 by Nathaniel Ochieng deposed that he is a Senior Land Surveyor with the defendant; that the defendant owns Railway Reserve Land at KM 715 known G113 Nakuru-London area; that the railway corridor at



KM714 is 30 meters; that the 1<sup>st</sup> defendant had developed permanent buildings on the land known as G113; that the said land was initially owned by East Africa Railways and Harbours since 1889 and was later vested to the defendant on 22/02/1986 vide Legal Notice No. 24; that in August 2018, the plaintiffs encroached on the said property and begun to fence it; that the defendant later learnt that the plaintiffs had irregularly obtained a Certificate of lease on the railway reserve land; that the defendant undertook a survey which established that Nakuru Municipality Block 8/83 fell on the defendant's railway reserve land; that it is clear that the plaintiffs did not undertake due diligence to establish the extent of the railway reserve land before purchasing it and the certificate of lease with respect to Nakuru Municipality Block 8/83 should be canceled and the land register rectified appropriately.

### Submissions

6. The plaintiffs filed their submissions on 05/06/2023 while the 1<sup>st</sup> defendant filed its submissions on 07/06/2023. I have perused the court file and found no submissions filed on behalf of the 2<sup>nd</sup> defendant as at the time of preparation of this judgment.
7. The plaintiffs in their submissions gave a summary of the pleadings and the case and identified only one issue for determination which was whether the 2<sup>nd</sup> Defendant should be compelled to rectify the register and re-issue the amended title for land parcel No. Nakuru Municipality Block 8/83 in accordance with the joint survey report dated 2/06/2020.
8. The plaintiffs submit that the issue of ownership of the suit property was resolved through the joint survey and the only issue that is pending resolution is whether the 2<sup>nd</sup> defendant should be compelled to rectify the register. The plaintiffs reiterate the contents of the supporting and supplementary affidavits of the 1<sup>st</sup> plaintiff and seek that the court issues an order to compel the 2<sup>nd</sup> defendant to re-issue a new certificate of lease for the suit property. The plaintiffs rely on Section 13(7) of the Environment & Lands Courts Act No. 19 of 2011, Sections 79(1)(a) - (d) and 80 of the *Land Registration Act* and the case of *Francis Nyauma Obare & 3 Others vs Maina Marwanga Omwamire & another* [2017] eKLR in support of their arguments. On its part, the 1<sup>st</sup> defendant in its submissions urges that that judgement be entered as per the findings and recommendations of the joint surveyor's report dated 2/06/2020.

### Analysis and determination

9. After considering the amended originating summons, the responses thereto and the supplementary affidavit, it is my view that the only issue that arises for determination is whether the court should compel the 2<sup>nd</sup> defendant to re-issue the amended title for land parcel No. Nakuru Municipal Block 8/83 to the plaintiffs in accordance with the joint survey report dated 2/06/2020.
10. By a consent of the parties recorded on 2/03/2020, it was agreed that they would commission their respective surveyors to jointly go to the ground and establish the beacons of the suit property vis a vis the rail reserve. The joint report dated 2/06/2020 was filed and made the following recommendations:
  1. A re-survey of that survey that created parcel No. 83 to respect the Kenya Railway Reserve.
  2. The boundary touching the railway property to be slightly adjusted to accommodate the railway property.
  3. The title for parcel 83 to be surrendered to the Land Registrar of area for re-survey.
  4. KR advised to embark on survey and registrations of its properties to avoid encroachments.



11. On 02/03/2021 the parties entered into a consent that the joint survey report dated 2/06/2020 that was filed in court on 19/11/2020 be adopted and the plaintiffs were to have the details of land parcel No. Nakuru Municipality Block 8/83 corrected as per the report and a new title be generated. Despite the said court order, the details of the suit property were not corrected by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant was joined to the suit but despite alleged service, he did not enter appearance. The 1<sup>st</sup> defendant does not oppose the grant of the said order.
12. A consent order can bind only parties to it and no other person. The consent order was not a judgment of this court issued in the matter on the merits but a compromise between only two parties. It would be foisting some onerous duties on the 2<sup>nd</sup> defendant to compel him to perform tasks under the consent on record which he never executed. It matters not that he was served and he did not file appearance nor defend its interest in the suit. In those circumstances only a judgment on the merits could bind the 2<sup>nd</sup> defendant to the orders that it would issue. This is the judgment in this matter. The main claim by the plaintiffs is against the 1<sup>st</sup> defendant who it accuses of several things. The survey report jointly prepared by the plaintiff's and the 1<sup>st</sup> defendant's appointed surveyors has arrived at the conclusion that the plaintiff had encroached on the 1<sup>st</sup> defendant's property. The plaintiffs' claim against the 1<sup>st</sup> defendant therefore lacks merit. There was no wrongdoing alleged against the Chief Land Registrar; the plaintiffs amended their originating summons and, thinking that the Chief Land Registrar was bound by the consent order entered into in the suit, alleged that he was delaying the process of issuing a new title as per the consent. With all due respect the opinion of the plaintiff is wrong for the reasons given herein above, namely that the Chief Land Registrar was not a party to the consent. How then can this court compel him into performing the terms of the contract he did not execute? In any event I have perused the court record and found that by the time the consent was being recorded between the plaintiffs and the 1<sup>st</sup> defendant the chief land registrar was not yet joined as a defendant in the suit.
13. Besides the legal position that a non- party can not be held liable to perform the terms of a consent there is also another ground that would have rendered the grant of proposed orders impossible. The issuance of a title document is the culmination of a long process. In the recent case of Dinah the supreme court of kenya stated as follows:

“ [104] The procedure for the allocation of unalienated land is laid out by the *Environment and Land Court in Nelson Kazungu Chai & 9 Others vs. Pwani University* [2014] eKLR as follows: “...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees. Petition No. 8 (E010) of 2021 37 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in 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 undertake 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.132. A part development



plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

14. The process by which the plaintiffs obtained title to the suit land has not been the subject of this suit. The matters related thereto have not yet been tried. How then can this court give the plaintiff's title a clean bill of health by proposing, as though it was convinced in these proceedings by way of evidence that that the plaintiffs' is a valid title, its rectification while the cause of action by both parties lay in alleged trespass? I find that course of action imprudent. In the circumstances therefore, this court can not issue an order compelling the 2<sup>nd</sup> defendant to correct, register and re-issue the amended title for land parcel No. Nakuru Municipality Block 8/83 to the plaintiffs in accordance with the joint survey dated 02/06/2020. The plaintiff's claim is hereby dismissed.
15. The plaintiffs shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**MWANGI NJOROGI**

**JUDGE, ELC, MALINDI**

