



Ramji Meghji Gudka Limited v Openda & 2 others (Environment & Land Case 138 of 2014) [2023] KEELC 21814 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 138 OF 2014**

M SILA, J

NOVEMBER 28, 2023

BETWEEN

RAMJI MEGHJI GUDKA LIMITED PLAINTIFF

AND

SHADRACK OPENDA 1ST DEFENDANT

THE COUNTY ENGINEER, KISII COUNTY 2ND DEFENDANT

KISII COUNTY GOVERNMENT 3RD DEFENDANT

JUDGMENT

A. Introduction And Pleadings

1. This suit was commenced through a plaint filed on 8 April 2014. The plaintiff, a limited liability company, has pleaded that she is the lawful proprietor of the land parcel Kisii Municipality/Block III/355 having become so registered on 12 March 1997. She complained that on 27 March 2014, the defendants, through their employees and agents, entered the suit land, excavated soil and started digging trenches therein, and destroyed a foundation put up by the plaintiff. She avers that she was subsequently informed by the 2nd defendant (the County Engineer, Kisii County) that the defendants wish to convert the suit property into a public utility land and build a car wash/garage to help the youth in Kisii earn a living. The plaintiff contends that the defendants are acting unlawfully as this is private land. It pleaded that there had been previous suits over the land, being Kisii CMCC No 126 of 2000 and Kisii CMCC No 422 of 2003, both of which were determined in favour of the plaintiff. In the suit, the plaintiff seeks the following orders (paraphrased for brevity):-

- i. Declaration that the plaintiff is the lawful, bona fide and registered owner of the suit land.
- ii. Permanent injunction to restrain the defendants from the suit land and restraining them from building a car wash/garage.



- iii. General damages for trespass and/or conversion.
 - iv. Interest at court rates.
 - v. Costs
 - vi. Any further relief that the court may deem fit and expedient to grant.
2. The defendants filed a joint statement of defence, and the 3rd defendant, the County Government of Kisii, lodged a counterclaim. The defendants pleaded that the suit land is designated as public land in the Approved Development Plan of Kisii town of 1971, being Plan Reference No N37/71/01. It is averred that the suit land is designated for recreational purposes (open land) and that the registration of the plaintiff as proprietor is irregular. They pleaded that the registration of the plaintiff as proprietor was through irregularity, collusion, corruption or fraud, and the following particulars were alluded to, being: colluding with officers of the former Municipal Council of Kisii to unlawfully acquire title; shifting the designated location of a public road to create the suit land; unlawfully acquiring ownership to riparian land; and acquiring the land in the knowledge that it was not fit for commercial development. They pleaded that the land is situated at Daraja Moja between the Kisii-Keroka road and the Kisii-Kisumu bypass and lies within the 30 metre riparian reserve for river Nyakomisaro. The 3rd defendant admitted sending an independent contractor to the suit land to erect car sheds for the youth, in a youth empowerment project, and that the youth are using the land on the basis that this is public land. They denied that the plaintiff had been in possession since 2003 and averred that their efforts to take possession in that year were thwarted by the public and the defunct Kisii Municipal Council. In the counterclaim, the 3rd defendant asks for the following orders :-
- a. A declaration that the suit land is public land irregularly acquired by the plaintiff.
 - b. An order directing the Land Registrar, Kisii to revoke the plaintiff's title to the suit land and have the land revert to its original use as per the approved development plan No N37/71/01 of 1971.
 - c. Costs of the suit.

B. Evidence Of The Parties

3. PW1 was Ashwin Ramji Gudka, the managing director of the plaintiff. He produced the Certificate of Lease in name of the plaintiff, the register, and a search, to demonstrate that the suit land is registered in the name of the plaintiff. The land was first registered in name of Gudka West End Motors Ltd on 6 April 1995 before being transferred to the plaintiff on 12 March 1997. The land was allocated by Gusii County Council but he could not recall the procedure that was followed to acquire it. He did not remember whether he applied for the land and whether he was issued with a beacon certificate. He did not know how the land was allocated by the Gusii County Council. He elaborated that the plaintiff wished to develop the plot and had her building plans approved. However, when they commenced construction, they were stopped by the Kisii Municipal Council and the Council filed the suit Kisii CMCC No 126 of 2000 against Gudka West End Motors Limited. The suit was compromised by a consent which he produced. They went back to the site and resumed construction but Council officers demolished the structures which led the plaintiff to file the suit Kisii CMCC No 422 of 2003 and an injunction in their favour was obtained. They opted to slow down but later made fresh building plans that were again approved. They also obtained a NEMA licence for the intended development. They could not construct as the County officials came to the land in 2014, destroyed the foundation and put up a car wash site. He averred that by then he had put up a wall. This is what precipitated this suit. He denied that the suit plot is impossible to develop on basis that the space is covered by the road



and riparian reserve. He insisted that the plot is intact and that he was allowed to develop it so long as it did not interfere with the Kisii – Kisumu bypass road. Questioned by the court (Onyango J) he acknowledged that part of the plot was taken up by the by-pass. He stated that the plaintiff occupies around 40% of the land and the other part is occupied by persons washing cars. He denied being on a riparian reserve.

4. With the above evidence the plaintiff closed her case.
5. DW1 was Patrick Achoki, the Director Physical Planning, County Government of Kisii. He produced the Development Plan for Kisii which he explained designates use of various plots in Kisii County. He testified that according to the plan the plot is located under Zone 35 which for recreation. He elaborated that recreation would be for sports or a park since the land borders a river. He had no record of change of use and added that if anyone claims it is a plot they should have evidence of replanning and survey of the area. He testified that his office is the custodian of Part Development Plans (PDPs) and he has no record of a PDP redesignating the plot for other use. He explained that for such land to be allocated, there should be authority from the Town Planning Committee and based on the said authority a PDP would be prepared. The PDP would be approved by the Director, Physical Planning. He testified that before 1996, PDPs would be approved by the Commissioner of Lands. The approval would form basis for issuance of an allotment letter and subsequently a registry index map (RIM). He stated that he had no record of this. He could not comment on the consent entered in Kisii CMCC No 126 of 2000.
6. With the above evidence the defence closed her case.
7. I felt the need to visit the site and we did so on 31 May 2023. At the site, there was Mr. Gudka (PW1), Mr. Achoki (DW1), Mr. Benard Ogechi, the District Surveyor, Ms. Harriet Oswera, the Land Registrar, Kisii, and Mr. Denis Ochora, the Director, Land Survey and Mapping, County Government of Kisii. I asked Mr. Gudka whether he could point out the boundaries of the plot, and interestingly, he stated that he does not know its boundaries. Mr. Ogechi had the survey plan which effected the survey and he pointed out that it was F/R No 274/11. He proceeded to identify the boundaries using this survey plan. The plot is marked by 6 beacon points DN1, DN2, DN3, DN4, DN5 and DN6. While at site Mr. Gudka pointed to an area near beacon DN5 where he claimed he had begun construction but I only saw a standing electricity pole and no sign of development.
8. I invited counsel to file written submissions, which they did, and I have taken these into account before arriving at my decision.

C. Analysis And Disposition

9. The plaintiff's case is that he has good title to the suit land and the defendants have no business interfering with it. The defendants on the other hand assert that this is a public utility plot and have made reference to the development plan of Kisii Town. They have also pointed out that the land is in a road and riparian reserve.
10. Starting with the development plan, it is indeed correct that the suit property is shown as a public open space. The defendants contend that that there has never been any change of use approved and that there is no Part Development Plan (PDP) for the plot. The plaintiff did not provide any evidence of change of use for the plot and had no PDP to present. The plaintiff did not also provide any history of allocation of the plot. She provided no letter of allotment, no fees paid for the allotment, nor beacon certificate. Granted, the plot was not allocated to the plaintiff but to Gudka West End Motors Limited. However, it would appear that the plaintiff herein is closely related to Gudka West End Motors Limited. This is discernable from the documents produced in relation to the Kisii CMCC No 422 of 2003. Among



the documents is an affidavit sworn on 28 April 2003 by Mr. Ashwin Gudka, and he has sworn that affidavit as a director of Gudka West End Motors Limited. It would mean therefore that Mr. Gudka would have knowledge of how the land was allocated to Gudka West End Motors Limited and could avail documents of allocation of the land but he did not. Given the contention by the defendants that the land was never allocated and that it remained a public recreational plot as indicated in the development plan, I think the plaintiff ought to have done better to provide some history of the land because this was within her knowledge.

11. But all this aside, what was glaring was the fact that a big chunk of the plot is actually inside the Kisii-Kisumu tarmac bypass. The survey plan of the plot shows that it starts from one side of the bypass road and crosses over to the other side of the tarmac. In fact, two beacons, that is beacon DN1 and DN4, were geo-located to be smack in the middle of the tarmac. One beacon, DN3 was on the opposite side of the tarmac, and a beacon DN2 was on the tarmac road reserve. The Kisii- Kisumu bypass, is a wide tarmac road and probably falls within the control of the Kenya National Highways Authority (KENHA). The plaintiff has not sued KENHA and I am surprised that she can assert to have a good plot which falls on a tarmac road.
12. It will be recalled that when we were at site, Mr. Gudka stated that he does not know the boundaries of his plot. I of course wonder how you can come to court claiming an encroachment when you do not know the boundaries of your plot. I think the truth of the matter, is not that Mr. Gudka did not know the boundaries of the plot, but Mr. Gudka was simply too embarrassed to show its boundaries, since they partly fall on tarmac. If this was a good plot, what the plaintiff ought to have done was to sue KENHA, or whatever entity that built the road, for compensation for compulsory acquisition of the plot when the bypass road was being built. If only part of the plot was being acquired for the road, then the plot would have needed to be resurveyed so as to leave out the chunk surrendered for the road, and the registry index map amended to show the road and the redesigned plot. There is no evidence of this having happened. To contend that this still remains a good plot, within the delimitations shown in the survey plan, despite the Kisumu-Kisii bypass passing through it, is stretching imagination too far. I am persuaded to find that this is a plot that never was, and if ever it was a plot that was, then it no longer is. It certainly cannot purport to retain the character as shown in the survey plan given the presence of the tarmac road. Apart from the road, there is also the riparian reserve which the plot appears to fall into.
13. A good chunk of the plaintiff's case is hinged on a consent that was entered into in the case Kisii CMCC No 126 of 2000, and indeed, in his submissions, counsel for the plaintiff alluded to it as providing evidence that the plaintiff has good title to the suit land. I have looked at the consent. The suit was indeed one of the year 2000 where Kisii Municipal Council sued Gudka Westend Motors Limited. I don't know why Gudka West End Motors Limited was the entity sued since they had already transferred title to the plaintiff herein on 11 March 1997. Be that as it may, the consent is to the effect that the defendant will not construct any structure on the portion of the suit land falling within the by-pass road and the bypass was to be availed and open for public use. I can't tell the context of the entire case but it does seem that the defendant in that case agreed not to interfere with the road. I have not seen anywhere that it was agreed that the plot was a good plot, which, in any event, could not have been an issue in the case, as the registered proprietor at that time (plaintiff herein) was not party to the case. There is also the suit Kisii CMCC No 422 of 2003 where Gudka West End Motors Limited sued the Municipal Council of Kisii apparently for demolishing her structures on the plot. I have no decree relating to this case and not aware whether it was finalized. But yet again, the issue of ownership of the suit land could not have been determined therein without the plaintiff, who was then the registered proprietor, being a party thereto. Nowhere in those two cases was it decreed that the suit plot is a genuine plot and in fact the consent entered in the suit Kisii CMCC No 126 of 2000 seems to suggest that the land is on a road and the defendant therein agreed not to interfere with the road.



14. The facts herein speak for themselves. There is no need of beating about the bush. I saw the plot and it is next to the river and is partly on tarmac. This plot is on a road, a road reserve, and a riparian reserve. How do you purport to have a good plot which is on a tarmac road ? There is no information on how the plot was created and no evidence how it morphed from a public open space to a residential or commercial plot that is privately owned, yet this evidence ought to be within the knowledge of the plaintiff's directors. One cannot fault the defendant for refusing to have the plot developed. How do you develop such a plot ? How will you make a building smack on top of a tarmac road ? That surely cannot happen for that is akin to grabbing a public tarmac road. And the plaintiff cannot be heard to say that half the plot is good, and only half is bad, for the whole plot is comprised in one title which is shown in the survey plan. As I had mentioned earlier, if a portion of the plot was carved out for a road, then the plot needed to be resurveyed but this was never done.
15. I am not persuaded that the plaintiff has demonstrated that she has good title that needs protection. As I have taken the trouble to elaborate, if the plot was a good plot, then the plaintiff ought to have sued to be compensated for the plot having been converted into a road, since the plot is already under active public use as a road. I am indeed persuaded that the 3rd defendant has demonstrated that the said plot was not properly created since it is still shown in the development plan as a public open space. There is no evidence of conversion of this plot by way of a PDP into private use. The creation of the plot was thus irregular and such title cannot be protected pursuant to Section 26 (1) (b) of the [Land Registration Act](#). The said Section allows nullification of titles procured illegally, unprocedurally or through a corrupt scheme. I will thus allow the counterclaim and proceed to nullify the title of the plaintiff to the suit land. The land reverts to the public for the use intended in the development plan i.e use as a public open space.
16. It is not part of the dispute, but if the plot is a recreational plot as contended by the 3rd defendant, then the 3rd defendant also has a duty to put it to that particular use. I was not particularly excited that the 3rd defendant has allowed people to use it as a car wash, yet it is next to a river. That activity exposes the river to a considerable amount of pollution which ought to be avoided. But that is besides the point. The point is that I am not persuaded that the plaintiff has demonstrated to this court that she has good title to the suit land which deserves protection and her title is thus nullified. In essence I dismiss the plaintiff's suit and allow the counterclaim of the 3rd defendant. I declare the suit land to be public land set aside for recreational purposes as outlined in the development plan No N37/71/01 of 1971. I proceed to direct the Land Registrar, Kisii, to nullify this title and have the land maintained as public land as shown in the development plan.
17. The last issue is costs. They will follow the event. The plaintiff will pay the costs of both the suit and the counterclaim to the defendants.
18. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 28 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE

