



Kimani v County Government of Kiambu & another (Environment & Land Case 773 of 2014) [2022] KEELC 2321 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 773 OF 2014**

MD MWANGI, J

MAY 11, 2022

BETWEEN

WANGUI KATHRYN KIMANI PLAINTIFF

AND

COUNTY GOVERNMENT OF KIAMBU 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff's case is as stated in her amended Plaintiff dated 31st July 2017 and filed in court on August 4, 2017. The Plaintiff prays for:
 - a) An order of specific performance compelling the Defendants to carry out the survey of the suit property, and to prepare, execute and submit such documents as are required to facilitate and complete the allocation to the Plaintiff of the plot No. 15B Juja situate in Juja Township and to facilitate the issuance of a certificate of lease by the District Land Registrar, Kiambu, District land Officer, Kiambu and the National land commission.
 - b) General damages assessed by the Honourable court being the loss incurred by the Plaintiff equivalent to the income that the Plaintiff could have derived from the suit property from 11th June 1992 to date.
 - c) In the alternative, the Defendants be ordered to compensate the Plaintiff with general damages equivalent to the current market value of plot No. 15B Juja situate in Juja Township and general damages assessed by the Honourable court being a sum equivalent to the income that the Plaintiff could have derived from the suit property from June 11, 1992 to date.
 - d) Costs of the suit with interest thereof.



- e) Any other relief that the Honourable Court may deem fit and just to grant.
2. The basis of the Plaintiff's claim is that on June 11, 1992, the then county council of Kiambu allocated her a parcel of land known as plot No. 15B Juja situated at Juja Township in Kiambu County. According to the Plaintiff, the approved user of the Plot was residential and she was to pay an annual plot rent of Kshs. 500/=
 3. The Plaintiff claims that her intention was to build high rise students' hostels on the suit property to serve the student population at the Jomo Kenyatta University of Agriculture & Technology which is near where the plot was situated.
 4. The Plaintiff avers that she commenced the process of pursuing the certificate of lease but the county council of Kiambu failed, refused and or neglected to forward the survey plans, the original allotment letter, the minutes and the other supporting documents to the District Land Officer and the District Land Registrar, Kiambu to facilitate the processing and issuance of lease for the suit property.
 5. The Plaintiff reiterates that despite the failure by the county council of Kiambu to carry out its part of the bargain, she on her part continued to pay rent and rates to the County Council of Kiambu.
 6. The Plaintiff states that, owing to the refusal by the County Council of Kiambu to issue her the necessary documents to enable her pursue the issuance of the lease, she was unable to execute her plans (of building a highrise students' hostel) despite having the necessary funds. She therefore suffered loss and damage for which she claims compensation.
 7. The Plaintiff contended that the 1st Defendant who is the successor in title to the former county council of Kiambu intends to allocate the suit property to a third party to her detriment, since she, had complied with all the terms and conditions of the allotment. She affirms that if the intended allotment to a third party is effected, she stands to suffer irreparable loss and immense damage which cannot be compensated in damages.
 8. Both Defendants filed their statements of defence in reply to the Plaintiff's claim.
 9. The 1st Defendant in its defence stated that the Plaintiff never complied with the express terms of the letter of allocation including payment of annual rent. That she mischievously only started doing so in the year 2010 by which time the offer had lapsed.
 10. In response to the claim by the Plaintiff that she had intended to build High rise students' hostels on the plot, the 1st Defendant avers that the reserved user of the plot as stated in the Plaintiff's own pleadings was for residential purposes only, not commercial purposes.
 11. Noteworthy is the 1st Defendant's contention that it no longer has power to alienate and allocate public land and that the said function is now the sole preserve of the 2nd Defendant, the National Land Commission, under part III of the Land Act, 2012.
 12. Finally, the 1st Defendant intimates that the Plaintiff's suit is time barred and should be dismissed with costs.
 13. The 2nd Defendant on its part, in its statement of defence alleges that the prayers sought by the plaintiff cannot be enforced against it as they do not form part of its mandate. The 2nd Defendant further states that it is not liable to pay any damages to the plaintiff since it played no part whatsoever in the alleged loss.
 14. The 2nd Defendant prays for dismissal of the Plaintiff's suit against it.



15. The case proceeded to full hearing. The Plaintiff testified in her case whereas the 1st Defendant called 1 witness. The 2nd Defendant did not participate in the hearing.

The Plaintiff's Case.

16. In her testimony, the Plaintiff adopted her witness statement filed in court on June 16, 2014 as part of her evidence in chief.
17. In her testimony, she basically reiterated the averments in her Plaintiff.
18. The Plaintiff's case was that on June 11, 1992, the County Council of Kiambu allocated her the plot No 15B Juja in Juja Township. She was duly issued with a letter of allotment and in her own words, commenced the process of acquiring a certificate of lease. Her intention was to build high rise students' hostels on the plot, with about 25 rooms. She had projected or estimated an income/rent of Kshs 10,000/= from each of the rooms on completion.
19. It was the Plaintiff's testimony that her plans never came to be, because the defunct county council of Kiambu frustrated the process and refused to issue her documents to enable her acquire a certificate of lease.
20. On cross-examination by the Advocate for the 1st Defendant, the Plaintiff confirmed that the only document that she had in support of her claim was a copy of the allotment letter issued on June 11, 1992. She could not explain the whereabouts of the original letter of allotment. She further confirmed that she had not been issued with a part development plan.
21. The Plaintiff agreed that the letter of allotment had terms and conditions including payment of rent which she did not comply with until 2010 when she paid Kshs 3,500/- as confirmed by the receipts she had produced in support of her case. Although she alleged that she had made some payments in 1999, she had no evidence to prove the same.
22. On being pursued to explain why she made no payments despite the allotment letter being clear on the payments required, the Plaintiff stated that she had been waiting for demand letters from Kiambu County Council which were not forthcoming. She however, was aware of the obligation to pay rent.
23. The Plaintiff only completed payment of the arrears of rent in 2011.
24. The Plaintiff confirmed that under condition (b) of the letter of allotment, it would have been possible to make a request for approval of building plans on the plot even without a certificate of title provided she complied with the other conditions therein. She however, had not made any such a request.
25. The Plaintiff in re-examination insisted that the 1st Defendant was obligated to issue her a certificate of title since they accepted payment of ground rent from her as evidenced by the receipts she had exhibited.
26. The Plaintiff further stated that she could not build on the plot since she was told that the plot had been allocated to some other person. She thought it was prudent to wait until she had a certificate of title to the plot.

The 1st Defendant's case

27. The 1st Defendant called one Teresia Wairimu, a surveyor as its witness. The witness adopted her statement dated January 5, 2018 as her evidence in chief.



28. The 1st Defendant's witness in essence reiterated the averments in the 1st Defendant's statement of defence. She affirmed that the Plaintiff blatantly breached the terms and conditions in the letter of allotment by failing to make rent payments. She only mischievously did so in 2010 and started demanding a title.
29. The witness was categorical that the Plaintiff's claim that she intended to build high-rise students' hostels was baseless as the plot was strictly for residential purposes and no change of user had been done.
30. Finally, the 1st Defendant's witness reiterated that the Plaintiff had failed to produce a Part Development Plan (PDP) which is a document that mandatorily accompanies any genuine letter of allotment.
31. On cross-examination, the 1st Defendant's witness confirmed that in 1992, the Physical Planning Act was not in force. PDPs were therefore issued from the Commissioner of Lands Office. The witness clarified that it was impossible to establish the exact location of the plot without a PDP.
32. In re-examination, the witness reiterated the position that a valid allotment must be accompanied by a PDP.

Courts Directions.

33. Upon conclusion of the hearing of the case, the court directed parties to file written submissions. Both the Plaintiff and the 1st Defendant have complied. I have had occasion to peruse the respective submissions of the parties and the authorities cited in support of their respective positions.

Issues for Determination

34. Having perused the pleadings in this matter, the evidence on record, and the submissions filed, the court is of the opinion that the following are the issues for determination.
 - A. Whether the Plaintiffs suit is time barred.
 - B. Whether the Plaintiff by way of the letter of allotment issued by the 1st Defendant's predecessor in title acquired a legal title over the suit property.
 - C. Whether the Plaintiff is entitled to the orders sought.

A. Whether the Plaintiffs suit is time barred.

35. I am surprised that neither the Plaintiff nor the 1st Defendant submitted on this issue despite it having emerged from their pleadings. The 1st Defendant raised it at paragraph 18 of his statement of Defence. The Plaintiff on her part at paragraph 9 of her reply to Defence denied that her suit was time barred.
36. The *Public Authorities Limitation Act*, Cap 39 Laws of Kenya, is an Act of parliament that provides for the 'limitation of proceedings against the Government and a local authority and for purposes incidental to and connected with the foregoing.'
37. The Act at section 3(a) prohibits the filing of any proceedings against the government or a local authority founded on tort after the end of 12 months from the date on which the cause of action accrued.
38. Section 3(b) of the Act on the other hand prohibits the filing of any proceedings against the government or a local authority founded on contract after the end of three (3) years from the date on which the cause of action accrued.



39. The case by the Plaintiff in this matter is based on an inferred contract created by the issuance of the letter of allotment by the 1st Defendant on June 11, 1992. The Plaintiff avers that on her, part, she fulfilled all the terms and conditions in the letter of allocation giving rise to the contract. She seeks for an order of specific performance to specifically compel the 1st Defendant to perform the contract, by issuing her with the necessary documents to facilitate and complete the allocation of the plot No. 15B Juja situated in Juja Township.
40. It is therefore not in doubt from the Plaintiff's pleadings and her submissions that her claim against the 1st Defendant is founded on contract. Under the [Public Authorities Limitation Act](#) referred to above, such a claim cannot be brought against the government or a local authority after the end of three (3) years from the date on which the cause of action accrued.
41. The letter of allotment to the Plaintiff, as pleaded and confirmed during the hearing was issued by the County Council of Kiambu, a local authority under the then Local Government Act (repealed). The County Council of Kiambu was the predecessor in title to the 1st Defendant, the County Government of Kiambu, amongst the other local authorities within the geographical jurisdiction of Kiambu County.
42. The County Government of Kiambu, in any event falls within the definition of 'government' as contemplated under the [Public Authorities Limitation Act](#).
43. Lady Justice Florence Muchemi in the case of [Josephat Gathee Kibuchi vs Kirinyanga County Council](#) [2015] eKLR held that a county government is part of the State or Government. [The Constitution](#) of Kenya establishes two levels of Government being the National and the County Governments. The Learned Judge therefore concluded that the provision of [Government Proceedings Act](#) are applicable to proceedings against a county government.
44. Likewise, the provisions of section 3 of the [Public Authorities Limitation Act](#) ought to and do actually apply in respect of proceedings against a County Government in the same manner as they apply to proceedings against the National Government.
45. Justice Odunga was more explicit on the issue in the case of [Republic v AG & another, Ex-Parte Stephen Wanyee Roki](#) [2016] eKLR, when he stated that :-

“Although the provisions of the [Government Proceedings Act](#) do not expressly refer to County Governments, section 7 of the Sixth Schedule to [the Constitution](#) (Transitional and Consequential Provisions) provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

It follows that the provisions of the [Government Proceedings Act](#), a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [the Constitution](#).

One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of [the Constitution](#) requires that the constitutional status and institutions of government both at the national and county levels be respected.

In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution of proceedings.”



46. I adopt the same reasoning in regard to the application of the provisions of the *Public Authorities Limitation Act* and hold that they are applicable in respect of proceedings against County Governments.
47. That being the case, the proceedings by the Plaintiff against the 1st Defendant were brought long after the end of three years from the date on which the cause of action accrued.
48. I agree therefore with the 1st Defendant's averment that the Plaintiff's cause of action against the 1st Defendant is time barred. The 2nd Defendant is a public authority too. The same fate would befall the Plaintiff's case against it.
49. In spite of my above findings, I will proceed to consider the other two issues, as good practice demands.

B. Whether the Plaintiff by way of the letter of allotment issued by the 1st Defendant's predecessor in title acquired a legal title over the suit property

50. I framed this issue after considering the undisputed facts in this case. In fact, the 1st Defendant in its submissions has clearly summarized the facts that are not in dispute follows: -
 - i. The Plaintiff was allocated plot number 15B Juja by the defunct county Council of Kiambu by way of a letter dated 11th June 1992.
 - ii. Condition (a) of the letter of allotment provided that the plot rent was to be paid by 31st March.
 - iii. Condition (f) stipulated that the plot holder must keep the premises in a clean and sanitary condition to the satisfaction of the medical officer of health.
 - iv. Condition (g) stipulated that if any person falls in arrears on the rent for more than three months, the plot would be taken from him or her.
 - v. The Plaintiff has never occupied the plot since 1992.
 - vi. The Plaintiff started paying rent in 2010.
 - vii. When the Plaintiff sought to be issued with a certificate of lease she was required to provide the original letter of allotment and part Development plan both of which she never provided.
51. In her submissions, the Plaintiff admits that the letter of allotment dated June 11, 1992 contained conditions upon which the suit property was allocated to her. She at paragraph 8 of her submissions submit that she adhered to the conditions set out in the said letter of allotment to the best of her ability, paying the land rates and rent despite the County Council of Kiambu actions that frustrated the processing of the certificate of lease of the suit property in her favour.
52. It is the plaintiff submissions that her non-compliance (with the terms and conditions in the letter of allotment) was waived by the County Council of Kiambu upon acceptance of the payments of the arrears and penalties in the year 2010. In that regard the Plaintiff relied on the persuasive authority in the case of *Joseph Mutua Zakayo v County Government of Makueni & 9 others* [2020] eKLR where the court held that:-

“....the lapse of the offer was waived by the County Government's conduct when it accepted the demanded payment. The court upheld the position that waiver can be express or by conduct.”



53. The Plaintiff further submitted that the letter of allotment issued to her, constituted sufficient proof that the Plaintiff is the rightful and legal proprietor of the suit property backed by the fact of the waiver by the county council of Kiambu, through its acceptance of the late payments made 18 years after the due date.
54. The Plaintiff cited the case of *John Muchiri Mbutia v Rebecca Were Mutanda & another* [2015] eKLR where the court cited with approval the holding in *Rukanya Ali Mohammed v David Gikonyo Nambacha & another* Kisumu HCCA No 9 of 2004, where Warsame J (as he then was) stated that where a letter of allotment had been issued and the allottee met the conditions, the land in question was no longer available for allotment unless that first allotment was validly and lawfully cancelled.
55. The 1st Defendant in its submissions while acknowledging that the Plaintiff was an allottee, clarified that she was not the registered proprietor of the suit property. It cited the Court of Appeal case of *Philemon L. Wambia Gaitano Lisista Mukufu & 2 others* [2019] eKLR, where the court embraced the legal principle stated in the case of *Stephen Mburu & 4 others v Comat Merchants Ltd & another* [2012] eKLR, to the effect that, “a letter of allotment is not a title to property. It is a transient and after a right or offer to take property.”
56. The 1st Defendant reiterates that the letter of allotment issued to the Plaintiff, was but an offer to her, to fulfil the conditions therein after which her application for proprietorship would be considered. Failure to comply meant that the Plaintiff acquired no rights whatsoever over the suit property.
57. The 1st Defendant cited the recent decision in *Ali Mohammed Dagane v Hakar Absbir & 3 others* [2014] eKLR, where Justice Cherono went into great details explaining the elaborate procedure for allocation of public land under the Government *Land Act* (repealed).
58. The court in the above case restated the point that in order for a letter of allotment to become operative and enforceable, the allottee was required to comply with the conditions set out therein including the payment of standard premium and ground rent within the prescribed period.
59. I have carefully studied the law and the many decided cases in this aspect; *Joseph N K Arap Ngok v Moiwo Ole Keiwua & 4 others* [1997] eKLR; *Philemon L Wambia v Gaitano Lusita Mukofu & 2 others* [2019] eKLR; *Stephen Mburu & 4 others v Comat Merchants & another* [2012] eKLR; *Kaseve Welfare Society v Harp Housing Ltd* [2020] eKLR; *Marcus Mutua Muluyi & another v Philip Tunoi & another* [2012] eKLR; *Lilian Waithera v David Shikuku Mzee* [2005] eKLR and *Ali Mohammed Dagane v Hakar Absbir & 3 others* [2021] eKLR.
60. The common denominator throughout the legion of these authorities is the position that a letter of allotment is merely a letter of offer. It does not confer title nor proprietary interests on the subject property.
61. I must be quick to point out that a valid letter of allotment must be accompanied by a Part Development Plan commonly referred to as ‘PDP’ as meticulously explained in the *Ali Mohammed Digane case (supra)*. The Allottee is bound to accept the terms and conditions therein within the set timelines failing which the offer lapses.
62. The Plaintiff’s letter of allotment in this case was not even valid as it was not accompanied by a PDP. Secondly, the Plaintiff did not fulfil the conditions therein within the stipulated period. The offer therefore lapsed. By the time she purported to make payments in fulfilment of the terms and conditions in the letter of allotment, 18 years later, the plot was non-existent as she stated in her own words. It was not even available for allotment. She was attempting to revive what was already dead and buried – dry bones.



63. From the foregoing, this court finds that the Plaintiff herein did not acquire any proprietary interests or legal title to the suit property known as plot number 15 B Juja situated in Juja Township. She has no enforceable claim against the Defendants.

C. Whether the Plaintiff is entitled to the orders sought in her Pleint.

64. Having said so much already, I need not make any farther explanations. The Plaintiff has not established that she has an enforceable interest over the suit property. Specific performance would only issue where there is an enforceable right arising out of a contract.

65. I will briefly comment on the other claims for compensation based on the imagined loss equivalent to what the plaintiff would have allegedly earned from a high rise students' hostel she had intended to build on the suit property. The Plaintiff did not produce any architectural plans to give credence to her claim that she intended to build on the land despite confirming that the letter of allotment allowed an allottee to make requests for building.

66. Secondly, the suit property was residential; not even multi-residential.

67. The claim by the Plaintiff was therefore not backed by any material evidence. Her conduct of holding onto an alleged letter of allotment for 18 years waiting for demand notices from the County Council of Kiambu is not in consonance with her claim that she was keen on building a high rise hostel. In my view, this claim is a demonstration that the human capacity for wishful thinking knows no bounds.

68. The conclusion is that the Plaintiff's suit is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2022.

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Nderitu for the Plaintiff

Mr. Kiplangat for the 1st Defendant

N/A for the 2nd Defendant

Court Assistant: Hilda

M.D MWANGI

JUDGE

