



**Garden Square Limited t/a Garden Square Restaurant v County Government of Nairobi & 3 others (Environment & Land Case 526 of 2009) [2022] KEELC 2820 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2820 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 526 OF 2009**

**OA ANGOTE, J  
JUNE 30, 2022**

**BETWEEN**

**GARDEN SQUARE LIMITED T/A GARDEN SQUARE RESTAURANT ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... 1<sup>ST</sup> DEFENDANT**

**BOARD OF THE CITY OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**KENYATTA INTERNATIONAL CONFERENCE CENTRE ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was commenced by way of a Plaint on 9<sup>th</sup> October, 2009 as against the City Council of Nairobi and the Kenyatta International Conference Center (KICC) as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. In the Plaint, the Plaintiff sought *inter alia*, for orders of permanent injunction restraining the Defendants from evicting it from the suit property or distressing for rent.
2. Vide an amendment to the Plaint, the Plaintiff replaced the City Council of Nairobi with the Board of the City Council of Nairobi and joined the National Land Commission. In the re-amended Plaint dated 12<sup>th</sup> November, 2013, the Plaintiff sought for the following reliefs:
  - i. A permanent injunction do issue restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants and agents from trespassing upon the suit property.



- ii. A permanent injunction do issue restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants or agents or in any other manner ejecting or removing the Plaintiff or its servants and agents from the suit property.
  - iii. A permanent injunction do issue restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants, agents from removing by way of distraint for rent the Plaintiffs property including tables, desks, chairs, seats, television sets and any other chattels from the suit property.
  - iv. A permanent injunction do issue restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants and/or agents from trespassing into the suit property and installing metal clamps upon motor vehicles parked at City Hall Way within the parking area reserved for the Plaintiff.
  - v. An order that the Plaintiff be at liberty to remit to the Registrar of the High Court of Kenya all amounts payable as rent.
  - vi. A declaration that the suit property constitutes Public Land within the contemplation of Article 62 of the *Constitution* of Kenya, 2010.
  - vii. A declaration that the National Land Commission is under a constitutional and statutory duty imposed by Article 60(1) and (2) as read with Article 67(2) of the Constitution of Kenya, 2010 and Sections 3(a), 5(1) and (2) of the *National Land Commission Act* to administer and manage the suit property.
  - viii. A declaration that the Plaintiff is entitled to enjoy the benefits of the principles of land policy as enacted by Article 60 of the *Constitution* of Kenya, 2010 and be allocated and issued with a lease or grant of the suit property.
  - ix. Costs of the suit.
3. It is the Plaintiff's case that it has at all material times been a tenant in possession occupying the property commonly known as Garden Square Restaurant comprising of a building, open to the sky courtyard and a motor-vehicle parking yard (hereinafter the suit property) measuring approximately 1.5 acres and that it has been in possession of the suit property since 1977.
  4. The Plaintiff averred in the amended Plaint that up until 31<sup>st</sup> October, 1999, it paid rent to the County Council of Nairobi; that following a presidential directive on 17<sup>th</sup> May, 1999, it received a letter dated 19<sup>th</sup> May, 1999 directing it to remit rent to KANU headquarters and that *vide* a letter dated 12<sup>th</sup> October, 1999, the Director of the then unincorporated Kenyatta International Conference Centre, offered to let out the suit property to the Plaintiff upon the laid out terms.
  5. According to the Plaintiff, it began paying rent to the Kenyatta International Conference Centre (KICC) on 26<sup>th</sup> October, 1999 and that the County Council of Nairobi (CCN), and its successor, the County Government of Nairobi and Kenyatta International Conference Centre laid out competing claims to the suit property necessitating the Plaintiff to file Nairobi HCCC 794 of 2001 in order to insulate itself from the claims aforesaid.
  6. It was averred in the amended Plaint that injunctive orders were issued by the court in the aforementioned case restraining the County Council of Nairobi from distraining the Plaintiffs' property for rent; that the suit has never proceeded for hearing and that in an escalation of the dispute between the CCN and KICC, CCN caused to be served on the Plaintiff a "Final Notice" calling for



rent arrears from 1999 to 3<sup>rd</sup> October, 2009 at the rate of Kshs 450,000 per quarter which was required to be settled by 21<sup>st</sup> August, 2009.

7. The Plaintiff averred in the amended Plaintiff that KICC on its part sent to the Plaintiff a letter dated 8<sup>th</sup> July, 2009 in which it stated that the Plaintiff's Lease Agreement would expire on 30<sup>th</sup> September, 2009 and thereafter KICC would be at liberty to lease the property to any other party; that the CCN and KICC herein are harassing the Plaintiff by claiming ownership of the suit property without any documentation and using underhand tactics to infringe on the Plaintiff's rights to possession and that the two Defendants ignored the pendency of HCCC No 794 of 2001 which sought to determine the lawful proprietor of the suit property.
8. The Plaintiff asserts that the suit property constitutes public land as contemplated by Article 62 (1) (a) (b) (d) and (m) and 62 (2) and (3) of the Constitution and should be administered and managed by the National Land Commission, the 4<sup>th</sup> Defendant, which has the mandate to issue a Lease in respect of the suit property to the Plaintiff.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence and Counterclaim in which they denied the allegations that KANU had any legal ownership or proprietary interest in the suit property; that the Plaintiff's occupation of the suit property from 1977 and the payment of rent to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants up 31<sup>st</sup> October, 1999 is admitted and that any presidential directive issued in respect of the suit property as alleged by the Plaintiff was illegal and unenforceable.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred in the Defence that the building and land which consists the suit property is a separate and distinct parcel which does not form part of the 3<sup>rd</sup> Defendant's property (KICC); that the suit property was put up by the Ministry of Works in 1975 as public lavatories and cafeteria; that the suit property was handed over to the 1<sup>st</sup> Defendant for management, being the entity responsible for provision of public services and that the 1<sup>st</sup> Defendant refunded to the Ministry of Public Works the construction costs amounting to 44,500 pounds.
11. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pleaded in the Defence that upon the payment aforesaid, the 1<sup>st</sup> Defendant took possession of the suit property and has been leasing it to tenants and that there is an ownership dispute between them and the 3<sup>rd</sup> Defendant in respect of ownership of the suit property which is being resolved at the relevant ministerial level. In the counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are seeking as against the Plaintiff the sum of Kshs 21,030,000 being rental arrears.
12. In its Defence, the 3<sup>rd</sup> Defendant (KICC) averred that the suit does not disclose any reasonable cause of action as against it; that the 3<sup>rd</sup> Defendant has never committed the acts alleged by the Plaintiff; that *vide* legal notice number 77 OF 2004, KANU claimed ownership of the suit property and that it is true the Plaintiff has been in possession of the suit property since 1977.
13. The 3<sup>rd</sup> Defendant averred that it has the legal authority and rights over the suit property including collection of rent, which rent it has in any event been collecting from the Plaintiff for the last 10 years; that the Plaintiff's occupation of the suit property is pursuant to a Lease Agreement between itself and the Plaintiff and that the suit property was initially owned by KANU before it was reclaimed by the government through the Ministry of Tourism and Information and handed over to it.
14. The 4<sup>th</sup> Defendant (NLC) averred in its Defence that from the available maps, the area in question is un-alienated public land in accordance with Article 62(1) (a) of the Constitution and that the 3<sup>rd</sup> Defendant has made an application for allocation of the suit property.
15. It was averred by the 4<sup>th</sup> Defendant that the KICC grounds, which the 3<sup>rd</sup> Defendant utilizes, comprises of a parcel of land on which the actual KICC building stands on, the water fountains at the front of



the building, the driveway at the main entrance of the building, the courtyard and the lawns just before the COMESA Grounds.

16. According to the 4<sup>th</sup> Defendant, the other two other parcels of land which have not been allocated are where the Garden Square restaurant and COMESA grounds are situated respectively and that the 3<sup>rd</sup> Defendant wished to have all the three parcels of land amalgamated and a title issued to it.

### **Hearing & evidence**

17. The matter proceeded for hearing on 15<sup>th</sup> December, 2020. It was the evidence of the Plaintiff's Director, PW1, that sometime in 1977, he was informed that Garden Square Restaurant was up for sale; that he was taken to City Hall where he was asked to pay all the arrears owed by the previous owner, which he did and that he thereafter took possession of the restaurant.
18. According to PW1, he conducted major renovations on the suit property after which City Hall asked him to be paying rent; that between 1977 and 1999, he was paying rent to the 1<sup>st</sup> Defendant without a formal lease and that about six months after he took over the suit property, City Hall stopped cleaning the public toilets and paying electricity bills for the restaurant which mandates he has undertaken to date notwithstanding that the toilets are still in use by members of the public.
19. According to PW1, sometime in 1999, when the then President came to witness the opening of the COMESA grounds situate next to the restaurant, he inquired to whom the Plaintiff was paying rent; that the President told him that City Hall did not own the suit property and asked him to be paying rent to KANU Headquarters; that as the directive was verbal, he sought clarification from the Town clerk who promised to get back to him and that in October, 1999, he received a letter of offer from the 3<sup>rd</sup> Defendant in respect of payment of rent, which he accepted and started paying rent to the 3<sup>rd</sup> Defendant.
20. PW1 informed the court that when KANU was removed from power, KICC reverted to the Ministry of Tourism; that the new Government published a gazette notice establishing KICC as a state corporation and was directed by way of a circular to continue paying rent to KICC; that the 1<sup>st</sup> Defendant continued demanding for rent for which he did not pay as he was paying rent to KICC and that the copy of the title for L.R 209/11157 where KICC building is situated was in the names of Daniel Toroitich Arap Moi and Peter Olo Aringo as Trustees of KANU. According to PW1, the Plaintiff occupies L.R 209/2676 (the suit property) while the land occupied by KICC is 209/11157.
21. On cross-examination, PW1 stated that he has been remitting rent to the court pursuant to its orders; that the restaurant was closed following threats by the then Governor Dr. Evans Kidero and was re-opened pursuant to a court order; that he has never been issued with a lease over the suit property; that he was initially unaware that the suit property where the restaurant is situate was public land and that he joined the National Land Commission in the suit because it is the custodian of public land. According to PW1, NLC should issue him a lease over the suit land.
22. The 3<sup>rd</sup> Defendant's Head of Legal, DW1, informed the court that the Plaintiff was paying rent to KICC until he filed a suit in court and was directed to be paying rent to the Court; that the Plaintiff is a tenant in the suit premises and that the 3<sup>rd</sup> Defendant has legal authority and rights over the suit property, the same having been handed over to it by the Ministry of Tourism.
23. On cross-examination DW1 stated that Garden Square Restaurant sits on land that has not been allocated; that the 3<sup>rd</sup> Defendant's Managing Director was summoned to court in respect of a criminal charge, which trial never took over; that she is unsure whether the Plaintiff was charged after its



- Managing Director denied owning the suit property; that the Plaintiff joined KICC to interplead with City Hall and that she is not aware if the Plaintiff has applied to be allocated the suit property;
24. On further cross-examination, DW1 stated that the 3<sup>rd</sup> Defendant has applied to be allocated the suit property because they need to expand; that the 3<sup>rd</sup> Defendant had a title where the KICC building stands in the names of the former President and Mr. Aringo and that the title was cancelled and a new one was issued in the name of the 3<sup>rd</sup> Defendant.
  25. The 4<sup>th</sup> Defendant's witness, DW2 testified that the suit property is un-alienated government land; that the restaurant standing on the suit property is an asset of the Kenyan government under the custodianship of the principal secretary to the Treasury; that the government has never alienated the suit property to any party or individual and that a request for allocation of the land by the 3<sup>rd</sup> Defendant is pending.
  26. DW2 stated that the Plaintiff entered into a lease agreement over the suit property with KICC; that KICC has legal authority over the land; that both KICC and the Plaintiff applied to be allocated the land because it is unallocated public land; that the land where KICC stands has a title which covers the KICC building itself, the fountain between the statue and the building and the parking between KICC and the Ministry of Foreign Affairs and Jogoo House.
  27. It was the evidence of DW2 that during the construction of KICC, the entire land was one including the COMESA grounds and Garden square Restaurant; that the land was re-planned to include KICC building and its parking as one block and that the COMESA grounds facing Parliament road was left as unallocated land, and so was the land where Garden square Restaurant stands. It was the evidence of DW2 that the COMESA grounds have since been surveyed and given title no L.R No.209/22535 and the Garden Restaurant has been given title number L. R. No. 209/2676.

### **Submissions**

28. The Plaintiff's counsel submitted that the crux of the Plaintiff's case is that the suit property is public land as defined by Article 61(2) and Article 62 (1) (a), (d), (e) and (h) of the Constitution; that the National Land Commission is a creation of Article 67 (1) with its functions spelt out by Article 67 (2) of the *Constitution* as well as Section 5 (2) (a) of the *National Land Commission Act* and that the National Land Commission has powers to allocate public land pursuant to Section 12 of the *Land Act*.
29. The Plaintiff's counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having not testified at trial, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Defence and Counter claim constitutes mere denials and that no lease agreement exists as between the parties because the suit property has never been part of L.R No 209/11157, a fact admitted by the 3<sup>rd</sup> Defendant's witness.
30. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocate submitted that the letter of 22<sup>nd</sup> June, 2004 by the Commissioner of Lands confirmed that the suit property is not part of KICC grounds and that the 3<sup>rd</sup> & 4<sup>th</sup> Defendants have no rights or claims over the rent arrears from the Plaintiff owing to the fact that the presidential directive issued on 17<sup>th</sup> May, 1999 was irregular, illegal, null and void.
31. Counsel submitted that the President has no power to allocate land that was already in the custody of the Nairobi City County; that the 3<sup>rd</sup> Defendant has failed to prove that it is the lawful and rightful owner of the suit property known as Garden Square Restaurant and that pursuant to Section 109 of the *Evidence Act*, the onus was on the 3<sup>rd</sup> Defendant to prove that the presidential directive issued on 17<sup>th</sup> May, 1999 was not irregular, unlawful, null and void.



32. As to whether the suit property is public land or not, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel submitted that the suit property does not constitute public land as the same was allocated to the Ministry of Public Works and thereafter transferred to Nairobi City County upon payment of construction costs and that for the land to be recognized as public land, the legal framework and laid down procedures must be followed.
33. The 4<sup>th</sup> Defendant's counsel submitted that the suit property falls within the description of public land as set out in Article 62 (a) of the *Constitution*; that the suit property is un-alienated public land surrounded by various government institutions and that the 4<sup>th</sup> Defendant is mandated by Section 12 (1) of the *Land Act*, 2012 to allocate public land on behalf of the National or County Government.
34. Counsel for the 4<sup>th</sup> Defendant submitted that the *Land (Allocation of Public Land) Regulations*, 2017 govern the allocation of public land and that Rule 3(2) of the Regulations provide that to determine the method of allocation, the Commission shall consult with the national or the respective county government and take into account all the prevailing circumstances.
35. Counsel submitted that the fact of occupation of land does not in itself constitute sufficient reason for allocation of public land; that the Commissioner of Lands has never, either by itself or through the defunct office of the Commissioner of Lands, alienated the suit property to any individual despite a request for allocation by the 3<sup>rd</sup> Defendant and that the Plaintiff can only bring a claim against the 4<sup>th</sup> Defendant if it believes that the required statutory provisions have not been adhered to during the process of allocation.

#### **Analysis & Determination**

36. Having considered the pleadings, the evidence by the parties and submissions, the following issues arise for determination;
  - i. Whether the suit property is public land?
  - ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or the 3<sup>rd</sup> Defendant have any rights to the suit property?
  - iii. Whether the Plaintiff is entitled to the orders sought.
37. The Plaintiff instituted this suit seeking, inter-alia, for a permanent injunctive order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from interfering with the suit property, otherwise known as Garden Square Restaurant; a declaration that the suit property constitutes public land and as such, the 4<sup>th</sup> Defendant is statutorily mandated to administer and manage the same and a declaration that the Plaintiff is entitled to enjoy the benefits of the principles of land policy as enacted by Article 60 of the *Constitution* of Kenya, and be allocated and issued with a lease or grant of the suit property.
38. It is the Plaintiffs' case that it has occupied the suit property since 1977 to date; that from 1977 up until 31<sup>st</sup> October, 1999, it was paying rent to the County Council of Nairobi; that sometime in May, 1999, the then President Daniel Moi made a presidential directive to the effect that the Plaintiff ought to start paying rent to KANU which allegedly owned the property and that he complied with the said presidential directive.
39. The evidence before this court shows that on 26<sup>th</sup> October, 1999, the Plaintiff received a letter by the then unincorporated KICC offering it a lease over the property. Upon receiving the said communication, it was the evidence of the Plaintiff that effective October, 1999, it ceased remitting rent to the County Council of Nairobi and began remitting the rent to the then unincorporated KICC.



40. It will appear that the former President's directive in 1999 in respect of payment of rent to KANU, on behalf of KICC, triggered competing claims over the suit property by the County Government of Nairobi (the 1<sup>st</sup> Defendant) and KICC (the 3<sup>rd</sup> Defendant). In the process of the supremacy wars between the two entities, the Plaintiff was caught in the cross-hairs of the fight where both the County Government and KICC were claiming rent from it.
41. The supremacy wars between the Defendants over the suit property led the Plaintiff to file HCCC 794 of 2001 in which it sought to know to whom it will pay rent to. The said suit notwithstanding, both the then City Council of Nairobi and KICC instructed auctioneers to distrain for rent, an action that led the court to order for the payment of rent by the Plaintiff to court. It is the Plaintiff's case that none of the two Defendants has any rights over the suit property as the same constitutes public land which should be managed by the National Land Commission.
42. The Plaintiff adduced in evidence a copy of the letter dated 19<sup>th</sup> May, 1999 from KANU directing him to pay rent to KANU, a letter dated 30<sup>th</sup> September, 1999 from Advocate-A.M Osure, directing him to pay rent to KANU, a letter of offer dated 12<sup>th</sup> October, 1999 from KICC to let the suit property to the Plaintiff and receipts for the various rental payments it made to KICC.
43. The Plaintiff also produced in evidence a proclamation notice from Whitestone Auctioneers, dated 24<sup>th</sup> February, 2003 issued to the tenants of KICC informing them that the administration of the building had reverted back to the Ministry of Tourism and Information, a letter from the Ministry of Tourism to the Plaintiff dated 9<sup>th</sup> December, 2003 giving the Plaintiff seven days to settle rental arrears or vacate the suit property and a letter from KICC to the Plaintiff informing it that its lease will expire on 30<sup>th</sup> September, 2009.
44. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case is that it has the legal authority over the suit property, the same having been handed over to it by the Ministry of Public Works upon payment of 44,500 pounds as its contribution for the buildings; that the property in contention was meant to serve the public as a lavatory and restaurant and that the same was handed over to the 1<sup>st</sup> Defendant for management being the body responsible for provision of public services in the city.
45. On the other hand, the 3<sup>rd</sup> Defendant's case is that the Plaintiff is its tenant by virtue of a Lease Agreement entered into between itself and the Plaintiff; that the suit property was previously occupied by KANU before being taken over by the Government through the Ministry of Tourism and Information who thereafter handed the same to the 3<sup>rd</sup> Defendant as a State Corporation and that it is the 3<sup>rd</sup> Defendant that is entitled to the suit property.
46. DW1 adduced in evidence the Lease Agreement between the 3<sup>rd</sup> Defendant and the Plaintiff dated 25<sup>th</sup> October, 1999, an internal memo discussing the ownership of KICC, a letter from the Ministry of Lands dated 19<sup>th</sup> February, 2003 stating that no allocation of the suit property had been made and a letter dated 9<sup>th</sup> October, by the Ministry of Tourism and Wildlife addressed to the Ministry of Lands requesting the allocation of the land on which KICC stands which had been allocated to KANU and the surrounding un-surveyed land, including the suit property.
47. The 4<sup>th</sup> Defendant agrees with the Plaintiff that the suit property constitutes public land and that neither itself nor its predecessor allocated the property to any entity. The 4<sup>th</sup> Defendant adduced in evidence a letter from KICC to the 4<sup>th</sup> Defendant requesting approval for allocation of un-allocated land comprised of upper and lower COMESA and the court yard, together with the approved Part Development Plan (PDP) for the area in question.



48. The definition of public land is to be found in Article 62 (1) of the *Constitution* and includes; “un-alienated government land and land which no individual or community ownership can be established by any legal process. Public land also includes land that is lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease.
49. Whereas the 4<sup>th</sup> Defendant maintains that the suit property is public land as contemplated by Article 62 of the *Constitution*, which position the Plaintiff concurs with, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant assert that the suit property does not constitute public land. All the three Defendants are laying claim to the land.
50. Section 107 of the *Evidence Act*, Cap 80 provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
51. The evidential burden of proof is captured in sections 109 and 112 of the same Act and states as follows;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
52. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in this jurisdiction stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
53. In the present circumstances the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, despite having filed a Defence and Counterclaim did not call a witness to testify. It is common ground that pleadings and documents by themselves do not constitute evidence unless formally produced. This position was upheld by the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta and 2 Others* [2015] eKLR in which it was held as follows:
- “First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence...”
54. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ failure to call any evidence in support of their case relegates its pleadings to mere unsubstantiated assertions. Indeed, despite its position that the suit property does not constitute public land after the same was handed to it by the Ministry of Public Works to manage it, no evidence by way of a Part Development Plan, a letter of allotment or any kind of map was produced to prove that position.



55. That being the case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' contention that it owns the suit property, and therefore entitled to the rent falls. In fact, there is no evidence on record to show that it is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who put up the restaurant and the lavatories on the suit property, or that it paid the then Ministry of Public Works for the said structures. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' contention that it owns the suit property therefore fails.
56. As regards the 3<sup>rd</sup> Defendant, whereas it lays claim to the suit property by virtue of having been given the same by the Ministry of Tourism as a state corporation, there was no demonstration of the process of "handing over" or alienation of the suit property in favour of the 3<sup>rd</sup> Defendant.
57. In fact, the evidence before this court shows that the 3<sup>rd</sup> Defendant is in possession of a Grant for L.R 209/11157 where the KICC building, together with the parking, the fountain and the statue of the first President of the country are situated. The dimension of the said land are clearly depicted in the Survey Plan and the Deed Plan annexed on the title for L. R. No. 209/11157. This position was acknowledged by the 3<sup>rd</sup> Defendant when it applied to the National Land Commission to be allocated the suit property which is depicted as L. R. No. 209/2676 for expansion purposes.
58. The 3<sup>rd</sup> Defendant's request to the 4<sup>th</sup> Defendant (NLC) to be allocated the suit property is an admission that it has no ownership rights over the suit land. In view of the foregoing and the evidence by the 4<sup>th</sup> Defendant indicating that the suit property constitutes un-alienated public land, the court has no difficulty finding that the suit property is un-alienated public land.
59. Having found that Garden Square Restaurant is on un-alienated public land, the next issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or the 3<sup>rd</sup> Defendant have the rights to manage the same, including the collection of rent from the Plaintiff.
60. It is undisputed that both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant have at different periods had control of the suit property of which they received rent from the Plaintiff. According to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' defence, its collection of monthly rent from the Plaintiff in respect of the suit property was interrupted by the President's directive of 17<sup>th</sup> May, 1999 directing the Plaintiff to remit rent to KANU, a directive that the Plaintiff complied with. However, before then, the Plaintiff was paying rent to the 1<sup>st</sup> Defendant's predecessor, the City Council of Nairobi.
61. The evidence of who actually put the restaurant and toilets on the suit property was not adduced. It is the Plaintiff's case that it has at all material times been the tenant in possession occupying the property commonly known as Garden Square Restaurant comprising of a building, open to the sky courtyard and a motor-vehicle parking yard since 1977.
62. The Plaintiff's director stated that from 1977 until 31<sup>st</sup> October, 1999, it paid rent to the County Council of Nairobi, and thereafter stated paying rent, first to KANU, and then to the 3<sup>rd</sup> Defendant. Although the Plaintiff was paying rent to the 1<sup>st</sup> Defendant between 1977 to 1999, there is no evidence on record to show that the suit property belonged to the 1<sup>st</sup> Defendant, or its successor, the Nairobi County Government.
63. The evidence on record shows that the 3<sup>rd</sup> Defendant is a state organ which owns land that is distinct from the suit property. That being the case, the 3<sup>rd</sup> Defendant did not have any legal right to purport to lease or collect rent from the Plaintiff considering that it does not own the said land.
64. Indeed, the land upon which the Plaintiff's business is situated does not form part of L.R 209/ 11157 which belongs to KICC, and any purported lease to the Plaintiff was irregular. In view of the foregoing, the court is inclined to agree with the Plaintiff that the 3<sup>rd</sup> Defendant has no rights over the suit



property. Having found that the suit property constitutes un-alienated public land, the court finds that the suit property should revert to the National Land Commission (the 4<sup>th</sup> Defendant) to manage it on behalf of the County Government of Nairobi.

65. I say so because the National Land Commission (NLC) is established under Article 67 of the Constitution, and one of its mandates under Article 67 (2) (a) of the Constitution is to manage public land on behalf of the national and county governments. Section 5 (2) (a) of the National Land Commission Act gives the NLC the sole mandate, on behalf of, and with the consent of the national or the county governments, as the case may be, to alienate public land.
66. The mandate of the NLC to alienate public land is further buttressed by Section 12 of the Land Act and the Land (Allocation of Public Land) Regulations, 2017. Section 12 (1) of the Land Act provides as follows:
- “(1) Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the Commission for the necessary action by way of-
- (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
  - (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
  - (c) public notice of tenders as it may prescribe;
  - (d) public drawing of lots as may be prescribed;
  - (e) public request for proposals as may be prescribed; or
  - (f) public exchanges of equal value as may be prescribed.”
67. Rule 3 (2) of the Land (Allocation of Public Land) Regulations, 2017 provides that in determining the method of allocation of public land, the Commission shall, in consultation with the national government or respective county government, as the case may be, take into consideration all the prevailing circumstances including the purpose for the allocation.
68. Although the 4<sup>th</sup> Defendant’s witness informed the court that the 3<sup>rd</sup> Defendant applied for allocation of the suit property during the pendency of this suit, the Plaintiff did inform the court that due to the investment it has made on the suit property since 1977, it had also applied to the 4<sup>th</sup> Defendant to be allocated the said land. That is an important circumstance that the 4<sup>th</sup> Defendant ought to consider in the allocation of the suit property.
69. The allocation of un-alienated public land by the 4<sup>th</sup> Defendant should strictly comply with the provisions of the law. The circumstances of all the applicants should be considered, and the reasons for preferring one applicant as against others given in writing.
70. The perusal of the evidence does not show that the provisions of the law were followed by the 4<sup>th</sup> Defendant when it purported to allocate the suit property to the 3<sup>rd</sup> Defendant, and more so, during the pendency of this suit. That being the case, any purported allocation of the suit property to the 3<sup>rd</sup> Defendant without following the above mentioned provisions of the law, cannot be countenanced by this court.



71. Under Article 62 (1) (a) of the Constitution as read with Article 62 (2) (a), land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date, shall vest in the county government and be managed by the National Land Commission on behalf the county government. The suit property falls in this category. Its allocation therefore requires the consent of the County Government of Nairobi.
72. Having found that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant failed to prove their claims over the suit property on a balance of probabilities, and having found that the suit property ought to revert to the 4<sup>th</sup> Defendant, to manage it on behalf of the county government of Nairobi, it follows that the Plaintiff's suit succeeds partially in the following terms:
- a. A declaration be and is hereby issued that the suit property constitutes un-alienated public land.
  - b. A declaration be and is hereby issued that the 4<sup>th</sup> Defendant (the National Land Commission) is under a constitutional and statutory duty to administer, manage and allocate the suit property on behalf of the 1<sup>st</sup> Defendant in strict compliance with the Constitution, section 12 of the Land Act and the Land (Allocation of Public Land) Regulations, 2017.
  - c. A declaration be and is hereby issued that the application by the Plaintiff for the allocation of the suit property, alongside others, be considered, and all the circumstances pertaining to the suit property be evaluated by the 4<sup>th</sup> Defendant (NLC) as provided for under the Land Act and the Land (Allocation of Public Land) Regulations, 2017.
  - d. An order be and is hereby issued directing the Plaintiff to forthwith pay the rent, save for the rent already paid to the Defendants, to the 4<sup>th</sup> Defendant for onward transmission to the County Government of Nairobi until when the process of allocating the suit property will be completed.
  - e. The rent deposited in court by the Plaintiff during the pendency of this suit to be released to the County Government of Nairobi.
  - f. Subject to the payment of rent, and the allocation of the suit property, a permanent injunction be and is hereby issued restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants and/or agents from trespassing upon the suit property.
  - g. Subject to the payment of rent, and the allocation of the suit property, a permanent injunction be and is hereby issued restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants and/or agents or in any other manner from ejecting or removing the Plaintiff or its servants and/or agents from the suit property.
  - h. Subject to the payment of rent, and the allocation of the suit property, a permanent injunction be and is hereby issued restraining the County Government of Nairobi, the Board of the City of Nairobi and the Kenyatta International Conference Centre by themselves, their servants and/or agents from trespassing into the suit property and installing metal clamps upon motor vehicles parked at City Hall Way within the parking area reserved for the Plaintiff.
  - i. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim is dismissed with costs.
  - j. Costs of the suit to be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants jointly and severally.



**Dated, signed and delivered in Nairobi virtually this 30<sup>th</sup> day of June, 2022.**

**O. A. Angote**

**JUDGE**

In the presence of;

No appearance for the Plaintiff

Ms. Mwambo for Mr. Katisya for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Chege for 3<sup>rd</sup> Defendant

No appearance for the 4<sup>th</sup> Defendant

Court Assistant – June/Tracy

