



**Mungai & 7 others v County Government of Kiambu (Environment & Land
Case 46 of 2019) [2022] KEELC 2730 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2730 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 46 OF 2019**

**JG KEMEI, J
JUNE 23, 2022**

BETWEEN

**CHARLES MIGICHI MUNGAI 1ST PLAINTIFF
ZIPPORAH NYAGUTHII MATHENGE 2ND PLAINTIFF
ROSELYNE WANJIRU WANYOIKE 3RD PLAINTIFF
NELSON MWANGI 4TH PLAINTIFF
JAMES KABUKI NGURE 5TH PLAINTIFF
ESTHER WAMBUI KUNGU 6TH PLAINTIFF
SIMON GITHAIGA GATIMU 7TH PLAINTIFF
MARY WAMBUI WANYOIKE 8TH PLAINTIFF**

AND

COUNTY GOVERNMENT OF KIAMBU DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiffs have described themselves as owners of various plots initially allocated by the Defendant at various times, some dating way back to 1990. That with the approval of the Defendant they have developed the suit lands while enjoying quiet possession until 2018 when they were served with demolition notices of their respective developments on the grounds inter alia that the plots are public land, a claim that they have vehemently refuted since the said plots are not included in the Ndung'u Land Report and that they stand to suffer irreparable loss and damage if the structures are demolished.
2. The Plaintiffs have sought the following orders in their Complaint filed on the December 18, 2018;



- a. A declaration that the first, second, third, fourth, fifth, sixth, seventh and eighth Plaintiffs were/are the registered owners of plot numbers (1A, 21, 22) 4A, (14A & 14B), 8A, 7A, 3, (9A & 9B, 17A & 17B) and 17 (suit lands) respectively.
 - b. A declaration that the Defendant has no rights whatsoever to evict the first, second, third, fourth, fifth, sixth, seventh and eighth Plaintiffs in their respective plot numbers (1A, 21, 22) 4A (14A & 14B) 8A, 7A, 3, (9A & 9B, 17A & 17B) and 17 respectively and that the intended demolition of the Plaintiffs' structures / buildings is unlawful, irregular null and void.
 - c. A permanent injunction restraining the Defendant through themselves and/or their servants and/or their employees, and/or agents from evicting, trespassing, entering, demolishing structures on, occupying, harassing and / or in any other manner interfering and/or dealing with the Plaintiffs' plots numbers 1A, 21, 22) 4A, (14A & 14B), 8A, 7A, 3, (9A & 9B, 17A & 17B) and 17.
 - d. Costs of the suit and the interest Courts rate.
3. The Plaintiffs' claim is denied. The Defendant filed a statement of defence on the November 28, 2019. It denied that the Plaintiffs are the lawful owners of the suit properties as the same is public land. It averred that no letters of allotments were ever issued to the Plaintiffs and if any the same were done on a temporary basis and the title to the property never passed to the Plaintiffs who were mere tenants of the Defendant. It further averred that the letters of allotments if any were unlawfully acquired through fraud, misrepresentation and or error whose validity is in doubt.
 4. In addition, the Defendant contended that the Plaintiffs did not acquire any interest in the land as they purport to have acquired them from strangers with no lawful interest therein. It denied that any building approvals were issued by the Municipal Council of Thika and that the document was a forgery. It reiterated that the developments on the suit lands were carried out contrary to the provisions of part V of the Physical Planning Act hence the issuance of the enforcement notices requiring the Plaintiffs to remove the illegal structures or submit documents, approved plans and occupation permits to the Defendant, which documents the Plaintiffs failed to avail.
 5. The Defendant lamented that the suit was filed prematurely before exhausting the alternative dispute resolution mechanisms.
 6. Lastly that the Plaintiffs suit raises no cause of action against the Defendant; frivolous vexatious and otherwise an abuse of the process of the Court.

The Evidence

7. At the hearing the Plaintiffs called 8 witnesses.
8. PW1- Charles Mugichi Mungai testified on 28/7/2020 and stated that he purchased plot Nos 1A, 21 and 22 from Irine Njeri Mbugua, Esther Wangui Nguru and Charles Muchunu Kiraha. That the vendors were allocated the plots by the County Council of Thika as shown in the letter of allotment although he did not produce the minutes of the council approving the said plot allocations. Confirming being served with enforcement notices by the Defendant he informed the Court that he never lodged any complaint with the Liaison Committee and neither did he serve a demand notice of intention to sue the Defendant.
9. PW2 – Nelson Mwangi stated that he is the registered owner of plot No 8A which he purchased from one Henry Musambi on the 3/8/13 who was the previous allottee for purposes of a spare parts shop. He admitted that he did not seek and obtain any approval from the Defendant before constructing the



house on the suit land. That he was unaware whether the letter of allotment was a forgery on account of lack of minutes from the Defendant approving the same. Like PW1 on receipt of the enforcement order, he filed suit in this Court. He informed the Court that he pays land rent for the plot. He refuted that the land is public land.

10. PW3- Mary Wambui Wanyoike testified that his late father Gitau purchased plot No 17 from Kiatagama Housing though he has not petitioned for letters of administration for his estate. That he died in 2013.
11. PW4- Zipporah Nyaguthii Mathenge stated that she was allocated plot No 4A on 3/5/96. That she developed a residential house thereon without any development permission from the Defendant as the property was not public land. The user as per the allotment letter was for spare parts.
12. PW5- Roselyne Wanjiru Wanyoike stated that she purchased plots 14 A and 14B from Samson Karuu Ngaru in 2008, the previous allottee of the Defendant. She stated that he took possession and constructed small structures thereon. In answer to a question whether she was the owner, she answered that if she was not one, she could not have been served with the enforcement notice.
13. PW6 – Esther Wambui Kungu stated that she was allocated plot No 3 by the then County Council of Thika and has continued to pay land rates without fail.
14. PW7- Simon Githaiga Gatimu stated that he purchased plot Nos 9A, 9B, 17A and 17B. Challenged to produce agreements for sale, he informed the Court that he had none.
15. Lastly PW8 – James Kabuki Ngure stated that he was allocated plot 7A by the then County Council of Thika although he failed to produce any letter of allotment in support. That he took possession and immediately constructed the plot although he lives elsewhere.
16. At the close of the Plaintiffs’ case the Defendant applied to close its case as it was not calling any witnesses.

The Written Submissions

17. The Plaintiffs filed their submissions on November 30, 2021 and submitted that they are the owners of the respective plots having been allocated and or acquired through purchase from previous allottees of the Defendant. Upon acquisition, they took possession and commenced the construction on the same with approval from the Defendant and further paid land rates to the Defendant with the belief that they own the said properties.
18. Citing the Land Act as read together with Art 162 of *the Constitution*, the Plaintiffs faulted the Defendant for failing to demonstrate how the suit land falls under the definition of public land as defined in the law. They questioned why the Defendant was receiving rates from illegal occupants if they are to be believed. That the actions of the Defendant is oppressive, arbitrary and unconstitutional.
19. The Defendant filed written submissions on the 1/3/2022. As to whether this Court has jurisdiction to hear and determine the matter, the Defendant submitted that the entire suit is anchored on the planning enforcement notice issued by the Defendant to the Plaintiffs on the basis of non-compliance by the Plaintiffs with the provisions of part V of the *Physical Planning Act*. The provisions of Section 13 of the Physical Planning Act provides for the procedure for the dispute resolution where a party is aggrieved by the decision of the Director Physical Planning concerning Planning Use and Development of the land. Citing the celebrated case of *Owners of Motor vessel Lilian S v Caltex Oil Kenya Limited* Civil Appeal 50 of 1989; [1989] KECA 1 (KLR), the Defendant where a Court has no power to determine a matter it should not take any further step but to stop.



20. It was its submission that a challenge to the decision of the Director of Physical Planning shall first lie with the relevant Liaison committee then the National Physical Planning liaison committee and a second appeal is preferred to the High Court. Under Section 13 and 15 of the Physical Planning Act offers the correct procedure for the Plaintiffs to challenge a planning enforcement notice and not the ELC Court. The Court is not envisaged as a Court of first instance as seen in the Act where an aggrieved party is challenging the decision of the Director of Physical Planning.
21. Citing the case of the *Speaker of the National Assembly v Karume* [1992] eKLR the Defendant reiterated its point that where there exists alternative dispute resolution mechanisms, the same should be promoted and protected by the Courts in line with the constitutional edict in Article 159 of *the Constitution*.
22. In support of its submissions the Defendant relied on the case of *Matanga Tea & Coffee Company Limited v Shikara Ltd & another* [2012] eKLR to show that the Plaintiffs have failed to follow the procedures laid down in the statute.
23. On locus to sue the Defendant submitted that the 8th Plaintiff lacked the locus standi to institute the suit on behalf of the Estate of the late Michael Wanyoike Gitau on account that she had not taken out Letters of Grant of Administration in the estate.
24. On the provisions of the Law of Contract, the Defendant submitted that the 1st 3rd and 7th Plaintiff could not have acquired any interest in the suit lands claimed as they did not show any evidence of a sale agreement thereof.
25. With respect to the 5th, 7th, and 8th Defendants it was the submissions of the Defendant that the said Plaintiffs were not issued with any enforcement notices and therefore they have no cause of action against the Defendant and consequently their claim is unsustainable as against the Defendant and should be dismissed.
26. In further submissions it was the view of the Defendant that payment of rates is not proof of ownership as ownership to land must be proved by a lease and or title, as the case may be.

The Determination

27. Having read and considered the pleadings, the evidence adduced at the trial, the written submissions of the parties and all the material placed before me, the issues for determination are;
 - a. Whether the Court has jurisdiction to determine the suit.
 - b. Whether the Plaintiffs have disclosed a right or interest in the land
 - c. Costs of the suit
28. With respect to the issue of whether or not the Court has jurisdiction to hear and determine the matter, the Court has perused the Ruling of this Court delivered on the 21/5/2019 and in answering the question the Court stated;

‘It is evident that they are aggrieved by the decision of the Defendant to serve them with enforcement notices removal of the structures on public land. However the Plaintiffs allege that they have allotment letters and approved development plans and the plots are no longer public land.



The Court finds that the issue that will call for determination in the Plaintiffs' suit is whether the suit plots are public land or not. These are issues that fall squarely under the jurisdiction of the Environment & Land Court as provided for under Section 13 of the ELC Act."

29. The long and short of it is that the issue of jurisdiction was aptly determined by the Court vide the Ruling aforesaid and the matter in my view is now res judicata. Consequently, the Court will determine the matter as pleaded.
30. It is the case of the Plaintiffs that they were allocated land by the Defendant and others purchased them from the previous allottees of the Defendants. That upon acquisition of the plots they took possession and commenced the development of various structures thereon with the approval of the Defendant. Further that the Defendant has been receiving payment of land rates from them as land owners. That through various enforcement notices dated the 14/10/2018 the Defendant requested the Plaintiffs to remove various constructions of commercial developments on public land and restore to its original state and or submit ownership documents and approved plans and occupational permits to Kiambu County.
31. The enforcement notice read as follows;
 - a. The development described hereunder has been carried out without the grant of permission and/or the following conditions required on that behalf under Part V of the Physical Planning Act.
 - b. Subject to which permissions for the development as described hereunder was granted in respect thereof under Part V of the Physical Planning Act has/have not been complied with.
 - c. Description of development (for details see overleaf)
 - d. You are hereby required to (describe the steps taken)
 - e. Within a period of From the date of this Notice failing which the Kiambu County Government may enter on the said land and execute the requirements as outlined herein above and may recover as a civil debt in any Court of competent jurisdiction from any related expense.
 - f. This NOTICE shall take effect on the day of 20.....
 - g. If you are aggrieved by this notice you may appeal to the Liaison Committee or High Court as the case may be under Provisions of Part III of the Act before the aforesaid day of 20..... in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal
 - h. Any person who uses or causes or permits to be used the land to which this notice relates or carries out or causes or permits to be carried out operations on the said land in contravention of this notice shall be guilty of an offence as provided for by Section 30 of the Act.
32. The Plaintiffs' claim that the land is not public land and that the Defendant has continued to accept land rate payments from them.
33. The Defendant has challenged the ownership claims of the Plaintiffs and contend that the plots are public lands; no building approvals were obtained by the Plaintiffs hence the enforcement notice calling for removal of the illegally constructed structures; alleged approvals are forgeries.



34. The Defendant did not lead any evidence at the trial. That said, the Plaintiffs retain the responsibility to discharge the burden of proof with respect to their claim however much the Defendant has not rebutted the claims through evidence.

35. I shall now analyse the evidence of the Plaintiffs in answer to the issues identified for determination.

36. The 2010 Constitution defines what public land in extenso under Article 61(1) in the following terms;

“Public land is—

- a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
 - b. land 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;
 - c. land transferred to the State by way of sale, reversion or surrender;
 - d. land in respect of which no individual or community ownership can be established by any legal process;
 - e. land in respect of which no heir can be identified by any legal process;
 - f. all minerals and mineral oils as defined by law;
 - g. government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
 - h. all roads and thoroughfares provided for by an Act of Parliament;
 - i. all rivers, lakes and other water bodies as defined by an Act of Parliament;
 - j. the territorial sea, the exclusive economic zone and the sea bed;
 - k. the continental shelf;
 - l. all land between the high and low water marks;
 - m. any land not classified as private or community land under this Constitution;
and
 - n. any other land declared to be public land by an Act of Parliament—
 - i. in force at the effective date; or
 - ii. enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-
- a. Clause (1)(a), (c), (d) or (e); and
 - b. Clause (1)(b), other than land held, used or occupied by a national State organ.



- (3) Public land classified under Clause (1)(f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”
37. Prior to the promulgation of the 2010 Constitution and the 2012 Land Laws, disposition of Government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:
- “ All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”
38. The power to dispose of public land was vested in two entities: The President and the Commissioner of Lands under Sections 3 and 9 of the *Government Land Act* respectively.
39. The process of the disposition of government land followed the following procedure:
- First, the respective Municipal Council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition.
- The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands.
- The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.
- The fourth step would be for the gazettment of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 GLA. The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.
- The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 GLA.
- The sixth step would be for the issuance of an allotment letter to the allottee.
- In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period.
- The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate.



The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease.

40. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri) Civil Case 182 of 1992; [2008] KEHC 622 (KLR); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moiwo Ole Keiyua & 4 others* C.A.60/1997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

41. In the case of *Nelson Kazungu Chai & 9 others v Pwani University College* [2014] eKLR the Court held as follows:

“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 survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd v The Hon. A.G*, Mombasa HCCC No.276 of 2013 where the Court held as follows:

“... 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 Part development plan (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.”

42. In the case of *Rukaya Ali Mohamed v David Gikonyo Nambachia & another* Kisumu HCCA.9/2004 where Warsame J held that:

“... Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public policy.

43. The plots allocated by the Defendant contain conditions as follows;

- a. Plot rent is payable to the County Council office by 1st January / 31st March every year.
- b. All building plans must be approved by the Public Health Officer and the County Council of Thika.
- c. A minimum period of 24 months from the date of this allocation is allowed to complete the building (Code Building By Laws No. 31)
- d. No building may be occupied until an occupation licence is issued by the County Council of Thika.



- e. The Plot holder must conduct the type of business prescribed in the licence and no other business is permitted except with a written permission of County Council of Thika.
 - f. The Plot holder must keep the premises in a clean and sanitary condition to the satisfaction of the Public Health Officer.
 - g. If any person becomes more than three months in arrears in payment of rent, action may be taken against him/her and the plot may be repossessed.
 - h. The foundation of the building must be laid out under supervision of the Council Building/works superintendent.
44. According to the evidence of PW1 he purchased plot Nos 21 and 22 on the 5/5/2005 vide from Irene Njeri Mbugua and Esther Wangui Nguru on the 5/5/2005 respectively. That on the 13/5/2009 he purchased plot No 1A from Charles Muchunu Kihara. I have perused the agreements of sale of even dates. Plot 21 was allocated to Irene Njeri Mbugua on the 31/7/2000 vide Min /97 (1) of 31/7/97. The 1st Plaintiff did not annex the letter of allotment of Esther Wangui Nguru as well as that of Charles Mucunu Kihara.
45. The 2nd Plaintiff was allocated plot No 4A vide the letter of allotment dated the 3/5/1996 for purposes of running a spare parts business. She admitted in evidence that she has constructed some structures on the land. She has annexed approved building plans by the Defendant in support of her claim.
46. My analysis shows that the 1st 2nd 3rd 4th and 6th Plaintiffs have neither an allotment letter nor agreement for sale. I agree with the Defendant's submissions that there is no cause of action that has been shown against the Defendant with respect to the claim of the 1st 2nd 5th 7th and 8th Plaintiffs. I say so because no enforcement notices were issued by the Defendant against them. Their claims are hereby struck out.
47. In addition, the 8th Plaintiff claims that plot No 17 belonged to her father the late Michael Wanyoike Gitau. Having not been appointed as an administrator of the estate of the said Gitau, it is not open for her to file a suit on behalf of the estate. In the circumstances the suit as against the said 8th Plaintiff is hereby struck out for want of locus and or cause of action.
48. With respect to the 3rd Plaintiff, she did not produce a letter of allotment and no evidence to show that she has complied with the conditions of allotment in relation to plot Nos 14A and 14B. She avers that she is the registered owner of the suit land although no evidence was adduced in support. That she purchased the plots from Samuel Karuu Ngaru and has constructed a commercial house with the approval of the Defendant.
49. The 4th Plaintiff averred that he purchased Plot No 8 from Henry Musambi on the 3/8/2013. Like the 3rd Plaintiff there is no evidence that the conditions of allotment have been complied with. He purchased the plot whose user was a spare parts business and constructed a residential building with the approval of the Defendant. None of the approved plans were annexed.
50. The 6th Plaintiff was allocated plot No 3 for purposes of residential. There is no evidence that the conditions of allotment stated in her letter of allotment have been complied with.
51. It is clear from the conditions that building plans are to be approved by the County and all businesses were to be approved by the County. The Plaintiffs have not shown any evidence to show that the buildings on the land have been approved.



52. Section 26 of the *Land Registration Act* mandates the Court to take a certificate of title as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the permitted limitations and restrictions.
53. It is the finding of the Court that the allotment letters on record do not support the conclusive ownership of the plots by the 3rd, 4th and 6th Plaintiffs. I say so because as stated earlier a letter of allotment takes the form of an offer; the Plaintiff had the onus of demonstrating that they have complied with the conditions set by the Defendant in the letter of allotment. Granted its absence the Court finds that the Plaintiffs have failed to proof their case on a balance of probabilities.
54. Before penning off, I am of the view that the justice of this case lies in the Plaintiffs complying with the enforcement notice to the extent of submitting their ownership documents, approval plans and occupation permits as may be applicable to the Defendant to ascertain compliance with the conditions of allotment as well as the building code of the County.
55. That said, the totality of my findings are that the Plaintiffs case fails and I proceed to make the orders as below.
56. Final orders and disposal
- a. The case of the 1st 2nd 5th 7th and 8th Plaintiffs cases are struck out.
 - b. The 3rd 4th and 6th Plaintiffs cases are dismissed.
 - c. Each party to bear their costs.
57. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Waigwa for Plaintiffs 1- 8

Ms. Cheserek for Defendant

Court Assistant – Phyllis Mwangi

