



Mwangi v County Government of Nyeri (Environment & Land Case 704 of 2014) [2022] KEELC 4915 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 4915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 704 OF 2014**

**L WAITHAKA, J
JUNE 16, 2022**

BETWEEN

DANIEL GITHAIGA MWANGI PLAINTIFF

AND

COUNTY GOVERNMENT OF NYERI DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated October 27, 2010, the plaintiff herein instituted this suit seeking judgment against the defunct County Council of Nyeri for among other reliefs; compensation on account of loss and damage said to have been occasioned on him when the council demolished a structure he had constructed on plot No 39 Mweru Trading Centre (suit land).
2. The plaintiff's suit is premised on the ground that he is the lawful allottee of the suit land; that he extensively developed the suit land with permission of the defendant and that he was meeting all his obligations to the defendant.
3. It is the plaintiff's case that sometime in 2010, the defendant issued him with a notice requiring him to stop the works he was undertaking on the suit land and to forward to it his ownership documents for scrutiny. Lamenting that the defendant demolished the house he had erected in the suit land thereby destroying his lifetime investment, the plaintiff terms the defendants actions malicious, illegal, unlawful and a violation of his right to property and human dignity.
4. It is the plaintiff's case that on account of the defendants actions complained of, he suffered loss and damage to wit Kshs 3,500/- on account of materials he had used to construct the demolished building and monthly income of Kshs 15,000/= on account of lost rent income. The plaintiff also complains that he was defamed by the defendant as following demolition of his building, he was considered by right thinking members of the society as a dishonest land grabber.



5. In reply, the defendant filed a statement of defence and counter-claim through which it inter alia contended that no land was allocated to the plaintiff; that the plaintiff's occupation of the suit land and the developments he effected thereon were illegal and unauthorized.
6. The defendant admits that it issued the plaintiff with notices to stop the developments he was undertaking in the suit land and states that the plaintiff failed to heed the notice forcing it to, in exercise of the powers vested in it, to demolish the illegal structures.
7. Maintaining that the plaintiff's occupation and activities in the suit land were unauthorized and illegal, the defendant through its counter-claim, urges the court to compel the plaintiff to vacate the suit land, pay to it damages for illegal occupation of the suit land and pay it the costs it incurred in removing the illegal structures he had erected in the suit land.
8. In a rejoinder, the plaintiff maintained that he was allocated the suit land by the defendant and that he had obtained the relevant approvals and authorizations to construct the demolished structures; that he had met all his obligations to the defendant and that he had no issues or trouble with the defendant until 2010 when the defendant required him to stop the development he was undertaking and submit his ownership documents to it for scrutiny.

EVIDENCE

The Plaintiff's case.

9. During hearing, the plaintiff who testified as PW 1, informed the court that he was allocated the suit land by the defendant following an application he had made. He produced the following documents concerning his ownership/claim to the suit land:-
 - (i) A search certificate showing that as at September 9, 2010 the suit property was registered in his name and the receipt issued to him in respect of the suit land as Pexbt 1A and B respectively;
 - (ii) Plot allocation programme showing that he was invited to apply for a plot by the defendant as Pexbt 2;
 - (iii) Application he made for allocation of a plot following his invitation and the receipt he paid in respect of the application as Pexbt 3A and B respectively;
 - (iv) Receipt dated July 5, 1979 for pegging of the plot as Pexbt 4(A);
 - (v) Letter dated November 26, 1997 allegedly showing that pegging was done as pexbt 5. The contents of the said letter are as follows:-

“Re:illegal Construction/unauthorized Demarcation at Mweru Market

I am in reference of your plot No 39 Mweru market. This plot as per council records was pegged on March 22, 1996 measuring 30 x 80.

On our routine visits to our markets, we found that you have fenced beyond where the pegs were put and in the same plot you have started some construction.

Let it be known to you that before commencing any construction, you should obtain an approved building plan by the local authority of which you have not done. Secondly, you have unlawfully extended your plot.



You are requested to stop and remove the construction materials and also the fence in the extended area within seven (7) days from the date of this letter failure to which the council will take drastic measures against you as to cost..”

- (vi) Approved plan for proposed building-approved on September 16, 1998 as Pexbt 6 (Approval done way after he had began developing the plot. He states that he began developing the plot in 1996. That fact is also borne out by Pexbt 5).
- (vii) Letter from the PS Local Government to the Clerk Nyeri County Council dated August 12, 1994 as Pexbt 7. Through the letter the PS required the clerk to address the plaintiff’s complaints. The plaintiff complained that he had not been shown the plot allocated to him and that despite having paid the necessary fees for pegging and survey fee, pegging had not been done.
- (viii) Letter from the county council dated June 25, 2020 indicating he was building illegally (Pexbt 8). The contents of that letter are as follows:-

“Unauthorized Construction at Mweru Market Centre

This council has received information that you have lately embarked on an authorized construction within the public open air market area in Mweru Market Centre.

It is hereby required of you to immediately:-

1. Stop the unauthorized construction work; and
2. Forward clear copies of your allocation/authorization documents for our scrutiny.

By copy of this letter the area chief is requested to ensure that you comply with requirement No 1 above in public interest.

This council will take the necessary action in the event that you do not comply with requirement No 2 within fourteen (14) days from the date of this letter...”

- (ix) Photographs of the demolished building as Pexbt 9(a) to (j);
 - (x) Photographs of the demolished building taken by members of the public as Pexbt 10(a) to (e);
 - (xi) Licences for the work which was being undertaken in the demolished building as Pexbt 11(a) to 11(g);
 - (xii) Bundle of receipts showing he was paying rates in respect of the plot as Pexbt 12;
 - (xiii) Valuation report for the demolished house, Pexbt 13;
 - (xiv) Plan annexed to an affidavit sworn by an officer of the defendant, David N Nganga showing his plot, Pexbt 14;
 - (xv) Allotment letter Pexbt 15. (The allotment letter does not show the size of the plot. He acknowledged that exhibit 5 shows that the plot was 30 by 80. He did not raise any complaint over the contents of that letter).
10. The plaintiff further informed the court that the ground floor of the building was complete which he had rented out to a health clinic, an agrovet and a pub; that he was receiving rent of 5,000/= per shop giving him total rent of 15,000/- which he lost as a result of the demolition and affected his reputation as he was now regarded as a land grabber.



11. In cross examination, the plaintiff stated that he made an application to be allocated a plot. His step father, Francis Wanjohi Githaiga balloted on his behalf; eight (8) people were successful. Some have been allocated their plots and have built shops.
12. He denied the defendant's contention that he has built in the market but acknowledged that the plots of the other persons allocated plots are not near the market yet his is adjacent to the market. He stated that every one knew that he had applied for Mweru Market and was given a plot of 50 x 100. Members of the public and a thug demolished part of the building. He was not given a report of pegging by the Mweru Committee. He paid Kshs 1200/- for the exercise. He maintained that he began developing the demolished house in 1996 and completed in 2000.
13. He informed the court that there was no issue between him and the defendant until 2010 (not factually correct, defendant had raised red flag in 1997-see Pexbt 5).
14. In re-examination he stated that he had not fenced his plot before demolition. After demolition the defendant fenced his plot alongside the market. The rumble is still there.
15. Reginald Okumu a Registered Valuer informed the court that their firm, Ark Consultants, was approached by the plaintiff herein to value the structure which had been demolished. They returned a value of Kshs 3,500,000/- for the structure for purposes of compensation. He produced the valuation report prepared by his firm Ark Consultants and signed by his associates, T P Saruni and Benson Kithinji, who had since existed the firm, as Pexbt 13. In preparing the valuation report, they relied on the documents supplied by the plaintiff. He informed the court that the demolished structure was a commercial building with three shops.
16. In cross examination, PW 2 stated that he was not personally involved in the valuation but visited the site after valuation. In doing the report, they used the contractor's method or depreciated cost method. Using that method, they consider the cost of construction and age of building. They did not get bill of quantities from the plaintiff. Although the plaintiff gave them the income he was earning, they did not use the income approach as it can be misleading. They were not able to ascertain the tenure but considering it was a town plot, they were assured it was a leasehold. They were unable to ascertain the area. The assessed value did not include the value of the land.
17. In re-examination, he maintained that he visited the land after the report was done and confirmed that what is in the report is what is on the ground. He stated that the issue of tenure and area would not affect the valuation because it was based on the cost of the destroyed building only.

The Defendant's case.

18. Francis Juma Gichuki who testified as DW 1 informed the court that he was one of the 8 people who were to be allocated land by the defendant in Mweru Market. Despite having been allocated a plot, he was not shown his plot. That notwithstanding, he has continued paying rates. He does not know whether the plaintiff who was issued with a letter of allotment for plot No 39 was shown his plot. They were to be allocated land belonging to a person known as Gichohi but that plan did not materialize. It is his testimony that the plaintiff started building on plot No 19 reserved for a public car park and 20 designated as an open air market. Explaining that none of the other allottees were shown their land, DW 1 stated that the plaintiff built on public land causing the community to be unhappy.
19. In cross examination, DW 1 confirmed that the plaintiff was given land by the defendant. They protested severally about the building the plaintiff was erecting because it was on public land. The plaintiff had problems with the residents as a result of putting up the demolished building. The residents were demonstrating against the defendant, trustee, who had given the land not the plaintiff.



20. In re-examination, DW 1 stated that he knows that the plaintiff had built on plot No 19 but because he had no measurement, he could not clearly say whether he had built on a car park or open air market.
21. At close of hearing, parties filed submissions which I have read and considered.

Analysis and Determination.

22. From the pleadings filed in this case, the evidence and the submissions, I find the following to be the issues for the court's determination:-
 - (i) Whether the plaintiff is the owner of plot No 39 Mweru Trading Centre?
 - (ii) Whether plot No 39 was ever pegged and shown to the plaintiff on the ground?
 - (iii) Whether plot No 39 is within land earmarked for an open air public market?
 - (iv) Whether the plaintiff in developing plot No 39 encroached on land set aside for public use, open air public market?
 - (v) Whether the plaintiff obtained requisite approvals from the defendant before developing plot No 39?
 - (vi) Whether the plaintiff was issued with a notice before the defendant demolished his building?
 - (vii) Whether the defendant violated the plaintiff's rights by demolishing the structure the plaintiff had erected in the suit property?
 - (viii) Subject to the outcome of (vii) above, whether the plaintiff suffered loss and damage on account of the demolition of the house he had erected in the suit land?
 - (ix) Whether the plaintiff or the defendant has made a case for being granted the orders sought or any of them?
 - (x) What orders should the court make?
23. With regard to issue No 1 and 2, which issues I will consider together, the defendant has submitted that it is not in dispute that the plaintiff applied and won a ballot for allocation of a plot but contends that the physical allocation of the plot was to be identified on a future date. Based on a letter from the PS Ministry of Local Government dated August 12, 1994 (Pexbt 7) and the evidence of DW 1 to the effect that the allottees are yet to be shown the plots allocated to them, the defendant contends that the plot allocated to the plaintiff was never identified to the plaintiff and pegged on the ground.
24. I have carefully read and considered the evidence adduced in this case concerning the issue of allocation of the suit land to the plaintiff and the issue as to whether the plot issued to the plaintiff was identified on the ground. The evidence shows that the plaintiff was allocated the suit land vide letter Ref No NYI/CC/Mark/104 dated September 28, 1977. The letter was produced as Pexbt 15. Its contents are as follows:-

“RE: Letter of Allotment

As a result of an interview and subsequent balloting, the council as per min.27/77 of Town Planning, Markets and Housing Committee has offered you plot No 39 at Mweru Market.

Please note that you are required to pay Kshs 100/= being plot rent for the year 1977 on or before October 31, 1977 otherwise the offer may be withdrawn.”



25. Based on the uncontroveted evidence of the plaintiff to the effect that he accepted the offer and met the obligations imposed on him and receipts showing that the defendant had been receiving payments from the plaintiff being rent in respect of the suit land (see bundle of receipts produced as Pexbt 12), I have no doubt that the plaintiff accepted the offer. The evidence adduced in this case, namely oral testimony of the plaintiff and documentary evidence to wit letter dated August 12, 1994(Pexbt 7) among other letters shows that as at August 12, 1994 the plaintiff had not been shown the plot allocated to him by the defendant. The evidence adduced in the case further shows that, following the intervention of the PS Ministry of Local Government vide Pexbt 7, pegging was done in respect of the plot allocated to the plaintiff. in that regard see the letter produced by the plaintiff dated November 26, 1997, produced as Pexbt 5 whose contents are reproduced herein above. Contrary to the defendant's contention that the plot was not identified to the plaintiff or pegged, that letter from the defendant makes it clear that the plot was identified to the plaintiff on the ground and pegged. It is however, noted that the letter indicates that the plaintiff had encroached/extended the area allocated to him thus encroaching on land set aside for public use.
26. As to whether the suit land is within land earmarked for an open air public market, in his evidence the plaintiff acknowledged that his plot is adjacent to the land set aside for a public open air market. He also admitted that none of the other person allocated plots by the council have their plots near his but denied the defendant's contention that the plot allocated to him was set aside for public use. On his part DW 1, maintained that the land allocated to the plaintiff was set aside for public use. For that reason, the public protested the allocation of the land to the defendant. I have carefully considered the evidence adduced in this case and the circumstances that led to the plaintiff being shown the plot in question. From the conduct of the defendant, I entertain no doubt that the defendant allocated the plaintiff, alongside the other allottees none existent land. Owing to the plaintiff's persistence push to be shown the land allocated to him and for which he had been paying rates for along period of time, the defendant appears to have succumbed to pressure and allocated to the plaintiff part of land that had been set aside for public use. However, there being no evidence capable of showing that the plot was actually curved from the public utility land adjacent to the plot eventually allocated to the plaintiff, I have no firm basis for concluding that the suit land is indeed public land. To make that determination evidence of the development plan for the area was required. No such evidence was produced. There was also no evidence produced to show what the sizes of the public utilities were before the plaintiff was allocated the plot and whether allocation of the plot resulted in reduction of the size of those public utilities. For the foregoing reasons, I find and hold that the evidence adduced is incapable of assisting the court make a determination on the issue. My conclusion on this issue is that though the suit land is public land allocated to the plaintiff, the defendant has not proved that it was hived off land set aside for public use.
27. On whether in developing the suit land the plaintiff encroached on land set apart for public use, although the defendant did not tender any evidence on this issue, on the strength of the document produced by the plaintiff showing that the defendant had issued to him a notice showing that he had encroached on land set for public use and requesting him to remove the fence in the extended area and the unproven claim by the plaintiff that the plot he was allocated was 50 x 100 when Pexbt 5 shows that he was allocated 30 x 80, I conclude that for the plaintiff to base his claim on a 50 x 100 plot as opposed to 30 x 80 that he was allocated, he must have encroached on the land set aside by the public as contended by the defendant. There being no evidence that the plaintiff complied with the notice issued vide Pexbt 5 and there being no evidence that the plaintiff contended the representation given in Pexbt 5 concerning the size of the plot he was allocated, I return a positive verdict to this issue.



28. On whether the plaintiff obtained requisite approvals from the defendant before developing the suit land; it is the defendant's submissions that the demolished building was constructed without authorization from all relevant bodies like the National Environment Management Authority (NEMA), National Construction Authority (NCA), approved architectural and structural drawings and defendant's development permission and occupation certificate. Based on section 30 of the Physical Planning Act (PPA) which makes it an offence to carry out development within the area of a local authority without a development permission granted by the law authority and renders a development carried out without permission null and void, it is submitted that the plaintiff erected an illegal structure on the suit land.
29. In his submissions, the plaintiff has contended that he applied for approval of his development plan in compliance with the law which was granted via building plan, which plans and approval are said to have been produced in court. Pointing out that the plaintiff was not charged for breach of the provisions of section 30 of the PPA, the plaintiff contends that he was not issued with the enforcement notice required under section 38 of the Act. The defendant is said to have contravened the law and violated the plaintiff's right to a fair hearing enshrined in article 50 of the Constitution.
30. The plaintiff admits that he was issued with the letter from the defendant dated June 25, 2010 (Pexbt 8) but states that his efforts to address the issues raised by letter were made futile. Terming the actions of the defendant as abuse of public power and a violation of his right to property, a fair administrative action and fair hearing, the plaintiff submits that the defendant failed to follow the right procedure. Consequently, the defendant infringed on his rights. The plaintiff urges the court to declare the demolition notice and the demolition which ensued from it unlawful.
31. In determining this issue, I begin by pointing out that the plaintiff was issued with what he terms an improper notice to stop what the defendant termed unauthorized construction work on the suit land and forward to it clear copies of allocation/authorization document for scrutiny. The letter, which was produced as Pexbt 8 notified the plaintiff that he was required to comply with requirement two (provision of clear copies of allocation/authorization document) within 14 days failing which necessary action would be taken. It is noted that the notice did not indicate the action that would be taken.
32. Did the notice comply with the law concerning issuance of an enforcement notice as stipulated in sections 38 and 39 of the PPA? Without stating the defect(s) in the enforcement order, the plaintiff submits that it did not comply with section 38 as read with section 39 of PPA. section 38 provides as follows:-
- “38(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.
- (2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the



discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

- (3) Unless an appeal has been lodged under sub-section (4) enforcement notice shall take effect after the expiration of such period as may be specified in the notice.
 - (4) If a person on whom an enforcement notice has been served under sub-section (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.
 - (5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.
 - (6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.
 - (7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).”
33. Section 39 on the other hand provides as follows:-
- 39 (1) If, within the period specified in the enforcement notice or within such further period as the local authority may determine any measures required to be taken (other than discontinuance of any use of land) have not been taken, the local authority may enter on the land and take those measures and may, without prejudice to any penalties that may be imposed or any other action that may be taken under this Act, recover from the person on whom the enforcement notice is served, any expenses reasonably incurred by it in connection with the taking of those measures.
 - (2) If such person has not lodged an appeal under section 38 he shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.
 - (3) Where a local authority has taken action under subsection (1) any material removed by it from the land in pursuance of such action shall, unless the owner claims and removes such material within thirty days, be sold and the proceeds thereof, after deduction of any expenses reasonably incurred by the local authority in connection with such action and sale, be paid to the owner.
 - (4) Any person who obstructs, or otherwise interferes with, a local authority in the execution of its functions under subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand shillings or to an imprisonment not exceeding two years or to both.”
34. Faced with circumstances similar to those of this case, this court in the case of *Republic v Director of Land Housing and Urban Development - Laikipia County Ex Parte Philip King'ori Nderitu & another* [2017] eKLR, stated: -

“It is clear from the foregoing cited provisions of the law that Local authorities (in the circumstances of this case read a County Governments), have power to issue enforcement notices on land owners or occupiers of land within their area of jurisdiction. It is also clear that the Act provides the procedure of challenging such a notice by an aggrieved person and the consequences of failure to challenge the notice.



21. Under section 38(2) of the Act, a person who has not lodged an appeal under section 38 of the Act shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.
22. In the circumstances of this case, the applicants who did not file an appeal against the impugned enforcement notice as by law required, claim that they were prevented from filing the appeal by the respondent whom they accuse of having failed to constitute the requisite appeals committee to receive, hear and determine their appeal.....36. As section 39(2) of the *Physical Planning Act* does not allow a person who did not lodge an appeal as required by Section 38 to question the validity of any action taken by the local authority under section 39(1) upon any grounds, that could have been raised in such appeal, I agree with respondent's submissions that she neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought.
35. As pointed out herein above, the plaintiff admits having been issued with a notice concerning the development, he was undertaking in the suit property. The plaintiff also admits that he did not comply with the notice. Instead, he sought the assistance of the Provincial Administration. Upon expiration of the notice period, the defendant enforced the notice against the plaintiff by demolishing the structures the plaintiff had erected in the suit property.
36. The question which arises from the above facts and the law, is whether this court has jurisdiction to entertain the plaintiff's claim, arising from the alleged irregular, unfair, illegal, unlawful and unconstitutional actions of the defendant.
37. In my considered view the impugned notice was issued pursuant to the defendant's powers under section 38 of the PPA. There was nothing illegal or unlawful in issuance of that notice. Upon receipt of the notice, the defendant had a legal duty to either comply with it or challenge IT using the procedure provided for in law for challenging such a notice. Section 39(2) of PPA is categorical that a person who did not lodge an appeal as required by section 38 to question the validity of any action taken by the local authority under section 39(1) upon any grounds, that could have been raised in such appeal, shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.
38. Being of the view that the issue of fairness, form and/or the legal propriety of the notice hereto is an issue that the plaintiff could have taken up in the appeal contemplated in section 38 of PPA, I find and hold that this court lacks jurisdiction to hear and determine those issues as the court of first instant. Under section 38 of PPA, this court is only clothed with the mandate to hear and determine appeals from the National Liaison Committee.
39. It is trite law that jurisdiction is everything and that without it the court has no power to make one more step. It must be acquired before judgment is given. See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR.
40. The upshot of the foregoing is that the plaintiff has not made a case for being granted the orders sought. Consequently, I dismiss his case with costs to the defendant.

DATED AND SIGNED AT ITEN THIS 13TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE



READ, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O OLOLA

JUDGE

NYERI ELC NO. 704 OF 2014 (JUDGMENT) Page 9 of 28

