



**Wachira & 2 others (Suing as Chairman, Secretary and Treasurer of Umoja II Residents Welfare Association) v Ndirangu & 2 others (Environment & Land Case 512 of 2017) [2022] KEELC 3970 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3970 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 512 OF 2017**

**OA ANGOTE, J  
JULY 28, 2022**

**BETWEEN**

**BURTON WACHIRA ..... 1<sup>ST</sup> PLAINTIFF  
GATHIMBA N. MWANGI ..... 2<sup>ND</sup> PLAINTIFF  
JOHN GITONGA ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS CHAIRMAN, SECRETARY AND TREASURER OF UMOJA II  
RESIDENTS WELFARE ASSOCIATION**

**AND**

**BENSON NDIRANGU ..... 1<sup>ST</sup> DEFENDANT  
FRED KINYUA ..... 2<sup>ND</sup> DEFENDANT  
BEATRICE KIRARA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs in this suit filed a Plaint dated July 27, 2017 in which they sought for the following orders:
  - a. A declaration that the defendants have encroached and illegally developed approximate area of 0.073Ha within the Plaintiff's land LR No Nairobi/ Umoja Block107/ 1057 (Original Plot No 1113).
  - b. The encroachment, development and construction of the defendants' storey buildings on LR No Nairobi/ Umoja Block107/ 1057 is illegal and should be demolished.
  - c. The demolition be supervised by licensed auctioneers and or court bailiffs. Officer commanding Buruburu Police Station (O.C.S) and his counterpart in Umoja Police Post do enforce the demolition orders using competent contractors.



- d. Defendants do meet the costs of demolition and clearing of the debris of their structures built on plaintiff LR No Nairobi/ Umoja Block107/ 1057.
  - e. Defendants do also pay costs of this suit.
2. The Plaintiffs averred in the Plaint that in 1985, when Umoja II Estate was being allocated to the residents by the then Nairobi City Council, land parcel No Nairobi/ Umoja Block107/ 1057 (Original Plot No 1113) measuring approximately 0.6104 Ha. (the suit property), was set aside in the subdivision plan as a public utility plot to build a community market.
3. It was averred that the City Council of Nairobi further subdivided the land into 300 stalls as a community market for the residents of Umoja II estate; that some stalls were constructed and given to traders, with room for expansion remaining vacant and that the defendants are the registered land owners of LR No Nairobi Umoja107/1105, which borders the suit property.
4. The Plaintiffs' case is that unknown to them, the Defendants maliciously encroached onto their land and hived off land measuring approximately 0.073 Ha, which is public land and part of the suit property and that the Defendants have since constructed storey commercial buildings on the Plaintiffs' land, which the Nairobi City County has ordered them to demolish.
5. The Plaintiffs articulated the particulars of trespass and encroachment on the suit property as follows:
  - i. The Defendants knowingly and without permission entered the Plaintiff's parcel of land despite the fact that it is market land.
  - ii. Such entry by the Defendants has infringed upon the Plaintiff's rights as custodians of Umoja II Residents' market.
  - iii. The illegal and continuous entry has resulted to loss of revenue by the Plaintiff due to the Defendant's occupation of part of the parcel land.
  - iv. The Defendant illegally built commercial flats on market land.
  - v. The Plaintiffs have continually protested over the years.
  - vi. The buildings have diminished the size of the plaintiff's parcel of land thus denying their exclusive occupation of the entire piece of land.
6. The Defendants in this suit did not file a Defence in this suit.

### **Hearing & evidence**

7. The Plaintiffs relied on the evidence of one witness, Burton Wachira Githinji, the Chairman of the Plaintiff's Association. PW1 adopted his witness statement as his testimony. PW1 reiterated the facts as set out in the Plaint and stated that the Defendants have encroached on a portion of the Association's market land measuring 0.073 Ha and built commercial flats despite their protests over the years.
8. According to the evidence of PW1, the court should order for the demolition of the commercial buildings encroaching on their land. PW1 produced in evidence the certificate of registration of Umoja II Residents Association, a survey map of parcel of land known as Nairobi Block 107/1057 (formerly 1113 Nairobi) which shows the encroached area of land and the minutes of the Nairobi City Council of a meeting held on 17<sup>th</sup> July 2007 where it was resolved that the Umoja II Community Market be formalised.



## Submissions

9. In his submissions, the Plaintiffs' counsel submitted that upon being served with the pleadings, the Defendants appeared before the court and admitted that they had indeed encroached on the suit land and that the Plaintiffs' Association has been the owner of the subject land since 1985 and has been in open occupation of it as a community market for more than twenty years.

## Analysis and determination

10. Upon considering the pleadings filed herein, the testimony of the 1<sup>st</sup> Plaintiff as well as submissions, the following arise as issues for determination:
  - a. Whether the Plaintiffs are the lawful proprietors of all that land known as LR No Nairobi/ Umoja Block107/ 1057 (Original Plot No 1113), and if so
  - b. Whether the Defendants have trespassed onto the property,
  - c. Whether the Plaintiffs are entitled to the reliefs sought in their Plaint.
11. It is the Plaintiffs' case that they are the registered owners of parcel of land known as Nairobi/ Umoja Block107/ 1057 (Original Plot No 1113), which was set apart by the Nairobi City County as a community market for Umoja II residents. According to the Plaintiffs, the Defendants have however maliciously encroached onto their land and hived off land measuring approximately 0.073 Ha, on which they have constructed storey commercial buildings.
12. This matter is undefended. Although the Defendants entered appearance, they failed to file a Defence or offer any evidence. It is trite law that even in an undefended matter, a Plaintiff must discharge his burden of proof. This was held by *Hancox JA in Karugi & another vs Kabiya & 3 others* [1983] eKLR as follows:

“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”
13. In the same suit, Platt JA stated as follows:

“The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be.”
14. It is not disputed that the Plaintiffs' Association is the registered owner of parcel of land known as Nairobi/ Umoja Block107/ 1057 (Original Plot No 1113). The Plaintiffs produced in evidence a certificate of title showing that the Plaintiffs' Association is the registered owner of the suit premises.
15. The Plaintiffs' title has not been challenged on the grounds that it was obtained fraudulently, through misrepresentation or illegally or at all. That being the case, this court should take it as prima facie evidence that the Plaintiffs' Association is the legal owner of the suit premises.
16. On the issue of trespass by the Defendants, the Plaintiffs produced in evidence a survey map of Nairobi/Umoja Block 107/1057 (formerly 1113 Nairobi) which shows the encroached area of land by the Defendants. It is thus clear that the Defendants have indeed encroached on the Plaintiffs' land by approximately 0.073Ha and built commercial buildings upon it.



17. It is trite that land reserved for public purposes should always be left for such purposes. Indeed, open public spaces are key built environmental elements within neighbourhoods. Such spaces are usually reserved to provide for green space and natural environments, accessible to the general public and not to be expropriated by private entities or individuals.
18. Considering that the Plaintiffs have proved that the land occupied by the Defendants is indeed part of the suit property, and the same is public open space, it is the finding of the court that the Defendants should be evicted from the land.
19. That being the case, this court allows the Plaintiffs' Plaint dated July 27, 2017 as follows:
  - a. A declaration be and is hereby issued that the Defendants have encroached and illegally developed an area measuring 0.073Ha within the Plaintiffs' parcel of land known as Nairobi/ Umoja Block 107/ 1057 (Original Plot No 1113).
  - b. A declaration be and is hereby issued that the encroachment, development and construction of the Defendants' storey buildings on LR No Nairobi/ Umoja Block 107/ 1057 is illegal and should be demolished.
  - c. An order be and is hereby issued that the Defendants do demolish at their own costs the structures standing on a portion of known as Nairobi/ Umoja Block 107/ 1057 within 60 days from the date of this Judgment.
  - d. An order be and is hereby issued that in the event the Defendants do not comply with order number (c) above, the demolition of the Defendants' structures standing on a portion of parcel of land known as Nairobi/ Umoja Block 107/ 1057 be supervised by licensed auctioneers and or court bailiffs and that the Officer Commanding Buruburu Police Station (O.C.S) and his counterpart in Umoja Police Post do enforce the demolition orders using competent contractors.
  - e. An order be and is hereby issued that the Defendants do meet the costs of demolition of their structures and clearing of the debris on a portion of the Plaintiff's land known as Nairobi/ Umoja Block 107/ 1057.
  - f. The costs of this suit be borne by the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2022**

**O.A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Wanjohi for Plaintiffs

No appearance for Defendants

Court Assistant: June

