



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Appeal 175 of 2000**

**JIM K. KAIRU & 267 OTHERS .....PLAINTIFFS**

**- VERSUS -**

**NATIONAL HOUSING CORPORATION ..... DEFENDANT**

**AND**

**MUNICIPAL COUNCIL OF NAKURU ..... THIRD PARTY**

**JUDGMENT**

The plaintiffs are land owners within Mwariki Estate in Nakuru Municipality. The parcels of land in the said estate were registered and certificates of leases issued under the **Registered Land Act** under Land Reference No. Nakuru Municipality/Block 27. The plaintiffs denied having ever entered into a contractual relationship with the defendant. They averred that they were strangers to the defendant. The plaintiffs aver that on or about March 2000, the defendant issued notices to them demanding various amounts allegedly owing to the defendant from the plaintiffs, a debt which the plaintiffs were not aware of. The plaintiffs averred that the defendant had threatened to evict them from their premises and their various plots within Mwariki Estate. The plaintiffs therefore sought perpetual injunction to restrain the defendant, its agents or servants from interfering with the plaintiffs' enjoyment of their ownership rights in their respective parcels of land at Mwariki Estate.

The defendant filed a defence. It averred that there existed a contractual relationship between the plaintiffs and the defendant that arose from a loan of Kshs.8.3 million that was disbursed to the plaintiffs through the Municipal Council of Nakuru. The defendant averred that it was the understanding that the said loan would be repaid by the plaintiffs after the same had been apportioned equally between all plot owners of parcels of land previously owned by Mwariki Farm Company. The defendant admitted issuing demand notices demanding the payment of various amounts that triggered the plaintiffs to file suit. It was the defendant's case that the plaintiffs were aware of their liability to the defendant. The defendant averred that it took action after the plaintiffs failed to repay the loan advanced to them in the installments that were agreed. The defendant stated that it had the legal mandate to take action against the plaintiffs to recover the said outstanding amount. The defendant urged the court to dismiss the plaintiffs' suit with costs. The Municipal Council of Nakuru was enjoined into the proceedings as third party. It duly entered appearance but did not file any pleadings either in support or in opposition of the plaintiffs' claim.

At the hearing of the suit, the plaintiffs and the defendant each called a witness to offer oral evidence in support of their respective opposing cases. Jim Kariuki Kairu testified as PW1 on behalf of the plaintiffs while DW1, Jackson Kiplangat Korir testified on behalf of the defendant. The third party, though it participated in the proceedings, did not offer any evidence. After the close of both the plaintiffs' and the defendant's case, their respective counsel filed written closing submissions. The third party also filed written closing submissions. After careful evaluation of the pleadings filed by the parties herein, the evidence adduced, including the documentary evidence produced in court, and the written submissions made, it was evident that the facts of this case are more or less not in dispute. According to the said evidence, in 1983, members of Mwariki Farm Company approached the housing project unit of the Municipal Council of Nakuru with a view to securing its assistance in the improvement of infrastructure within the farm owned by the said company. The farm owned by Mwariki Farm Company was originally agricultural land. Due to its proximity to the municipality of Nakuru, the members of the farm sought approval to change its user from agricultural land to residential use. The approval was duly granted by the Commissioner of Lands. With the approval, the land was subdivided

into smaller holdings suitable for residential purposes.

A need arose for the improvement of the infrastructure within the residential estate now known as Mwariki Estate. The then officials of Mwariki Estate approached the Municipal Council of Nakuru with a view to securing funds for the improvement of the said infrastructure. In September 1984, after concluding negotiations with the World Bank, that resulted in a loan being advanced to the Municipal Council on behalf of the members of Mwariki Estate, a meeting was held between the Municipal Council of Nakuru and the members of Mwariki Estate. The infrastructure to be constructed was agreed upon. The modalities of the repayment of the cost of upgrading the infrastructure was also agreed. The infrastructure that were to be improved included a tarmac road to serve as a bus route for the estate, street lighting along the bus route, water reticulation in the estate but not to individual plots, storm water drainage and the grading of secondary roads within the estate. The infrastructure within the estate was upgraded with a loan of Kshs.8.3 million secured from the World Bank. The loan was to be repaid for a period of 20 years at an interest of 12% per annum.

In the meeting held on 28<sup>th</sup> September 1984, (minutes of which were coincidentally produced by the plaintiffs and the defendant in support of their respective cases) the members of Mwariki Farm agreed to repay the said loan through their water bills and annual land rates payable to the Municipal Council of Nakuru. From the evidence adduced, it was apparent that at the time the infrastructure was upgraded, (the upgrading of the infrastructure was completed in 1987) none of the plot owners at Mwariki estate had been issued with titles with regard to their respective portions of land. At the time, the land within the estate was being surveyed and sub-divided with a view to enabling the plot owners to be issued with titles of their respective parcels of land. The process was completed in 1997. Meanwhile, between 1986 and 1989, plot owners within the said estate entered into individual agreements with the Municipal Council of Nakuru. They agreed to repay the loan granted for the upgrading of the infrastructure within the estate. They agreed that they would pay the amount that would be apportioned to each plot owner pursuant to a method that would be devised by the Municipal Council of Nakuru. The said agreements did not, however, state the amount that each plot owner would be required to pay. It was apparent from the evidence adduced that the Municipal Council of Nakuru and the plot owners at Mwariki Estate could not reach an agreement on the modality by which the plot owners would pay for the cost of upgrading the infrastructure within their estate. From the evidence adduced, it was also clear that the plot owners at Mwariki estate did not repay the loan that was applied for the upgrade the infrastructure in their estate. Certificates of leases were issued to the plot owners within Mwariki estate in 1997. Even after the said certificates of leases were issued, it was apparent that the plot owners at the said estate did not make any effort to settle the loan that they had agreed to repay in 1984.

According to the evidence adduced by the defendant's witness, the Government of Kenya designated the defendant as the body which was to ensure that the loan advanced by the World Bank for the improvement of infrastructure, was repaid by the plot owners. In that regard, it was the defendant's case that the Municipal Council of Nakuru, its agent in the transaction failed in its duty to recover the amount advanced for the improvement for the said infrastructure, and thereby compelling the defendant to take over the management of the said loan recovery process. It was in that regard that the defendant issued notices to the plot owners at the said Mwariki estate demanding repayment of the loan together with the accumulated arrears in form of interest. The notices were issued on 7<sup>th</sup> February 2000. It was the issuance of the said notices that provoked the filing of the present suit.

I have read one of the said notices that was produced by the plaintiffs as an exhibit during the hearing of the case. The said notice is referenced "*Take Over (of) Management from Nakuru Municipality of Houses Funded by National Housing Corporation.*" The first paragraph of the notice states as follows:

*"I wish to inform you that failure by majority of tenant purchasers in this estate to pay loan charges due to Nakuru Municipal Council, the Council has also been unable to pay National Housing Corporation. Consequently, the National Housing Corporation has invoked the relevant clauses in the Housing Act, and repossessed this estate from the Council."*

It was clear that the above notice issued by the defendant to the plaintiffs was not in reference to the

infrastructure loan that was to be recovered from the plot owners at Mwariki estate. The defendant did not advance any money to the plaintiffs for the construction of houses as members of a tenant purchase scheme. The said notice was therefore unlawful since it was not in reference to the actual loan that the plaintiffs, as the plot owners at Mwariki estate, had agreed to repay being the costs of the improvement of infrastructure within their estate. The defendant could therefore not purport that the notices issued were valid notices in accordance with the *Housing Act* which mandates the defendant to repossess a housing estate constructed using funds advanced by the defendant to a local authority. The plaintiffs were not beneficiaries of a tenant purchase scheme or any scheme put in place by the defendant by which houses were constructed within Mwariki estate.

From the evidence adduced by the plaintiffs, it was clear that the plot owners at Mwariki estate constructed their own houses using their own resources and not from a loan advanced to them by the defendant. The plaintiffs were therefore justified in seeking protection from the court when it became apparent that the defendant was in the process of demanding payment from them in regard to a loan or a scheme that they were unaware of and further that they were strangers to. If the court were to consider the contents of the notice and go no further, then it would reach a finding that the plaintiffs had established their case on a balance of probabilities entitling them to judgment as prayed in their plaint. However, as the plaintiffs have admitted that they actually owe the defendant the sum that was applied in the development of infrastructure in Mwariki estate, this court would be acting in dereliction of its constitutional duty to administer justice to the parties and render a decision that would serve the ends of justice.

Having carefully considered the totality of the evidence adduced in this case, this court will make the following findings with a view to resolving once and for all the dispute between the plaintiffs on the one hand, and the defendant and the third party on the other. As stated earlier in this judgment, it is not disputed that the plot owners of Mwariki estate accepted to shoulder the burden of the cost of improvement of infrastructure within the said estate. According to PW1's evidence, it was clear that to a large extent, the said infrastructure was developed. The said improved infrastructure resulted in the appreciation of the values of the residential plots within the said Mwariki estate. The lifestyle of the residents of Mwariki estate was changed for the better with the improvement of roads of access and by the provision of water and electricity supply. The plaintiffs and other residents of Mwariki estate therefore immensely benefited from the improved infrastructure. According to the 1<sup>st</sup> plaintiff, the plot owners within the said Mwariki estate have no problem in paying the amount owed provided that modalities are put in place to enable the said plot owners pay the said amounts, either through their monthly water bills or through the annual land rates payable to the third party (*Municipal Council of Nakuru*). It also emerged during the hearing of this case, that the plaintiffs had not been notified of the amount actually now owing in respect of the infrastructure that was developed in their estate. The defendant did not make any effort to consult the plaintiffs before it issued the disputed notice. In the above scenario, it was not a surprise that the conduct of the defendant engendered suspicion in the minds of the plaintiffs.

I will therefore make the following orders to resolve the matters in dispute in this case. I direct the defendant and the third party to meet with the representatives of the plaintiffs so that the actual amount owed by the plaintiffs may be determined. The said amount shall include interest calculated at the simple rate of interest of 12% per annum from the time the loan was disbursed at the commencement of the construction of the said infrastructure. Thereafter, the agreed amount shall be apportioned and applied on a prorata basis, depending on the acreage (or size) of each plot, to all parcels of land within Mwariki estate (*i.e. the parcel of land formerly owned by Mwariki Farm Company, in which the infrastructure in question was developed*). The Municipal Council of Nakuru is directed to charge the respective amounts to each plot within Mwariki estate and recover the said amount together with next year's (2010) land rates. The defendant, in conjunction with the Municipal Council of Nakuru, shall maintain a record of the payments made. Upon each plot owner completing payment, the defendant shall issue a certificate to that effect, indicating that such plot owner has been discharged from further liability to the defendant. The Municipal Council of Nakuru shall be at liberty to demand the payment of the said surcharge with effect from the date of this judgment in the event that a plot owner shall require to be issued with a rates clearance certificate.

Each party shall be at liberty to apply. Since neither party in this case has wholly been successful, I shall make no orders as to costs.

**DATED at NAKURU this 22<sup>ND</sup> day of MAY 2009.**

**L. KIMARU**

**JUDGE**