



**Wakaba v County Government of Kiambu (Environment & Land Case
30 of 2021) [2022] KEELC 13500 (KLR) (17 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 30 OF 2021**

BM EBOSO, J

OCTOBER 17, 2022

BETWEEN

FRANCIS NDUNGU WAKABA PLAINTIFF

AND

COUNTY GOVERNMENT OF KIAMBU DEFENDANT

JUDGMENT

1. Through a plaint dated February 26, 2021, the plaintiff, Francis Ndungu Wakaba, seeks a declaration that, technically, the defendant has compulsorily acquired his land, Nguirubi/Ndiuni/1476, measuring 2.10 hectares [the suit property] without compensation; a directive to the defendant to pay him the sum of Kshs 28,635,000/- being the value of the suit property; interest from April 4, 2019; and costs of this suit. The plaintiff contends that he was registered as proprietor of the suit property in 1993 after the property was allocated to him by the defunct county council of Kiambu through balloting. The suit property abuts Gatarakwa public cemetery.
2. It is the plaintiff's case that sometime in the year 2007, the defunct county council of Kiambu allowed bodies of deceased persons to be buried on the suit property. By the year 2017, over 100 bodies had been buried on the suit property. He protested the encroachment onto his property and wrote to the National Land Commission. The commission conducted an inquiry which established that the suit property belonged to him and upheld his title. Further, the commission recommended that the county government of Kiambu should acquire the suit property for public use. The findings and recommendations of the commission were published in the Kenya Gazette as Legal Notice No 11714 of 9/11/2018.
3. The plaintiff further contends that, in tandem with the recommendations of the commission, the county government of Kiambu carried out an inspection and valuation of the suit property. The resultant inspection and valuation report gave the suit property a value of Kshs 28,635,000. Despite



- pleas by the plaintiff, the defendant has failed to complete the acquisition process and to compensate him, despite having turned his land into a public cemetery.
4. The defendant entered appearance and filed a statement of defence dated June 3, 2021. The defence contains general denials of the plaintiff's allegations. Further, and in the alternative, the defendant avers that under section 9(5) (c) of the *Land Act*, the National Land Commission is vested with powers to make rules for regulating and controlling the conversion of land from one category to another. In addition, the defendant faults the plaintiff for not protesting nor lodging his claim to the "proper authority" until after the expiry of 10 years.
 5. At trial, the plaintiff testified as PW1. He adopted his witness statement dated February 26, 2021 as part of his sworn evidence-in-chief. He outlined his case as summarized above. He produced 10 exhibits, among them: the title to the suit property, bearing him as the registered proprietor; and a copy of the notice published in the Kenya Gazette by the National Land Commission, upholding his title and recommending that the county government of Kiambu acquires the suit property for public use.
 6. During cross-examination, he stated that when he learnt about disposal of bodies on his land, he complained to the area Chief and to the District Commissioner [the DC]. The DC wrote a letter and directed that dead bodies should not be buried on his land. Disposal of bodies stopped. Disposal of bodies resumed towards the end of 2010. He moved to court and obtained an injunction.
 7. The defendant elected not to lead evidence. Similarly, the defendant did not file written submissions despite participating in the trial. The plaintiff filed written submissions dated May 16, 2022 through M/s L Maina Irungu & Co Advocates.
 8. Counsel for the plaintiff submitted that the plaintiff had demonstrated that he was the registered proprietor of the suit property, having acquired it through balloting in 1988. Counsel added that after the defendant illegally converted the plaintiff's land into a public cemetery, the National Land Commission inquired into the dispute and recommended that the defendant undertakes the process of compulsory acquisition of the land. Counsel further submitted that, in furtherance of the recommendation, the defendant caused the suit property to be inspected and valued and the inspection and valuation exercise returned a figure of Kshs. 28,635,000. Lastly, counsel submitted that the defendant had delayed the process of compensation. Counsel urged the court to grant the reliefs suit by the plaintiff, noting that the plaintiff's evidence was uncontroverted.
 9. I have considered the pleadings, evidence and submissions tendered in this suit. The defendant filed a statement of defence largely consisting of general denials. Secondly, despite being afforded an opportunity to lead evidence to controvert the plaintiff's evidence, the defendant elected not to lead any. Thirdly, the defendant elected not to file submissions in this suit. Consequently, the single question that falls for determination is whether the plaintiff has proved his claim to the required standard.
 10. The gist of the plaintiff's claim and evidence is that he is the registered proprietor of the suit property, having acquired it through balloting in 1988. The suit property abuts Gatarakwa public cemetery. Between 2007 and 2017, the defendant's predecessor [and subsequently the defendant] allowed dead bodies to be interred on the suit property. The actions and/omissions of the defendant and its predecessor have effectively converted the suit property into a public cemetery. It is for this reason that the plaintiff seeks the reliefs set out in the plaint.
 11. Prior to the promulgation of *the Constitution* of Kenya 2010, disposal of dead human bodies was a function of the local authority and was regulated by the framework in Part XIII of the *Public Health Act*. Section 144 of the *Act* required that dead bodies of human beings be buried or disposed in



- cemeteries. The Act conferred in the local authorities powers to make and enforce rules relating to disposal of dead bodies of human beings.
12. Section 2 of part 2 of the fourth schedule to *the Constitution* of Kenya 2010 fully devolved to the County Governments all functions relating to cemeteries, funeral parlours, crematoria and general disposal of dead bodies. No dead body of a human being can be disposed without a permit issued by the county government. It is the responsibility of the county government to satisfy itself as to the location where the body is to be disposed.
 13. Given the foregoing, it is clear that by allowing the plaintiff's land to be converted into a public cemetery, the defendant violated the plaintiff's right to property as pleaded at paragraph 9 of the plaint. With more than 100 bodies interred on the land, the land is no longer available for other economic uses by the plaintiff.
 14. Consequently, the court agrees with the plaintiff that through the illegal actions and omissions of the defendant, the defendant has, technically, irregularly acquired the plaintiff's land. The defendant having assessed the value of the land at Kshs 28,635,000/- as at April 4, 2019, I will award the plaintiff damages equivalent to the said sum, together with interest at court rate from the date of filing this suit. Upon settlement of the award, the plaintiff's interest in the land shall cease and the land shall wholly become property of the defendant.
 15. For clarity, the plaintiff's suit against the defendant succeeds and is disposed in the following terms:
 - a. By allowing the plaintiff's land, parcel number Nguirubi/Ndiumi/1476 to be used as a public cemetery, the defendant is deemed to have irregularly acquired the said land.
 - b. Consequently, the defendant shall pay the plaintiff damages in the sum of Kshs 28,635,000/- being the value of the said land. Further, the defendant shall pay to the plaintiff interest at court rate on the above sum from the date of filing this suit.
 - c. Upon payment of the above judgment sum by the defendant, the plaintiff's interest in the said land shall cease and the land shall wholly become property of the defendant. The plaintiff shall surrender his title to the defendant for cancellation by the land registrar and the land registrar shall upon cancellation, register the said land, parcel number Nguirubi/Ndiumi/1476, in the name of the defendant.
 - d. The defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Irungu for the Plaintiff

Court Assistant: Sydney

