



**Elias M Mategwa & 5 others (Suing on their behalf and on behalf of the BIAFRA Residents Association) v City Council of Nairobi & another (Environment & Land Case 814 of 2005) [2022] KEELC 13609 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13609 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 814 OF 2005  
LN MBUGUA, J  
OCTOBER 13, 2022**

**BETWEEN**

**ELIAS M. MATEGWA ..... 1<sup>ST</sup> PLAINTIFF  
PATRICK MWANGI ..... 2<sup>ND</sup> PLAINTIFF  
LYDIA KAURA CHUI ..... 3<sup>RD</sup> PLAINTIFF  
ABDALLA MOHAMED ..... 4<sup>TH</sup> PLAINTIFF  
ZUHURA MZEE ..... 5<sup>TH</sup> PLAINTIFF  
ABDULLAH JASHO ..... 6<sup>TH</sup> PLAINTIFF  
SUING ON THEIR BEHALF AND ON BEHALF OF THE BIAFRA RESIDENTS  
ASSOCIATION**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1<sup>ST</sup> DEFENDANT  
THE TRUSTEES OF THE SALVATION ARMY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background/pleadings**

1. Through the plaint dated June 30, 2005, and amended on July 15, 2005, the plaintiffs claim that they are residents of Biafra estate which was developed after the government leased to the 1<sup>st</sup> defendant land known as LR 209/7259 measuring 10.15 hectares *vide* grant IR 45861/1 dated September 23, 1988. The 1<sup>st</sup> defendant went on to develop a tenant purchaser housing scheme in an estate known as Pumwani Relief Scheme (commonly known as Biafra Estate) where the plaintiffs and other persons purchased houses and reside therein.



2. The plaintiffs went on to plead that the 1<sup>st</sup> defendant had delineated a portion of land known as LR 209/7259/231 measuring about 0.1030 hectares for common facilities such as shops and parking spaces for the use and benefit of the estate. However, the 1<sup>st</sup> defendant later leased that portion of land to the 2<sup>nd</sup> defendant for construction of a church which was against the terms and conditions of the lease.
3. The plaintiffs stated that the lease was meant for residential purposes and the lease to the 2<sup>nd</sup> defendant was in breach of the conditions of the lease and the construction of the church was thus illegal and unlawful. They went on to state that the 1<sup>st</sup> defendant was in breach of trust because the tenant purchasers of Biafra Estate could not enjoy amenities such as shops and parking spaces as was meant to be when the project was designed.
4. The plaintiffs thus pray for the following orders:
  - i. A declaration that the 1<sup>st</sup> defendant holds land parcel number 209/7259 in trust for the plaintiffs.
  - ii. A declaration that the lease and/or allocation of the plot known as land reference number 209/7259/231 thereof by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was in breach of trust and is therefore unlawful and illegal.
  - iii. An order that the said lease and/or allocation be revoked and cancelled.
  - iv. An order that the defendants do pay costs of this suit.
5. The 1<sup>st</sup> defendant in the statement of defence dated February 19, 2009 admitted that the government had leased to them, the land parcel LR 209/7259 for purposes of developing a tenant purchase scheme; that initially *vide* Part Development Plan (PDP) No CP & Arch/FD/2/B/41/92 dated November 1992, the scheme included roads, gardens, parking bays, schools and a market shopping centre. However, this PDP was superseded by PDP CP & Arch/FP/2/B/41/92 also of November 1992 which allocated LR No 209/7259/231 for church purposes and it was then allotted to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendants deny that the grant No LR 209/7259/231 was solely meant for a parking lot, shops, school and market.
6. The 2<sup>nd</sup> defendant in their statement of defence dated August 1, 2005 acknowledged that the land known as LR No 209/7259 was leased by the 1<sup>st</sup> defendant from the government, but denied the allegation that the piece of land in question 209/7259/231 was only meant for construction of shops and parking space for the residents of Biafra Estate. The 2<sup>nd</sup> defendant stated that the main lease did not have a condition that expressly stipulated that the land was meant for residential purposes only. Therefore, the 1<sup>st</sup> defendant's allotment of LR 209/7259/231 to the 2<sup>nd</sup> defendant was not contrary to the conditions of the lease and the church was ancillary to the purposes for which the main lease was granted.
7. The 2<sup>nd</sup> defendant went further to state that the allotment letter from the 1<sup>st</sup> defendant clearly stipulated that the plot was to be used for church/ religious purposes. The 2<sup>nd</sup> defendant further claimed that the construction of the buildings on that piece of land began after its construction plans were approved by the 1<sup>st</sup> defendant.
8. The 2<sup>nd</sup> defendant also pleaded that the relationship between the 1<sup>st</sup> defendant and the plaintiffs was a landlord-tenant relationship and the issue of the 1<sup>st</sup> defendant holding LR 209/7259/231 in trust for the plaintiffs was incorrect. They went on to state that the plaintiffs and or their agents had filed



a case High Court No 1111 of 1994 restraining the 1<sup>st</sup> defendant from allotting the said land to the 2<sup>nd</sup> defendant but that suit was dismissed for want of prosecution. As such, the current suit was *res judicata*.

### **The Evidence**

9. Elias Mategwa (hereinafter referred to as PW1) a farmer in Kakamega testified for and on behalf of the plaintiffs. He adopted his witness statement dated July 16, 2014 as his evidence. His evidence reflects the contents of their pleading adding that in 1992, the 1<sup>st</sup> defendant allotted the suit land LR No 209/259/231 to the 2<sup>nd</sup> for use as a church and a lease was thereafter issued for 99 years. The plaintiffs contend that the allotment and the issuance of the lease was contrary to the purpose of the initial grant. The witness also averred that there was no consent of the commissioner of lands in the transfer of the suit land to the 2<sup>nd</sup> defendant. The plaintiffs therefore terms the lease of the 2<sup>nd</sup> defendant as illegal.
10. The plaintiffs further contend that the 1<sup>st</sup> defendant holds the land parcel 209/7259 in trust for the plaintiff, and the leasing of a portion thereof to the 2<sup>nd</sup> defendant amounted to a breach of such trust.
11. PW1 produced ten documents found in their trial bundle as plaintiff's exhibits 1 to 10.
12. On cross examination by counsel for the 1<sup>st</sup> defendant, PW1 stated that he was not aware that there was a second Part Development Plan. He contended that he was not awarded the plot as an individual, but the city council carried out the developments and gave the plaintiffs the plots. He was aware that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had a lease agreement of which the plaintiffs had a similar document, but he could neither remember the date of his lease nor had his copy in court.
13. PW1 pointed out that he was not sure when the 2<sup>nd</sup> defendant started developing the suit property, but they put up an iron sheet fence in the year 2005. He went further to state that the open space was left for a market and the 1<sup>st</sup> defendant was supposed to put up market stalls or allow residents to put up their stalls then pay rent to the commissioner of lands. He added that they did not give consent for the 2<sup>nd</sup> defendant to develop the property.
14. On further cross examination by counsel for the 2<sup>nd</sup> defendant, PW1 stated that he did not have proof of a registered entity known as Biafra Estate and had no authority from such an entity, but in his bundle of documents he had annexed a resolution with the residents' signatures giving him authority to file a representative suit. He stated that all plot owners were about 75 and not only the six in this suit. He also confirmed that his name did not appear on the document running from page 27-41 of his bundle. PW1 also noted that Abdalla Jasho appeared as entry number 19 on the list of leases but his name on the list was captured as Maulid Jasho but he was one and the same person.
15. He once again affirmed that he did not have his land entry records in court and neither did he have a resolution of Biafra as an entity to file the suit. He confirmed that he did not have anything to show that the signatures on the list produced were actual signatures from members of Biafra estate.
16. He confirmed that the plan on page 51 of his bundle showed demarcation for a parking lot but it neither showed the LR number of the suit land, nor was there indication that it emanated from the city council of Nairobi; It also did not capture information about its registration. He further stated that entry number 63 in the lease was in respect of the 2<sup>nd</sup> defendant whose lease was for a period of 99 years registered on March 13, 2002 but the entry did not stipulate the purpose of the lease.
17. PW1 also noted that paragraph I of the allotment letter on page 52 of his bundle stipulated that "the purpose of which the plot was issued was to be kept in accordance with approval plans..." He further



- stated that the lease on page 54 of his document did not show the exact purpose for the development required.
18. He pointed out that his complaint was that as a tenant purchaser, there was no space allocated in the scheme as per the original plan while pointing out that he did not have the said plan in court. He also stated that they had photographs to show that there was a church on the ground but the said photographs had not been presented in court. On the issue of approvals and change of user, PW1 stated that he did not raise any objection on change of user.
  19. On re-examination PW1 stated that he was living in the said estate when the church was put up and he still had a lease for his property which was LR 209/7259/74. He stated that on page 27-41 was a list of the registered owners but that the revised list had his name on it. He further stated that he had never seen approvals for the development of the church and this was raised with the 1<sup>st</sup> defendant, adding that on page 66 of his bundle was an enforcement notice against the 2<sup>nd</sup> defendant.
  20. No evidence was tendered by the defendants.

### Submissions

21. The submissions of the plaintiff are dated March 23, 2022 and June 28, 2022 respectively. It was submitted that the property LR No 209/7259 leased by the government to the 1<sup>st</sup> defendant was public land which was meant for a public purpose being the tenant housing scheme and was thus held in trust for the plaintiffs. And in leasing the said property to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant was in breach of the law, because the property was leased to a private entity without following the laid guidelines as per the repealed [Government Lands Act](#).
22. The plaintiffs highlighted the special condition number 5 and number 9 of the initial grant which stipulated that; “the land and the buildings shall only be used for a tenant purchase housing scheme or houses for letting and such ancillary purposes as may be approved by the commissioner of lands... The grantee shall not sell, transfer, sublet, charge part with possession of the land or any part thereof or the buildings thereon except with the prior consent in writing of the commissioner of lands...”
23. The 1<sup>st</sup> defendant was given a last chance to file their submissions within 14 days from June 6, 2022 but there was no compliance with this direction.
24. The submissions of the 2<sup>nd</sup> defendant are dated June 3, 2022 where it is averred that the suit was statute barred under section 7 of the [Limitation of Actions Act](#) because on paragraph 7&11 of the amended plaint, it is stated that the allotment to the 2<sup>nd</sup> defendant was done on October 27, 1992. As such they ought to have objected to the allotment within 6 (six) years of the cause of action.
25. It was further submitted that the plaintiffs were aware that the said land was allocated on October 27, 1992 because they had filed High Court civil case No 1111 of 1994 between *Biafra Muslim Welfare Society v Nairobi City Council & Salvation Army* which case was dismissed.
26. It was submitted that the contract to lease the suit property was between the government and the 1<sup>st</sup> defendant; and the 1<sup>st</sup> defendant with the 2<sup>nd</sup> defendant. Therefore, the plaintiffs could not claim that the defendants breached terms of an agreement they were not privy to. To this end, reference was made to the case of [Mobamed Bashir Abdulaziz v Monarch Developers Limited & 2 others](#) [2022] and [Savings & Loans \(K\) Ltd v Kanyenje Karangaita Gakombe & another](#) [2015] eKLR.
27. It was also submitted that the suit land was private land and not public as argued by the plaintiffs.



28. It was further submitted that the plaintiffs did not have locus standi to institute the current suit because the plaintiffs had not demonstrated their interests over the suit property. It was pointed out that PW1 had testified that the said association was unregistered; there was no resolution of the association for the institution of the suit; there was no evidence that the plaintiffs were competent to bring the suit on behalf of the association; there was no evidence of registration of the plaintiffs as proprietors on the suit properties and the plaintiffs had not evidenced how the said land was either public or community land.
29. The following cases were cited to support this position: *Charles M. Waibanya & 2 others v Mary Wanjiku Njoroge & 3 others* [2017] eKLR, *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank* [1992] KLR 354, *St Mary School, Nairobi v Josphat Gitonga Kabugi*, Nairobi (Milimani) HCCC No 65 of 2004 and *Kituo Cha Sheria v John Ndirangu Kariuki & another* (2013) eKLR.
30. It was further submitted that plaintiffs lacked evidence to substantiate their claims as provided by section 107 – 109 of the *Evidence Act*. This is because the plaintiffs did not adduce the PDP plan they were making reference to, nor the lease agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. Adding that the enforcement notice dated March 22, 2004 was for the construction of temporary structures and not in respect of the religious activities of the 2<sup>nd</sup> defendant as claimed by the plaintiffs.
31. It was submitted that parcel LR No 209/7259/231 was private alienated land which had been alienated to the 2<sup>nd</sup> defendant lawfully through a lease and was exempt from being a public land. Thus the lease of the 2<sup>nd</sup> defendant should not be revoked.
32. Other cases relied on by the 2<sup>nd</sup> defendant include *Samuel Ndirangu & 141 others v County Government of Baringo & 2 others* (2018) eKLR, *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR, *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* (2016) eKLR, *Mutsonga v Nyati* [1984] KLR 425, *Koinange & 13 others v Koinange* (1986) KLR 23 and *Njuwangu Holdings Ltd v Langata Kpa Nairobi & 5 others* (2014) eKLR.

### Analysis and Determination

33. I note that in the statement of defence of the 2<sup>nd</sup> defendant dated August 1, 2005, the issue of this suit being resjudicata to HCCC 1111 of 1994 was raised. Indeed the original file of the aforementioned suit is attached to the current case where the subject matter is the same, the parties too are more or less the same. The said suit HCCC 1111 of 1994 was dismissed for want of prosecution on April 4, 2004. However, the issue resjudicata was not adequately canvassed during the trial or submissions, hence this court will say no more on that issue.
34. I find that the issues falling for determination are:
- i. Whether the suit is time barred.
  - ii. Whether the suit land was held in trust for the plaintiffs by the 1<sup>st</sup> defendant.
  - iii. Whether the lease between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant for land reference number 209/7259/231 should be revoked for being illegal.



## Limitation

35. The issue of limitation was raised by the 2<sup>nd</sup> defendant in their submissions, where they stated that the suit is statute barred under section 7 of the Limitation of Actions Act. The said section stipulates that;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.
36. A perusal of plaintiff exhibit 4 reveals that the letter of allotment of the suit land to the 2<sup>nd</sup> defendant is dated October 27, 1992 and the plaintiffs have challenged this allotment in paragraph 7 of their amended plaint. This suit was filed in year 2005. That notwithstanding, I find that the 2<sup>nd</sup> defendant did not make the issue of limitation of time a subject of contest before this court throughout the lengthy lifespan of this suit. They never raised the issue in their statement of defence. This court has stumbled upon the agreed issues signed by advocate for plaintiffs and 2<sup>nd</sup> defendant filed on September 5, 2007 and they don't make reference to the issue of limitation. During the trial, again the 2<sup>nd</sup> defendants were mute on that issue.
37. Much as the issue of limitation is a point of law, raising the said issue only at the submission stage after a hiatus of 17 years denies the plaintiffs a chance to address the court on the same. I therefore find that the said issue has been improperly raised at the 11<sup>th</sup> hour and this court shall not entertain the claim of limitation of time.

## Trust/Fraud

38. The plaintiffs claim that the portion of land in the hands of the 2<sup>nd</sup> defendant in terms of registration was held in trust by the 1<sup>st</sup> defendant in their favour. How true is this?
39. The provisions of section 107 of the Evidence Act stipulate that:
- “ (1) (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
40. The Court of Appeal in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR stated that:
- “Denning J in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think its more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow”.



41. I have keenly looked at the grant LR No 45 864 (LR No 209/7259) issued by the government to the 1st defendant dated November 1, 1967; under the special conditions at clause 5, it reads that;

“The land and the buildings shall only be used for a tenant purchase housing scheme or houses for letting and such ancillary purposes as may be approved in writing by the commissioner of lands.”

42. During cross examination by counsel for 1st defendant, PW1 did state that the allocation was for residential purposes with ancillaries that is schools, market, parking. He further went to state that the land was subdivided and the tenants like PW1 were issued with leases of which their leases are similar to the one held by the 2nd defendant.

43. And during cross examination by counsel for 2nd defendant, PW1 stated that he did not have the sketch plan of the area, nor the agreement between the 1st defendant and the tenants.

44. What I discern from the foregoing analysis is that the 1st defendant had the mandate to provide for ancillaries of which the term in the *Oxford English Dictionary* means:

“Providing support to the primary activities of an organization. Additional but less important; subsidiary”,

45. PW1 defines ancillaries as school, markets and parking. However there is no tangible evidence adduced by PW1 to indicate that a place of worship like the one owned by the 2nd defendant doesn't fall in this docket.

46. In his recorded statement, PW1 stated that:

“As an ancillary and for the convenience and use of the residents of the said estate the council planned the said estate and set aside certain portions of the estate for public use as schools, dispensaries, markets roads, recreational parks and parking bays. This was in accordance with the lease between the council and the government of Kenya.

One plot set aside for use by the public was LR No 209/259/231 measuring 1.030 hectares (2.5 acres) which had been set aside for use for shops, parking and gardens.”

47. This means that the 1st defendant did make provisions for the ancillaries mentioned by PW1 but their problem was in the allocation of the portion of land LR 209/259/231 to the 2<sup>nd</sup> defendant. PW1 has not availed the map used in planning the mother title so as to prove that 2nd defendant's land is the one which was meant for shops, parking and gardens. The document availed on page 51 of plaintiff's bundle is but a drawing, one cannot tell where it came from, and when it was generated. It has no land reference number.

48. It is also pertinent to note that PW1 has not availed any agreement between 1st defendant and the plaintiffs. What is apparent is that the 1st defendant was entering into agreements with the would be tenants on individual basis as can be seen from the agreement of one Diana Wanjiku on page 42 of plaintiffs bundle. At clause 3 thereof it is stipulated that the purchaser was to accept a lease upon payment of all sums due. That evidence is in tandem with the provisions of leases availed to the tenants running from page 30 to 41 of the plaintiffs bundle.

49. At page 31 of plaintiff's bundle is the initial grant, therein is a certificate of subdivision by Nairobi city council approving the subdivision of that big land into 216 plots; various person acquired subsequent leases including the 2nd defendant who are listed in entry No 63. It follows that the tenants and the 2nd



defendant acquired their respective portions of land in a similar manner. Thus the plaintiff is estopped from alleging that there was no consent for the allocation of the land to 2nd defendant since he has not availed such a consent for their own allocation. Similarly, it is apparent that with the issuance of the leases, the land was converted from public to privately owned. The allocation to 2nd defendant cannot therefore be viewed as having been a different subdivision from that of the tenants. Thus as rightly submitted by the second defendant, the suit land is private land having been delineated from public land.

50. Notwithstanding that no evidence was tendered by the defendants, the plaintiff was still bound by law to formally prove their case. In the case of *Samson S Maitai & another v African Safari Club Limited & another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

51. In the final analysis, I find that the plaintiffs have failed to prove that the 2nd defendant acquired the land through fraud or that the 1st defendant held the suit land in trust for them. The prayer for cancellation of the 2<sup>nd</sup> defendant’s lease is therefore unmerited.
52. The end result is that the plaintiffs have not proved their case to the required standard. The said suit is hereby dismissed. On costs, I have considered the lengthy litigation history. I therefore direct that each party bears their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Dr. Chokaa holding brief for Mr. Keyanyo for the plaintiff

Nyakoe for the 1<sup>st</sup> defendant

Wendoh holding brief for Lubullelah for 2<sup>nd</sup> defendant

Court assistant: Eddel/Joan

