



Gicheha & another v Nairobi County Government (Environment and Land Case Civil Suit 401 of 2016) [2022] KEELC 15437 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 401 OF 2016
MD MWANGI, J
DECEMBER 20, 2022**

BETWEEN

JOSEPHAT MUHORO GICHEHA 1ST PLAINTIFF

LUCIA MBEERE 2ND PLAINTIFF

AND

NAIROBI COUNTY GOVERNMENT DEFENDANT

JUDGMENT

Background

1. The Plaintiffs instituted this suit by way of a plaint dated the 21st April, 2016 and filed in court on the same date. The plaintiffs' case as per their pleadings is that *vide* an agreement/allotment Letter dated 22nd August, 2007, the Defendant's predecessor in title, the City Council of Nairobi, made an offer to them that upon payment of the fees, it would allocate them plots number 327 and 326 within KCC Village Squatters Settlement Scheme along Kangundo Road measuring 0.015 hectares.
2. That pursuant to the said agreement, the Plaintiffs paid the demanded fees, that is, stand premium, ground rent, survey fees and fees for beacon certificates totaling Kshs. 32,380/=. The Defendant however, despite the payment of the fees failed, neglected and/or refused to point out the said plots on the ground demarcate and/ or issue beacon certificates as promised. The Plaintiffs accuse the Defendant of breach of contract.
3. The Plaintiffs therefore prays for Judgement against the Defendant for; -
 - a. A declaration that the Plaintiffs have a right to be allocated plots numbers 327 and 326 measuring approximately 0.015 acres each within KCC Village Squatter Settlement Scheme before any other applicant is considered.



- b. An order directed at the Defendant (through her officers) to demarcate, issue Beacon Certificate and point out the two plots to the Plaintiffs herein.
 - c. An order directed to the Defendant to give to the Plaintiffs the most current development plans they have for KCC Village Squatters Settlement Scheme and any new numbers they may have given the two plots in issue.
 - d. A permanent injunction against the Defendant not to re-plan, demarcate, lease out, sell, mortgage, build or in other way deal with land known as KCC Village Squatters Settlement Scheme without involving and/or consulting the Plaintiffs.
 - e. In the alternative, a refund of all monies paid to the Defendant with interest at commercial rates of 25% and an appropriate penalty to be determined by the Court.
 - f. General damages for breach of contract with interest at commercial rates.
 - g. Costs of this suit with interest at court rates.
4. The Defendant filed its Statement of Defence dated the 10th May, 2016. The Defendant pleaded that there has never been any allotment of the suit Plots to the Plaintiffs. Further that the Plaintiffs have been occupying the land illegally. The Defendant denied ever receiving any payments for standard premiums, ground rent, survey fees or for beacon certificates from the Plaintiffs.
 5. The Defendant therefore denied the existence of a contract with the Plaintiffs since the plots were never allotted to them. The Defendant termed the Plaintiff's claim for damages as baseless questioning the authenticity of the documents relied upon by the Plaintiffs.
 6. This case was initially dismissed on the 8th December, 2021 for non-attendance with costs to the Defendants. The Plaintiffs however moved the court *vide* an application dated 8th December, 2021 seeking to set aside the orders dismissing the suit and reinstate it. The application was allowed as prayed on the 19th May, 2022. The hearing was then scheduled for 13th October, 2022.
 7. The case proceeded to hearing in the absence of the Defendant who had nonetheless been served with a hearing date.

Plaintiffs' Case

8. PW1- was Josephat Muhoro Gicheha, the 1st Plaintiff herein. He averred that he was duly authorized by the 2nd Plaintiff, his mother, to testify on her behalf. The Witness adopted his Witness Statement dated 21st April, 2016 as his evidence in-chief. He too produced in evidence the documents listed in his 'Plaintiff's List of Documents' and 'Supplementary List of Documents' dated 21st April, 2016 and that of 6th December, 2021 respectively as exhibits.
9. PW 1 testified that their case was a follow up on the plots that had been allotted to them. Up to date, they have not been given the Plots; neither were the plots ever pointed out to them on the ground neither were they demarcated nor beacons certificates issued to the Plaintiffs though there were some other people who had been issued with plots in the same scheme. This was after the Defendant made new development plans to the land in issue and assigned new numbers to different plots without consulting the Plaintiffs.



10. The Witness further testified that if the plots are not available, they seek compensation in form of the current value of the suit.
11. The Plaintiffs filed written submissions which the court has had an opportunity to read and consider.

Issues for determination

12. Having heard the Plaintiffs witness, considered the pleadings, the evidence adduced on trial, the brief submissions of the Plaintiff and all the materials placed before me in this case the following issues will dispose of the suit.
 - a. Whether the Plaintiffs are entitled to the reliefs sought in the plaint;
 - b. What order should be made in relation to the costs of this suit?

Analysis and determination

A. Whether the Plaintiffs are entitled to the reliefs sought in the plaint

13. In his testimony, PW1 testified that Up to date, they have not been given the plots; neither were the plots ever pointed out to them on the ground. The plots too were never demarcated nor beacons certificates issued to the Plaintiffs.
14. Prayers (a), (b), (c) and (d) are in the nature of prayers for specific performance. I take note that the Plaintiffs were not purchasing the plots but were rather seeking an allotment from the Defendant. As they put I in their plaint; the Defendant made an offer which they accepted by paying the requisite fees. Was the contract actualized?
15. I wish to address the import of an allotment letter by making reference to the case of *Lilian Waitthera Gachuhi vs. David Shikuku Mzee* [2005] eKLR where it was held as follows:

“I have no doubt that, legally, a letter of allotment is an intention by the Government to allocate land. It is not a title.”
16. I must be quick to point out that a valid letter of allotment must be accompanied by a Part Development Plan commonly referred to as ‘PDP’ as meticulously explained in the *Ali Mohamed Dagane Vs Hakar Absbir & 3 others* (2014) eKLR, where Justice Cherono went into great details explaining the elaborate procedure for allocation of public land under the *Government Land Act* (repealed).
17. The Plaintiffs did not in this case prove that they had been issued with a PDP to validate their supposed allotment. Without it, their supposed allotment was not legally valid; therefore, not enforceable. The prayers (a) to (d) would not be granted.
18. In their submissions, the Plaintiffs submitted that considering the lapse of time, it was clear that the Defendants have no intention of giving them the plots they had paid for, that was their reason for seeking the alternative prayers. The alternative prayers are for an order of refund of the monies paid and general damages for breach of contract.
19. I will address each prayer, that is prayer (e), (f) and (g) distinctively.
20. On the prayer for a refund of all monies paid to the Defendant with interest at commercial rates of 25%, the Plaintiffs submit that they each paid a sum of Kshs. 32,380/= to the Defendant. They submit



that this claim is in the nature of special damages. They submitted that they had pleaded and proved the same. They therefore, seek to be refunded the said monies.

21. I am satisfied that the Plaintiffs have proved the claim for Kshs. 32,380/- each which they had pleaded in their plaint.
22. The Plaintiffs have however, prayed for interest at the Commercial rates of 25% from the date of payment of the money to the Defendant. Although the Plaintiffs claim interest at the commercial rates of 25%, they have not laid the basis of the claim at such an interest rate.
23. In determining the interest if any to be awarded to the Plaintiffs herein, the starting point is Section 26 of the [Civil Procedure Act](#). That Section provides as follows:
 1. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 2. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
24. Justice Joel Ngugi (as he then was) in the case of [Jane Wanjiku Wambu vs Anthony Kigamba Hato & 3 others](#) [2017] eKLR stated that the three principles which have been derived from the general rule in Section 26 of the [Civil Procedure Act](#). The principles are:

First, at all times a Trial Court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously....

Second, Under Section 26(1) of the [Civil Procedure Act](#), the Court has discretion to award and fix the rate of interests to cover two stages namely:

 - a. The period from the date the suit is filed to the date when the Court gives its judgment; and
 - b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.

Third, when it comes to the period before the filing of the suit, Section 26 of the [Civil Procedure Act](#) has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See [Gulambusein v French Somaliland Shipping Company Limited](#) [1959] EA 25; [Highway Furniture Mart Limited – v- The Permanent Secretary & Another](#) EALR (2006) 2 EA 94; Mulla – The Code of Civil Procedure (16th Ed.) Vol. 1 at p. 505.



25. The Plaintiffs' claim for interest is not covered under Section 26 of the *Civil Procedure Act*. They ought to have pleaded and proved that the alleged interest was either agreed upon in the contract or prove that although interest is not provided, it is allowable by mercantile usage or further that and in any event that the interest claimed is provided for in statute or that an agreement to pay interest can be implied from the course of dealing between the parties.
26. It is therefore my finding that the Plaintiffs are entitled to an award of interest from the time of filing the suit.
27. The other question on interest as stated above is what the appropriate interest rate should be. Counsel for the Plaintiffs has suggested a figure of 25% as the "commercial rates." Counsel has not disclosed where that figure was gotten from. The rate that is mostly used by the Courts in the absence of special or exceptional circumstances which are not proved here, is to award interest at court rates from the date of filing suit until payment in full.
28. I will award the Plaintiffs interest of the decretal amount at court rates from the date of filing suit.
29. I will now turn to the prayer for general damages for breach of contract. The Court of Appeal in *Kenya Tourist Development Corporation Vs Sundowner Lodge Ltd* (2018) eKLR had this to say regarding general damages for breach of contract;
- “...as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction and with good reason”.
30. The Court in the case of *Kenya Power and Lighting Company ltd - vs - Abel M. Momenyi Birundu* (2015) eKLR, was of a similar view that,
- “Authorities are legion to the effect that general damages may not be awarded for breach of contract.”
31. This court will not deviate from that settled principle of law. The Plaintiffs' claim for general damages for breach of contract is disallowed.
32. Before making the final orders, I wish to address the Plaintiffs' claim of Kshs. 3,000,000/= as sought in their submissions. The said amount allegedly being the current market value of the suit plots. It is trite law that parties are bound by their pleadings. The Plaintiffs had not prayed for the same in their plaint.
33. In the case of the *Independent Electoral and Boundaries Commission -vs- Stephen Mutinda Mule & 3 others* (2014) eKLR, the court cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd -Vs- Nyasulu* (1998) MWSC 3, where the court quoted an article by sir Jacob entitled "The present importance of pleadings" published in 1960 where the author had stated that
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the



parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the sense that points other than those specific may be raised without notice.”

34. The Supreme Court of Nigeria on the other hand in *Adetoun Oladeji (NIG)- Vs- Nigeria Breweries PLC SC 91/2002* re-emphasized the principle that parties are bound by their pleadings and further stated that,

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

35. In the case of *Raila Odinga & Another –Vs- IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

36. In the end, the court makes the following orders:

- a. The Plaintiffs are granted the sum of Kshs. 32,380/= each, being a refund of all monies paid to the Defendant for each of the suit plots being plots numbers 327 and 326 measuring approximately 0.015 acres each within KCC Village Squatter Settlement Scheme with Interest at court rates per annum from the date of filing this suit till payment in full.
- b. The Plaintiffs too shall have the costs of the suit.

37. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mwangi holding brief for Mr. Koceyo for the Defendant.

Mr. Gachoka for the Plaintiff.

Court Assistant – Hilda/Yvette

M.D. MWANGI

JUDGE

