



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Waithira & 3 others v Kenya National Highways Authority (Environment & Land Case 911 of 2013) [2025] KEELC 1337 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 911 OF 2013**

**LN MBUGUA, J  
MARCH 12, 2025**

**BETWEEN**

**VERONICA WAITHIRA ..... 1<sup>ST</sup> PLAINTIFF  
EDWARD MWAURA ..... 2<sup>ND</sup> PLAINTIFF  
STEPHEN MUCHIRI (AS TRUSTEES OF INTER-CHRISTIAN CHURCHES  
DENOMINATION OF NAIROBI) ..... 3<sup>RD</sup> PLAINTIFF  
HON GIDION MIKE MBUVI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs commenced this suit vide a plaint dated 25.7.2013 where they aver that the 1<sup>st</sup> plaintiff is the registered owner of Land Reference No. Nairobi/Block 72/3074 situated in Lang'ata, whereupon they have erected a church and a permanent office building.
2. It is their case that on 20.7.2013, the defendant unlawfully and without notice marked "X" on the perimeter wall of the said parcel denoting its intention to demolish the 1<sup>st</sup> plaintiff's buildings thereon, yet the suit parcel is not on a road reserve, thereby adversely affecting the 1<sup>st</sup> plaintiffs' rights as land owners.
3. The plaintiffs therefore pray for judgment against the defendant for:
  - a. A permanent injunction restraining the defendant, its agents, servants and employees from entering into, alienating or taking possession of the land parcel known as Nairobi/ Block 72/3074 or destroying, demolishing or in any way interfering with the buildings erected thereon.



- b. General damages.
  - c. Costs of this suit.
  - d. Interest on (b) and (c) above.
4. The defendant opposed the suit vide its statement of defence dated 3.9.2013 where it contends that part of LR No. Nairobi/Block 72 / 3074 falls on land that was set aside for a road and railway reserve and that the plaintiffs have encroached on the said road and railway reserve.
  5. During the trial, the plaintiffs called one witness, Veronica Waithera Githiaka (PW1), a trustee of the 1<sup>st</sup> plaintiff to advance their case. She adopted her witness statement dated 1.11.2019 as her evidence. She also produced 11 documents running from page 4-42 of the plaintiffs' bundle dated 1.11.2019 as P. Exhibit 1-11.
  6. She avers that in 1989, the 1<sup>st</sup> plaintiff applied to the Government of Kenya- Ministry of Local Government for allocation of Plot No.1983 Block No.72 for church use, of which their request was acceded to and they were issued with an allotment letter on 23.12.1998.
  7. That on 1.4.2001, the 1<sup>st</sup> plaintiff was issued with another allotment letter which was an extension to the initial plot No.1983. Survey was done, the RIM was amended and the plot was given a new number being Nairobi/Block 72/3074. A lease was then registered in their favour thereafter on 20.11.2001.
  8. That the 1<sup>st</sup> plaintiff took possession of the suit property and erected a church thereon and its occupation was peaceful until 2013 when the defendant indicated to them that the church was on a road reserve since the suit plot was earmarked for construction of the southern bypass.
  9. That they instructed surveyors known as Geomatics Services who compiled a report indicating that the suit plot is not on a road reserve, adding that the Southern bypass has since been constructed and it is far from their plot as there is a 12 meter road in between, then a buffer zone and a road reserve.
  10. In cross-examination, PW1 stated that their allotment came in year 1983, though in their plaint, reference is made to years 1988 and 2001 in relation to when they acquired the land. She further stated that their certificate of lease was given in year 1988, but it was merged with another parcel.
  11. She avers that their rights have been infringed because the 1<sup>st</sup> defendant wanted to demolish their church. Hence the 1<sup>st</sup> plaintiffs had to remove all their instruments from the church. Referred to the letter of allotment at page 54 of the plaintiffs' bundle, PW1 stated that it does not indicate special conditions, but they have been paying rates even though they have no receipts to that effect. PW1 also stated that the buildings on the suit land were approved but they did not file the said approvals.
  12. In re-examination, PW1 stated that the 1<sup>st</sup> Plaintiff was allocated 2 plots which were later merged and they were issued with the lease at page 22 of their bundle. They have built a perimeter fence and it is the one which was marked by the 1<sup>st</sup> defendant for demolition, though it is still there.
  13. The defendant called one witness, DW1 who was Milcah Muendo, a licensed surveyor working for the defendant. She adopted her witness statement dated 25.5.2021 as her evidence in chief. She produced 5 documents from the defendant's list of documents dated 3.9.2013 as D. Exhibit 1-5. She also stated that there is an affidavit of one Thomas Gachoki dated 20.8.2013 which represents the position of the defendant.
  14. She contends that the suit property was not available for allocation as it had been set aside as a transport corridor, adding that the road development is not complete and it is at the junction of several



infrastructural facilities including; The Nairobi Southern Bypass, Langata Kibera Westland link road and a proposed railway line.

15. She avers that as early as year 1956, the Royal National Parks of Kenya agreed that land be excised including 267 acres for marshalling yard and 75 acres for a bypass line which resulted in park boundaries being adjusted in favour of the railway infrastructure complying with the International Civil Aviation safety requirements of at least 570 metres clearance of the Southern Bypass from Wilson Airport.
16. That the amount of land to be taken up by the transport corridor is approximately 60 Hectares and in 2011, the government commenced construction of the Southern bypass.
17. She avers that a survey has established that part of the suit property falls on land that was set aside for a road reserve (a buffer zone between South Land's Estate) and the road and railway reserve as marked on the Nairobi South Structure Plan No.42-28-85-9 of 5.6.1985 as well as plan No.FR/No.155/30 of South Land's Estate, of which the two plans were produced as exhibits.
18. She avers that on 6.6.2003 and on 6.8.2003, the government through the Ministry of Roads, Public works & Housing issued notices requiring that all those who had erected illegal structures on road reserves to remove them for construction works on the Nairobi Southern Bypass Road which commenced on 2.7.2012 before the instant suit was filed.
19. In cross-examination, DW1 stated that she is aware that there was amalgamation of 2 allotments which make up the suit land but she did not know who did the amalgamation and did not know if the suit plots had titles.
20. She stated that on the west side of the suit property, there is the transport corridor and some sections of buildings of a residential estate, adding that the suit property borders the said estate while the link road is to the north but from Kilimani to Lang'ata road, it is to the east crossing from South to North.
21. She averred that she is familiar with the map of Ngei phase 2 which shows the Trans Africa Highway. It also shows that between the 1<sup>st</sup> plaintiffs' plot and the highway, there are no properties and that there is no access from Nairobi Southern bypass to plot 3081 which is on the same line with the suit property .
22. She contended that other plots were demolished, but the church on the suit land was not. Referred to the survey report dated 28.9.2013 at page 29 of the plaintiff's bundle, DW1 stated that the surveyor referred to a survey plan and to distances of the properties in relation to the road, but any survey ought to be based on a Part Development Plan(PDP) which in turn is based on main structural plan which has not been amended to include the suit property.
23. She stated that plan FR 155/30 at page 35 of the plaintiff's bundle is for the area where the suit property is located and the junction where the infrastructure is located and neighbours a residential estate adding that it is not correct that the survey shows that the church is part of the estate.
24. Dw1 also stated that between the southern bypass and the church, there is a buffer zone which has been taken by the suit property though he did not have calculations to indicate the extent of the encroachment.
25. Refereed to the letter dated 7.9.2011 from the defendant at page 44 of plaintiff's bundle indicating that the suit parcel is not encroaching on the Nairobi Southern Bypass, DW1 stated that it did not emanate from the defendant's Director General as he did not sign it, adding that not all properties in the buffer zone were demolished as it is a continuous exercise.



26. In re-examination, DW1 stated that those other documents have to be read with the structural plan of 1985.
27. Parties did not file written submissions.

## DETERMINATION

28. The 1st plaintiffs claim to be the registered proprietors of Land Reference No. Nairobi/Block 72/3074. They contend that the perimeter wall built around the said property has been earmarked for demolition by the defendant, actions that infringes on their right to property.
29. On its part, the defendant contends that the portion that the suit land lies is a buffer zone created via Nairobi South Structural plan of 1985.
30. The record indicates that on 8.2.2022, a consent was recorded by the parties to the effect that a joint survey was to be conducted on the suit parcel to confirm if the entire property encroaches on the road reserve. It was a term of the said consent that a report would be prepared and filed by the joint surveyors and that the same would be binding upon both parties. It appears that the parties never adhered to the aforementioned order, hence no joint surveyors report was ever filed. I hold the view that this is a matter that would really have benefited from the expertise of joint surveyors. Be that as it may, the court will make a determination based on the evidence adduced.
31. The provisions of Section 107-112 of the *Evidence Act* stipulates that he who alleges must prove, See - Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR. And in the case at hand, it was incumbent upon the plaintiffs to prove that their property had not encroached on the road reserve.
32. The 1<sup>st</sup> plaintiffs have given an account of how they acquired the suit parcels through the two letters of allotments. The 1<sup>st</sup> allotment refers to parcel Nairobi/Block 72/1983 dated 23.12.1998 measuring approximately 0.0649 hectares. The 2<sup>nd</sup> letter of allotment for extension to Nairobi Block 72/1983 is dated 1.4.2001 measuring approximately 0.2 hectares. That would give total acreage approximately 0.2649 hectares. The plaintiff was required to demonstrate the lay out of the amalgamated two parcels as well as give an account leading to the issuance of the lease certificate bearing an approximate area of 0.1491 hectares.
33. To start with, the total acreage in the two hectares adds upto 0.2645 (0.0649+0.2 ha) while the certificate of lease bears acreage of 0.1491, a difference 0.1158 ha. That margin of the acreage even though it was approximate is rather wide as between the total acreage in the allotment and what was eventually factored in the lease certificate. The discrepancy has not been explained and it is not clear as to whether the ground occupation by plaintiff is in tandem with the acreage in the title document.
34. A perusal of the witness statement of Pw1 reveals that it does not cross-reference the documents produced. Indeed the only reference to the survey made by Pw1 in her witness statement is that “Surveys were done, the R.I.M. was amended and the plot was given a new plot number”.
35. It appears that an entity known as Geomatics services are the ones who were involved in the survey works of the suit plots and their report has been availed at page 29-40 of plaintiffs bundle. At page 30 paragraph 3, the report states that:

“We had earlier on obtained copies of all the relevant survey plans of the area from the office of the Director of Surveys, Ministry of Lands and Settlement. The plans were;



1. Folio No/Register No.155/30 (F/R 155/30) showing the layout of part of the Southland Estate. This plan was “Authenticated” by the Director Surveys under the Survey Act, 1961 in 1981.
  2. F/R 158/158 showing the survey of parcel No. 1983 known as Nairobi Block 72/1983 within Southland Estate. The survey plan was “Authenticated” by the Director of surveys in 1982”.
36. Thus the aforementioned documents are the ones referred to as “relevant survey plans” which are to be found at page 35 – 40 of plaintiffs bundle (note that the court had to dismantle the trial bundle to access the said documents). These documents are not Part Development Plans (PDP’s) which would have lead to the creation and amalgamation of the suit plots, so as to give rise to allotment letters in accordance with the then applicable legal regime governing land use and planning anchored under the Repealed Land Planning Act Cap 303 Laws of Kenya.
37. Another consideration relates to the plan availed as F/R155/30 by PW2 which is dated 1981. By then the suit land had not been alienated in favour of 1<sup>st</sup> Plaintiff. Why would the suit parcel be identified as that of the Church? (Inter church) in 1981 when the suit land did not exist.
38. It is further noted that both parties have availed the map FR No. 155/30, but the one availed by plaintiffs clearly shows that the suit plot (Inter-church) protrudes way beyond what is occupied by other properties in the vicinity. This encroachment is clearly marked out as the buffer zone in the map availed by the defendant.
39. As per another plan No. FR 158/158 availed by Plaintiffs the suit property cannot be identified as it has not been marked.
40. As for map No. FR 394/143 which is annexed to map FR 158/158 showing that the suit parcel No. 3074 has an acreage of 0.14 ha, it is noted that the lay out of this parcel sharply differs with the “Inter church” property in FR 155/30 or any of the parcels in FR 158/158.
41. In essence, the plaintiff has not established on a balance of probability the extent of their property in terms of ground occupation as well as the process that gave rise to such ground occupation, but their map FR 155/30 shows that the church land protrudes into the buffer zone.
42. On the other hand, while Dw1’s case is that the suit land had been planned as a buffer zone from 1985 as conceptualized way back in 1957, its evidence though led by a surveyor was shaky on the question of extent of encroachment of the suit land on the buffer zone. In her testimony in chief, DW1 stated that the entire suit property had encroached onto the buffer zone but on cross-examination, she stated that she could not tell by how much the encroachment was.
43. Nevertheless, defence exhibit 2 is the plan identified as Plan No.FR/NO155/30 Southland estate which shows that part of the suit land encroaches on the buffer zone. This plan was drawn before the suit plot came into existence. It happens to be one of the two plans relied upon by the plaintiffs at page 30 of their bundle. Further the structural plan of 1985 availed by DW1 shows the proposed Trans Africa Highway and Railway Reserve with all other parcels including residential areas being contained outside the Highway and the Railway Reserve. Thus, any allotment of land encroaching into the road and railway land ought to have been sufficiently supported by another plan. No such plan has been availed.



44. The above analysis leads to the conclusion that long before the plaintiffs were allocated the 1<sup>st</sup> plot in 1998, the buffer zone had already been created. As it were, that plan shows that part of the church (read 1<sup>st</sup> plaintiffs land) lies on the buffer zone.
45. In *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR, the Court of Appeal stated that;
- “The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register.”
46. The court is also persuaded by the holding of the court in; *Kabiru & another (suing as the administrators of the Estate of Amos Kabiru Kimemia (Deceased)) v Kenya National Highway Authority (Environment and Land Case Civil Suit 149 of 2018) [2022] KEELC 2696 (KLR) (19 May 2022) (Judgment)* as well as in *Sunshine Villas Limited v County Government of Kisumu & Another, Ethics and Anti-Corruption Commission (Interested Party), (Environment and Land Case Civil Suit 239 of 2018) (2023) KELC 21601 (KLR) (16 November 2023) Judgment*.
47. This far, I make a finding that the defendant should go ahead and hive off part of the suit land that encroaches on the buffer zone as Article 40 of *the Constitution* does not extend protection to land that is unlawfully acquired.
48. In the end, I find that the plaintiffs have not proved their case on a balance of probabilities. It is however pertinent to note that the role of the 2<sup>nd</sup> plaintiff appears to have been minimal and was limited to giving the 1<sup>st</sup> plaintiffs assistance in pursuing their claims. Nevertheless, the plaintiff's suit is hereby dismissed. Each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Mweresi for defendant

Court Assistant – Nancy Mwangi

