



**Rassam & 3 others v Murengi (Environment & Land Case  
116 of 2016) [2024] KEELC 404 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 404 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 116 OF 2016**

**MAO ODENY, J**

**FEBRUARY 2, 2024**

**BETWEEN**

**OMAR ALI RASSAM ..... 1<sup>ST</sup> PLAINTIFF  
ADNAN HASSAN SAID ..... 2<sup>ND</sup> PLAINTIFF  
SALEH AWADH SAID ..... 3<sup>RD</sup> PLAINTIFF  
FARID FARAJ AWADH ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**EDGAR THANDE MURENGI ..... DEFENDANT**

**JUDGMENT**

1. By an amended Plaint dated 15<sup>th</sup> March, 2017 the Plaintiffs herein sued the Defendant seeking the following orders:
  - a. A declaration that the wall constructed on parcel of land known as plot 48 Vipingo Trading Centre, Vipingo Squatter Settlement Scheme Kilifi County is illegal and unlawful for want of necessary approval by the National Environment Management Authority approval and for breach of by-laws.
  - b. An order of the court to issue compelling the Defendant by himself, his agents and/or servants to demolish the unlawfully constructed structure on the parcel of land known as plot 48 Vipingo Trading Centre, Vipingo Squatter Settlement Scheme Kilifi County and comply with the statutory requirement: for failure to comply with the *Physical Planning (Building and Development) (Control) Rules* [Rev. 2012] and the *National Construction Authority Act*.
  - c. Damages of Ksh. 710,000/- equivalent to the value of the destroyed/damaged part of the premises on plot 48 Vipingo Trading Centre, Vipingo Squatter Settlement Scheme Kilifi County.



- d. Costs of and incidental to this suit.
- e. Interest on [c] above at court rates.
- f. Any other relief.

### **Plaintiffs' case**

2. PW1 Omar Ali Rassam adopted his statement dated 23<sup>rd</sup> July, 2013 and stated that they were allocated the parcel of land vide an allotment letter dated 31<sup>st</sup> March 2008 where they built a mosque.
3. PW1 stated that they are yet to receive the title deed to the land and that the defendants started construction of a foundation which damaged the mosque and part of the building collapsed.
4. PW1 testified that they reported the matter to NEMA who prepared a report and that despite the report, the Defendant continued with the construction. It was his testimony that they engaged the services of a valuer who did a valuation report dated 19<sup>th</sup> March, 2011 which he produced as PEXH 3.
5. PW1 testified that the damage forced them to build the mosque afresh and expended more than Ksh 700,000/= and produced a bundle of receipts totaling to Ksh 710,000/= as PEXH 4. PW1 also stated that the Wakf is registered by a deed dated 18<sup>th</sup> August, 2011 which he produced PEXH 5 and photographs as PEXH 6.
6. On cross-examination by Mr. Nyachiro, PW1 told the court that the Plot belongs to Masjid Mosque Vipingo and that the plot was allocated to Mosque House. He further confirmed that most of the plots in Vipingo now have titles and that they have not been given the title as they had not registered the Deed.
7. PW1 also testified that they reported the matter to Kijipwa Police Station and the Defendant and another person were arrested, charged on 13<sup>th</sup> March 2011 in Kilifi Criminal Case Number 29 of 2011 with malicious damage to property.
8. He stated that the receipts produced as PEXh 5 are for the repairs, they did on the damaged building and that they did a ring beam around the house. Further that the house that collapsed had no ring beams and columns.
9. On re-examination, he testified that he applied for allocation of the land as a member of the committee of trustees and that the Wakf was registered in August 2011 but they had the committee before the Wakf.
10. PW2 Salim Bashir stated that he is the NEMA County Director Tana River and stated that he is the one who prepared the report which he produced in court. It was his evidence that the report was not signed, as there was nobody on site and urged the court to take it as part of the evidence.
11. On cross-examination by Mr. Nyachiro, he confirmed that the Plaintiff was the complainant, whose complaint was verbal and that he does not know a person by the name Edgar whom he described as the proponent.
12. PW2 also stated that he went to the site on 20<sup>th</sup> March 2011 and that he did not give a copy of the report to the Defendant but gave the Plaintiff. On re-examination, PW2 testified that the complaint was verbal and there are different ways to report a complaint verbally, either by phone call or in writing. He also stated that the proponent did not sign the report as he was not on the site.



## Defendant's Case

13. DW1 Edgar Thande Murengi adopted his statement dated 6<sup>th</sup> September, 2018 and produced a list of documents as DEXH No 1 to 5. He testified that his plot number at Vipingo Trading Centre is plot No 47 which he purchased from one Hachija Mija either in 2011 or 2010.
14. DW1 testified that the Plaintiff's plot is No 48 of which he was shown the boundaries and beacons by the previous owner and a Land surveyor, Mr. Kinyua. Further that at the time he bought the plot, it was not fenced but later fenced it.
15. It was DW1's evidence that sought for approval to build a perimeter wall and wrote to the NEMA office and County Council of Kilifi who acknowledged the application and approval was granted to allow him build the fence.
16. DW1 testified that after the approval, he built the fence but Mr. Omar Rassam went to Kijipiwa Police station and accused him of destroying his house. He stated that he was charged with a criminal offence but the court dismissed the charge and produced the judgment dated 2<sup>nd</sup> February, 2016 as DEXH No 1.
17. It was DW1's testimony that he has not seen any surveyors report indicating that he has encroached on plot No 48. On cross-examination, DW1 confirmed that he is the owner of Plot No 47, which neighbors plot No 48, and there is no mosque near his plot. He stated that there was no requirement to leave 1.5 meters when constructing the wall. Upon re-examination, DW1 stated that there is no mosque on Plot No 48.
18. DW2 Ronald Habakuk stated that he witnessed the construction of a fence on Plot No 47 and that there are no houses on the said plot. It was his testimony that he was charged together with Edgar (the Defendant) in Kilifi Criminal case but they were acquitted.

## Plaintiffs' Submissions

19. Counsel identified the following issues for determination:
  - a. Whether there was a structure/Mosque house constructed on Plot No 48?
  - b. Whether the Defendant is liable for the collapse of Plaintiff's structure that existed on Plot No. 48 as a result of Defendant's act of building a wall without complying with statutory requirements?
  - c. Whether the Plaintiffs are entitled to special damages of Ksh 710,000/=?
  - d. Whether the Plaintiffs are entitled to costs of the suit and interest thereon?
20. On the first issue whether there was a structure/Mosque house constructed on Plot No 48, counsel submitted that it is trite that he who alleges must prove and relied on Section 107 to 109 of the [Evidence Act](#). Counsel further submitted that the Plaintiffs have proved existence of structure/Mosque house on Plot No 48 as their PEXh 3- Valuation Report remained uncontroverted.
21. It was counsel's submission that the Plaintiffs were the trustees of the Mosque, vide a Wakf Deed dated 18<sup>th</sup> August, 2011 was produced as PEXH 5 which clearly identified Plot No 48 and the Plaintiffs herein have been listed as the trustees. He submitted that there was no objection to the production of the said Wakf Deed.



22. Counsel further submitted that it is trite that a trust must be proved by way of evidence and relied on the case of *Samuel Gichina Muiruri v Evanson Kimemia* [2002] eKLR. He submitted that the Plaintiff produced the Wakf deed to prove existence of a trust between them and parcel of land No 48 for a mosque wherein they are listed as the trustee and relied on the case of *Abmed Mobamed Abmed v Abmed Mobideed & another* [2017] eKLR.
23. Counsel submitted that it is trite that at first instance WAKF Deed can only be challenged at the Kadhi's court and the Defendant cannot and or at all challenge the validity of the WAKF Deed through submissions and relied on the case of *Maalim v Shosi* (Civil Appeal 99 of 2018) [2022] KECA 518 (KLR).
24. On the second issue, counsel submitted that the Defendant did not produce a valuation report to controvert PEXH 3- and that in absence such rebuttal, it follows that the Plaintiffs have proved their case on a balance of probabilities against the Defendant.
25. Counsel relied on the case of *Kenindia Assurance Company Ltd v Wangungu* (Civil Appeal 155 of 2017) [2021] KECA 10 (KLR) and submitted that the Defendant relied on Criminal Case No 29 of 2011 to exonerate himself from being liable for damages caused to the Plaintiff's mosque house. Counsel submitted that the acquittal in a criminal matter does not have much bearing on a civil matter and relied on the case of *Barclays Bank of Kenya Limited vs Come to Africa Safaris Limited* [1998] eKLR.
26. On the third issue, counsel submitted that it is trite that special damages must be specifically pleaded and proved. It was his submission that PW1 produced receipts as PEXH 4 and valuation report dated 17<sup>th</sup> March, 2011 thus proved the amount of Ksh 710,000 expended in rebuilding the damaged Mosque House as a result of the Defendant's acts of illegally constructing a wall.

### **Defendant's Submissions**

27. Counsel identified the following issues for determination:
  - a. Whether the Plaintiffs have the locus standi to sue in this matter?
  - b. Whether the wall fence constructed on Plot No 47 is illegal and unlawful?
  - c. Whether the Defendant is liable to pay damages of Ksh 710,000/=?
28. On the first issue, counsel submitted that the suit property being Plot No 48 Vipingo Trading Centre Squatter Settlement Scheme was allotted to Mosque House on 31<sup>st</sup> March, 2008 and the letter of offer was issued accordingly. He submitted that from the heading of the plaint, five people are named as Plaintiffs and in the first paragraph of the plaint; they are claiming to be trustees of "Masjid And Madrasatul Qubaa Mosque." It was counsel's submission that there is no evidence in court to show its relationship with the mosque house that was the allottee of the plot
29. Counsel submitted that the ownership of Plot number 48 is in doubt and relied on the cases of *In the Estate of Bakari Madi Chosi* [2016] eKLR, *Alfred Njau vs City Council of Nairobi* [1983] KLR 625 and *Julian Adoyo Ongunga vs Francis Kiberenge Abano Migori* Civil Appeal No 119 of 2015.
30. On the second issue, counsel submitted that the Defendant is the legal and registered owner of Plot No 47 and the Defendant built a wall fence around his plot a fact reiterated by PW1's testimony. Counsel submitted that there is no provision whatsoever in the Environmental Management and Control Act that states that land owners should build their wall fence by leaving 1.52 meters distance.



31. Counsel submitted that the Defendant complied with Section 35 of the Physical Planning (Building and Development) (Control) Rules as well as the Environmental (Impact Assessment and Audit) Regulations and that the Defendant got NEMA approval and a license was issued for implementation of the Defendant's project.

### **Analysis And Determination**

32. The issues for determination are:
- a. Whether the Plaintiffs have the locus standi to sue in this matter?
  - b. Whether the Defendant is liable for the collapse of Plaintiff's structure that existed on Plot No. 48?
  - c. Whether the Defendant is liable to pay damages of Ksh 710,000/=?
  - d. Whether the Plaintiffs are entitled to costs of the suit and interest thereon?
33. The Defendant had raised an issue that the Plaintiffs do not have locus standi to institute this case as there is no nexus between the plot and the Mosque House that was the allottee of the plot.
34. In the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR the court held as follows:
- “*Locus Standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229, the Court also held that:-
- “the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings”.
35. *Locus standi* is defined in Black's Law Dictionary, 9th Edition at page 1026 as-
- “The right to bring an action or to be heard in a given forum”.
36. It is on record that vide an allotment letter dated 31<sup>st</sup> March, 2008 Plot No 48 was allocated to Mosque House and that the Plaintiffs have produced evidence that they are trustees of the Mosque through a Wakf Deed dated 18<sup>th</sup> August, 2011 which has listed the Plaintiffs as trustees and clearly identified plot No 48. It follows that the Plaintiffs have locus standi to institute this suit.
37. On the second issue, PW2 produced a NEMA report dated 16<sup>th</sup> March, 2011 which report indicated that the Defendant had not complied part V (1) 58 (2) of the *Environmental Management and Co-ordination Act* 1999 and recommended that the Defendant applies for the Environmental Impact Assessment license from NEMA and to stop the construction until approved by NEMA.
38. Section 58 (2) of the *Environmental Management Co-ordination Act* provides: -
- 2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.



39. The Defendant in his Further list of documents filed on 6<sup>th</sup> September, 2018 produced an Environment Impact Assessment (EIA) project from NEMA dated April 2011. The 1<sup>st</sup> Defendant has however only produced the cover page and the court is unable to deduce the contents of the report. The Defendant has an acknowledgment of the Environmental Impact Assessment Report from NEMA dated 26<sup>th</sup> April, 2011.
40. The Court equally notes that the Defendant produced a Notification of approval of the Application for Development Permission from the County Council of Kilifi which document gave a conditional obligation on the part of the 1<sup>st</sup> Defendant to conduct the Environmental Impact Assessment and the report be submitted to NEMA for approval. No evidence has been adduced that the approval was given after submission of the EIA report to NEMA. The Defendant has therefore failed to prove that he complied with the requisite legal provisions in constructing the wall.
41. On the third issue, the Plaintiff has produced a valuation report from Wyco Valuers Company dated 19<sup>th</sup> March, 2011 who assessed the compensation payable for the damaged House, free from encumbrances and assuming vacant possession, including statutory allowance of 15 percent of Ksh 710,000/=.
42. In the case of David Bagine V Martin Bundi CA No. (Nrbi) 283/1996, the Court of Appeal referring to Lord Goddard CJ in *Bonhan Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177) held that-
- “It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and so to speak, throw them at the head of the Court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”
43. The Plaintiffs specifically pleaded the damages incurred due to the Defendant’s acts that led to the damage to the building and produced receipts amounting to Ksh 710,000/=. I find that the Plaintiffs have proved their case against the Defendant and are therefore entitled to the orders sought with costs.
44. I therefore make the following specific orders:
- a. The Plaintiffs are hereby awarded damages of Ksh. 710,000/- equivalent to the value of the destroyed/damaged part of the premises on plot 48 Vipingo Trading Centre, Vipingo Squatter Settlement Scheme Kilifi County.
  - b. Defendant to pay costs of the suit together with interests at court rates.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

