



**Riech & 2 others v Tiema & 6 others (Environment and Land Case Civil Suit E003 of 2022) [2024] KEELC 3271 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3271 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E003 OF 2022**

**JA MOGENI, J  
APRIL 11, 2024**

**BETWEEN**

**EDNA KWAMBOKA RIECH ..... 1<sup>ST</sup> PLAINTIFF  
GEORGE AMBUCHÉ ..... 2<sup>ND</sup> PLAINTIFF  
ANTHONY MAINA AND OTHER DELTA DRIVE COURT  
RESIDENTS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PAULINE ANYONA TIEMA ..... 1<sup>ST</sup> DEFENDANT  
BRENEEN ELISHA MALOBA ..... 2<sup>ND</sup> DEFENDANT  
LOREEN AKOTH AJWANG ..... 3<sup>RD</sup> DEFENDANT  
NAIROBI METROPOLITAN SERVICES ..... 4<sup>TH</sup> DEFENDANT  
NAIROBI CITY COUNTY ..... 5<sup>TH</sup> DEFENDANT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 6<sup>TH</sup>  
DEFENDANT  
NATIONAL CONSTRUCTION AUTHORITY ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs instituted a suit vide a Complaint dated 12/01/2022 and Further Amended Complaint dated 20/04/2022 and sued the Defendants seeking the following orders:
  - a. A declaration that the construction of a multiple-dwelling apartment on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085).



- b. Declaration that the construction on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085) is illegal and/or undertaken in breach of approved plans, approved user and gazette notice issued by the 6<sup>th</sup> Defendant and stoppage and demolition notice issued by the 5<sup>th</sup> Defendant.
  - c. A declaration that the Plaintiff's right to a clean and healthy environment shall be violated and infringed upon by the continued construction and subsequent occupation of the multi-dwelling apartments.
  - d. A mandatory injunction directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to comply with all the national and county laws and regulations, the enforcement notice, the suspension of works order and the existing plans of Harambee Sacco Estate before any further construction can be carried out on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085).
  - e. An order directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to demolish the illegal structure constructed on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085).
  - f. An order directing the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants to demolish the multi-dwelling apartment situated on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085), Harambee Sacco Estate in the event that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do not comply with order (c) and (d) hereinabove at the cost of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - g. An order directing the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants to revoke any permits and/or approval given in furtherance of the construction, if at all any were issued.
  - h. A permanent order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their directors, their agents and/or servants and all other persons acting under them/or claiming under them from constructing, developing or in any other way building any multiple dwelling apartments in all that piece of land known as Plot No 376, Harambee Sacco (Land Title Number Block 82/5085), Harambee Sacco Estate without the necessary compliance and approvals thereof.
  - i. An order directed to the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants to enforce compliance of the law and notices issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and/or to demolish the illegal structures constructed on Plot No 376, Harambee Sacco (Land Title Number Block 82/5085).
  - j. In default of orders ( c ) to ( h ) above, the officer commanding Donholm Police Station to ensure compliance with the order and/or to provide the Plaintiffs, their agents, employees and or any person claiming through them security and necessary assistance in demolition of the illegal structure Plot No 376, Harambee Sacco (Land Title Number Block 82/5085),
  - k. Costs of this suit.
  - l. Any other relief that this Honourable Court may deem fit to grant.
2. The suit is opposed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered appearance and filed a defence and counterclaim dated 23/01/2023 and an amended defence and counterclaim dated 16/03/2023. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants pray for judgment against the Plaintiffs as follows: -
    - a. A permanent injunction to restrain the Plaintiffs, their servants, laborers and any other person claiming through them from continued interference with the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants construction of their Residential House, quiet enjoyment, possession, occupation and use of the Property known as Title No Nairobi/Block 82/5085.



- b. A mandatory injunction compelling the 6<sup>th</sup> Defendant Nairobi City County Government, to issue the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants with the mandatory Approval Letters forthwith.
  - c. A declaration that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants' Residential House erected on Title No, Nairobi/Block 82/5085 has fully complied with the general residential architectural Plans for Delta Court and the entire Harambee Sacco Estate.
  - d. The OCS Savanna Police Station do supervise the enforcement of the orders issued herein.
  - e. The Plaintiffs be condemned to pay the costs of the suit.
3. The 4<sup>th</sup> Defendant entered appearance on 19/10/2021 and filed a Defence dated 30/06/2022. The 5<sup>th</sup> Defendant entered appearance and filed a Defence dated 13/03/2023. The 6<sup>th</sup> Defendant entered appearance on 14/07/2022 and filed a Defence dated 4/07/2022. The 7<sup>th</sup> Defendant entered appearance and filed a Defence dated 11/05/2022.
  4. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiffs' failed to appear in court on 20/02/2024 despite being served with a hearing notice as evidenced by a return of service dated 19/02/2024. The Plaintiffs' advocates were served with the hearing notice on 22/11/2023 and they subsequently accepted the service by stamping the return copy. The Plaintiffs' case was therefore dismissed with costs for want of prosecution. The hearing of the counterclaim proceeded ex-parte. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants called one witness who testified on 20/02/2024.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' counterclaim**

5. In summary, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants assert that they are the intended registered owners and developers of a residential property known as Title No Nairobi/Block 82/5085, which they acquired on 16/08/2021 from the 1<sup>st</sup> Defendant, Pauline Anyona Tiema, through a Transfer of Lease and Sale Agreement. They state that they are in the process of constructing their residential home on this property after obtaining necessary approvals and paying required fees.
6. However, they claim that their construction activities were unlawfully interfered with by the 3<sup>rd</sup> Defendants from 12/04/2022, citing alleged breaches of uncodified estate by-laws. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that despite repeated requests, the Plaintiffs have failed to provide them with any lawful or written by-laws. They further contend that their right to develop their property has been arbitrarily deprived, despite paying for necessary approvals from the 6<sup>th</sup> Defendant's Development Control Department.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants maintain that their architectural building plan and the actual physical structure comply with similar residential houses in Delta Court and the entire Harambee Sacco Estate. They argue that the Plaintiffs' actions are motivated by ill-will and malice, aimed at denying them the quiet enjoyment of their property. They seek permanent injunctions and other orders to restrain the Plaintiffs' interference and ensure their peaceful development and enjoyment of their property rights, as guaranteed under Article 40 of the Constitution of Kenya, 2010.

#### **Plaintiffs' Reply to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Defence and Defense to Counterclaim: -**

8. The Plaintiffs did not file a response to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' defense or a defense to the counterclaim. The counterclaim is thus uncontroverted.



## Evidence by the Parties: -

### Counterclaim

9. PW1 – Breneen Elisha Maloba testified that he is a Human Resource professional. He was the 2<sup>nd</sup> Defendant in the main suit. In support of his defence and counterclaim, he adopted his witness statement dated 16/03/2023 together with a list of documents dated 16/03/2023 and produced them as his evidence in chief. Exhibits 1-9. He testified that the prayers in the counterclaim be granted as prayed.
10. With that evidence, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants closed their case.
11. After hearing counsel for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opted against filing of written submissions. It was his contention that he will rely on his pleadings. He requested for a judgment date as his claim is uncontroverted and un rebutted.

### Submissions: -

12. The Court did not give directions on filing of written submissions as per the request of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

### Issues for Determination: -

13. The Court has now carefully read and considered the pleadings together with the evidence adduced by the Plaintiffs and the Defendant and I find the issues for determination are as follows.
  - i. Whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to the orders sought in the counterclaim.
  - ii. Who should bear the costs of the counterclaim?

### Analysis and Determination

#### Whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to the orders sought in the counterclaim.

14. The Plaintiffs' case was dismissed for want of prosecution on 20/02/2024. This Court will therefore proceed and determine the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' counterclaim. The Plaintiffs failed to defend the suit. The fact that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' suit has not been opposed means that their evidence remained unchallenged and uncontroverted. However, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are still required to prove their case on the required standard of balance of probability. See the case of *Shaneebal Limited v County Government of Machakos* (2018) eKLR and *Karuru Munyororo v Joseph Ndumia Murage & another*, Nyeri HCCC No 95 of 1988.
15. The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Court still has an obligation to interrogate the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' evidence and determine whether the same is merited to enable the Court to come up with a logical conclusion as ex-parte evidence is not automatic prove of a case. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have to discharge the burden of proof. See the case of *Kenya Power & Lighting Company Limited v Nathaniel Karanja Gachoka & another* [2016] eKLR and *Gichinga Kibutha v Caroline Nduku* (2018) eKLR.
16. It is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' assert that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the intended registered owners of property known as Title No Nairobi/Block 82/5085. They have substantiated their claim



by demonstrating the acquisition of the property from the 1<sup>st</sup> Defendant through a sale agreement dated 16/08/2021 (Exhibit 5) and a Transfer of Lease executed on 16/08/2021 (Exhibit 4). The issue of ownership is not contested in this matter. The crux of the dispute revolves around an incident on 12/04/2022, wherein the construction activities of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were disrupted. They argue that they were accused of engaging in an illegal, unauthorized, and non-compliant construction, contrary to the estate by-laws.

17. It is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' contention that the Plaintiffs have collectively failed, refused, and/or neglected to provide the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with any lawful or written By-Laws. They allege that since 12/04/2022, the Plaintiffs have jointly, unlawfully, and illegally prevented the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from accessing their construction site property by instructing the guards stationed at the Delta Court gate to unlawfully deny access to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and their laborers.
18. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants assert that on 7/02/2022, they paid fees for Approval letter and construction sign board to the 6<sup>th</sup> Defendant's Development Control Department for the construction of their Residential house on their property. In support of their claim, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants have presented a construction permit invoice No INV-34238 dated 4/02/2022 (Exhibit 1) and a receipt dated 7/02/2022 issued by the Nairobi City County indicating payment of Kshs 44,150.00 towards Building plans approval fees (Kshs 24,150) and construction site board fees (Kshs 20,000.00), received by J. Mwangi (Exhibit 2). They have also provided a copy of the building plans (Exhibit 3) and other documents as proof of ownership, along with photographs of the subject property.
19. Upon careful review of the documents and photographs presented, particularly Exhibits 7A and 7B, it is evident that the construction sign board was not displayed at the construction site by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Upon examination of photographs marked as 8A and 8B at page 46 and 47 of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants' bundle, it is my considered view that the physical structure under construction appears to resemble other houses in Delta Court. I am persuaded that the structure depicted in Exhibits 7A and 7B does not seem intended for rental or commercial purposes.
20. From the photographs submitted to the Court, the construction undertaken by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants appears similar to other residences in Delta Court. The construction does not appear to constitute a multi-dwelling residential building but rather a single dwelling unit for occupancy by a single family. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants maintain that their house mirrors other residential properties within Delta Court and the entire Harambee Sacco Estate, which is supported by the building plan dated 8/12/2021, along with photographs marked as 7A, 7B, 8A, and 8B.
21. It is my view that the primary issue concerning the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is their failure to adhere to legal requirements by not providing any approvals issued for the project and failing to display them during construction.
22. In this regard, it is undisputed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant are the owners of the suit property. Since the present matter does not concern ownership, the Court finds and holds that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are entitled, under Article 40 of the *Constitution* of Kenya, 2010, to the peaceful development, quiet enjoyment, occupation, use and possession of their property.
23. The Plaintiffs failed to present evidence during trial and the evidence provided by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants remained uncontested. Consequently, the Court is satisfied that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have proved their case on a balance of probabilities, warranting the grant of prayers (a), (b) and (d). However, I find that these orders cannot issue as drawn. Prayer (a) as drawn would have the effect of allowing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to continue construction and development of their residential house for an indefinite period of time without obtaining the relevant approvals and permits.



The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not presented any approvals issued for the project. Therefore, the Court determines that prayers (a) and (b) should be granted, but subject to the condition that the necessary approvals and permits are obtained before proceeding with construction activities. These orders shall be contingent upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants securing the required approvals and permits.

24. Prayer (c) seeks a declaration that the residential house erected by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the suit property complies fully with the general residential architectural plans for Delta Court and the entire Harambee Sacco Estate. I acknowledge that certain organizations are tasked with assessing the compliance of proposed residential developments with established regulations upon application. The National Construction Authority (NCA) is the statutory body responsible for overseeing and regulating the construction industry in Kenya. It is understood that, in addition to obtaining construction approval from the County Government, project registration with the NCA is required (see section 17 of the *National Construction Authority Regulations 2014*). The NCA also has the authority to investigate the compliance status of proposed residential developments. However, it is noted that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants have not applied for NCA project registration.
25. In my assessment, this prayer appears premature as it requests the Court to declare compliance without the submission of residential architectural plans or an NCA compliance certificate. While the building under construction by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants resembles those in Delta Court and seems to be a single dwelling unit, the absence of a compliance certificate creates uncertainty. A compliance certificate from the NCA would provide clarity, as the NCA possesses the necessary expertise to make such determinations. Therefore, the Court finds that this prayer is not justified without the issuance of a compliance certificate by the NCA.
26. Costs generally follow the event, and in this instant case, since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been inconvenienced with the Plaintiffs acts culminating in filing the counterclaim, I find that they are indeed entitled to costs of the counterclaim and will award it to them.
27. The upshot of the foregoing is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have proved their case on a balance of probabilities and their claim succeeds in part. I therefore enter judgment for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against the Plaintiffs in the following terms:
  - a. A permanent injunction is hereby issued restraining the Plaintiffs, their servants, laborer's and any other person claiming through them from continued interference with the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants construction of their Residential House, quiet enjoyment, possession, occupation and use of the Property known as Title No Nairobi/Block 82/5085 subject to obtaining the necessary approvals and permits.
  - b. A mandatory injunction is hereby issued compelling the 6<sup>th</sup> Defendant Nairobi City County Government to issue the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants with the mandatory Approval Letters forthwith provided the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants demonstrate that they applied and duly paid for the necessary mandatory approvals.
  - c. The OCS Savanna Police Station do supervise the enforcement of the orders issued herein.
  - d. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall have the costs of the counterclaim.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

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**MOGENI J**

**JUDGE**

In the virtual presence of:

Mr. Gitau for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms. Mwau for the Plaintiffs

Ms. Cherop holding brief for Mr. Mosota for the 7<sup>th</sup> Defendant

Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

