



**Walia v County Government of Nakuru (Environment & Land Case
37 of 2020) [2024] KEELC 5070 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 37 OF 2020**

MAO ODENY, J

JULY 4, 2024

BETWEEN

ANIL WALIA PLAINTIFF

AND

COUNTY GOVERNMENT OF NAKURU DEFENDANT

JUDGMENT

1. By a Complaint dated 10th June, 2020 which was subsequently amended on 12th October, 2020, the Plaintiff herein sued the Defendant seeking the following orders:
 - a. An award of general damages for trespass.
 - b. A permanent injunction restraining the 1st Defendant (sic) whether by itself, its servants, agents and/or anyone acting under its authority from dealing, entering, taking possession, constructing, demolishing, selling, charging, advertising, transferring and/or interfering whatsoever with all that parcel of land known as Title No. Nakuru Municipality Block 4/395.
 - c. An award of general damages for denied use and possession for all that parcel of land known as Title No. Nakuru Municipality Block 4/395 arising from the trespass by the 1st Defendant and the refusal to remove the restriction by the (sic).
 - d. An order for the removal and/or demolition of the wall and developments on the parcel of land known as Title No. Nakuru Municipality Block 4/395 at the 1st Defendant's (sic) costs or in the alternative it be ordered to avail the plans for the construction and that the said wall be left for the use by Plaintiff.
 - e. Costs of this suit and interest.
 - f. Any other reliefs and/or orders as this Honourable Court may deem fit in the interest of justice.



Plaintiff's Case

2. PW1 Anil Walia adopted his witness statement dated 12th June, 2020 as his evidence in chief and produced the documents attached to his list of documents dated 11th June 2020 as Exhibits No PEXH 1 to PEXH 17.
3. PW1 was shown the Defendants witness statement filed on 22nd October, 2021 and testified that he never obtained the land fraudulently as he had followed due process and that there is a letter from the Ethics and Anti-Corruption Commission produced as PEXH 15.
4. PW1 was shown PEXH 13 and 14 and he testified that he was required to surrender all documents in respect of NKU MM BK 4/396 to Kenya Anti- Corruption Commission which he did.
5. It was PW1's testimony that he has a Part Development Plan and that he followed due process in the allocation of the suit property and further that he has been paying rates since 1997.
6. PW1 was shown PEXH 8 and he testified that he applied in 2017 for change of user to build flats which permission was granted as nobody objected and continued paying rates to the council and the county government.
7. Upon cross-examination by Ms. Litunda, PW1 stated that he was allocated the land from the Municipal Council of Nakuru. That he had made an application to the Municipal Council for land to start a college and build hostels of which he got a response, with a letter of allotment of which he paid a stand premium of Kshs. 39,880/= . It was PW1's evidence that since he acquired the suit property it has been vacant.
8. PW1 was shown PEXH 2 a search certificate which he obtained it on 8th December, 2016 and told the court that there was no restriction as the same was registered in 2020. PW1 stated that he went to the Anti-Corruption in respect of plot No 396 and he was told that there was a restriction and further stated that there is a church, a dispensary on plot No 396 which he gave up voluntarily to expand the dispensary. PW1 also stated that the approval was subject to condition "H" that the plot does not constitute disputed public or private land.
9. Upon re-examination by Ms. Alwala, PW1 was shown PEXH 8 and testified that after the approval, the Municipal Council gave him a clearance certificate as indicated in PEXH 13.
10. PW1 was shown PEXH 14 and 15 and he stated that the Kenya Anti-Corruption Commission began investigating the land in 2006 and cleared them in 2019 and further testified that he could not develop the land during the pendency of the investigations.

Defendant's Case

11. DW1 Justine Manyaka Mayo adopted his witness statement dated 22nd October 2021 and testified that he is a physical planner with the county government of Nakuru and previously worked for the defunct Municipal Council of Nakuru. He also produced a list of documents as DEX No 1 & 2
12. It was DW1's evidence that the local authorities used to allocate land to individuals and there was a procedure for allocation of land. DW1 testified that before land is allocated there had to be a Part Development Plan with an intention and a resolution of the planning committee to be adopted by the full council of the local authority.



13. DW1 testified that the plan would be prepared by the Ministry of Lands by the Director of Physical Planning and state the purpose why the land is being allocated and such process would be a public participatory process and the same would be advertised.
14. DW1 testified that the lease that has been provided by the Plaintiff is not dated, no rubber stamp or registration from the Land Registrar hence they cannot ascertain the documents. DW1 referred to PEX No 8 which is a notification of approval for development, change of user from single dwelling to multiple dwelling of the suit land and testified that it refers to the same property.
15. Upon cross-examination by Ms. Alwala, DW1 stated that the certificate of lease is in the Plaintiff's name and that the County government has been working with the Ethics and Anti-Corruption Commission on the legality of the suit land. DW1 referred to PEX No 15, which is a letter from the Ethics, and Anti-Corruption Commission dated 21st November, 2019.
16. DW1 further informed the court that the letter stated that the suit land was procedurally allocated to the Plaintiff and that he does not have any minutes in court where the county government is challenging the title. DW1 referred to PEX No 6 which is a lease certificate and he stated that it was presented for registration on 16th January, 1998. He stated that there are signatures of a mayor and the clerk on page 3 of the lease.
17. DW1 referred to PEX No 8 which is a notification of approval for development permission and stated that the document is of no consequence as he could proceed with the development. DW1 confirmed that there are records that the Plaintiff has been paying rates and that he does not have documents challenging the Plaintiff's title.
18. Upon re-examination by Ms. Litunda, DW1 testified that the details for registration of the lease are blank and that government minutes are public documents further that they do not have any records that the Ethics and Anti-Corruption Commission relied on to write the letter.

Plaintiff's Submissions

19. Counsel for the Plaintiff filed submissions on 11th April, 2024 and identified the following issue for determination:
 - a. Whether the Plaintiff is the absolute legal and registered owner of the parcel of land known as Nakuru Municipality Block 4/395.
20. Counsel submitted that the Defendant invaded the suit parcel and erected a stone wall with the objective of blocking the Plaintiff from accessing the same and relied on Sections 24, 25 and 26 of the *Land Registration Act* and submitted that the Plaintiff is the absolute legal and registered owner of the suit parcel and his ownership has not been challenged.
21. Counsel relied on the case of *Kenya Power & Lightning Co Ltd v Ringera & 2 others* [2022] KECA 104 (KLR) and submitted that the Plaintiff having proved his case, he should be awarded costs of the suit plus interest. He submitted Kenya Shillings 2,000,000/= would be sufficient for acts of trespass from 6th June, 2020.
22. Counsel also referred to the letter dated 21st November 2019 to the County Land Registrar and copied to the Plaintiff where it specifically absolved the plaintiff of any wrong doing in the allocation process.



Defendant's Submissions

23. Counsel for the Defendant filed submissions on 9th May 2024 and identified the following issues for determination:
 - a. Whether an order of permanent injunction should issue?
 - b. Whether the land was lawfully acquired by the Plaintiff?
 - c. Whether the plaintiffs are entitled to general damages for trespass?
 - d. Who should bear the cost of the suit?
24. On the first issue, counsel submitted that the process and subsequent sub division and allocation of the suit property to the plaintiff was flawed.
25. Counsel relied on Article 40 and 62 (4) of *the Constitution* and submitted that a title is a product of a legal process that must be supported by evidence corroborating the said process hence the Plaintiff is not entitled to the orders sought
26. Counsel relied on the cases of *Kenya Power & Lighting Co Limited v Sheriff Molana Habib* [2018] eKLR, *Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others* [2013] eKLR and *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR.
27. On the second issue, counsel submitted that payment of rates is not proof of ownership and that the plaintiff acquired the suit property unlawfully hence the suit should be dismissed.
28. Counsel relied on Section 26 (1) of the *Land Registration Act* 2012 and the cases of *Pharis Ndung'u Chege & 4 others v Attorney General & 4 others* [2018] eKLR, *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR and *Franco Nderitu Kanyari & 6 others v County Government of Nyandarua* [2018] eKLR.
29. On the third issue, counsel submitted that the Plaintiff cannot claim trespass to land on public land and relied on the case of *Entick v Carrington* [1765].

Analysis And Determination

30. The issues for determination are whether the Plaintiff is the absolute legal and registered owner of the parcel of land known as Nakuru Municipality Block 4/395 and whether the Plaintiff acquired the suit land lawfully.
31. From the plaintiff's evidence, he stated that he made an application for allocation of land whereby he was issued with an allotment letter by the defunct Municipal Council of Nakuru in 1997 and was required to pay standing premium before ownership documents could be processed of which he paid, a survey done and the land was registered as Nakuru Municipality Block 4/395 in his name and certificate of lease issued. in his favor.
32. It is the Defendant's case that the land, which the Plaintiff is claiming was, excised from Land Reference No 451/851 which later came to be known as Nakuru Municipality Block 4/52. That Land Reference No 451/851 was public land and the same was held by the National Government and the defunct Municipal Council of Nakuru.
33. The Defendant further submitted that for the defunct local authority to sub-lease any parcel of land belonging to the National Government, procedure had to be followed as indicated in the repealed Local Government Act hence the process resulting to issuance of the title to the Plaintiff is questionable.



34. In the case of *Nelson Kazungu Chai & 9 Others v Pwani University College* (2014) eKLR. the court held as follows:
130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.
131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Company Limited v The Hon. Attorney General, Mombasa HCCC No. 276 of 2013.....*”
35. The plaintiff produced documents leading to allocation, letter of allotment, approved Part Development Plan, subdivision and survey, compliance with the terms of the allotment letter, issuance of certificate of lease which has not been challenged, application and approval of Notice of change of user. The PDP came first before the survey was done and consequently a lease and certificate of lease were issued after all the processes had been complied with.
36. In the case of *African Line Transport Co. Ltd v The Hon AG*, Mombasa HCCC No.276 of 2013, the court held as follows:
- “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”
37. Vide a letter dated 21st November 2029 by Ethics and Ant Corruption Commission to the County Land Registrar and copied to the Plaintiff at paragraph 3 it states as follows:
- “However from our investigations and evaluation of the evidence, the Commission found out that the property was properly allocated and there is no claim against the registered proprietor.”
38. This letter absolved the plaintiff from any wrongdoing, as this is one of the bodies tasked to investigate corruption and fraudulent acquisition of public land. The Commission wrote the letter that the land was acquired procedurally, therefore the plaintiff should be allowed to enjoy peace and quiet on his property.
39. The plaintiff has proved that he is the registered owner of the suit land, and that he acquired it procedurally. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR the Court explained as follows regarding permanent injunctions:
- “A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually



restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.
 10. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.”
40. The plaintiff having proved his case he is also entitled to general damages for trespass. In the case of *Duncan Nderitu Ndegwa v KP& LC Limited & Another* (2013) eKLR P. Nyamweya J. held that: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”
41. In the case of *Willesden Investments Limited v Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000 the court stated that:
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.
42. I have considered the pleadings, the evidence on record, the submissions by counsel and find that the plaintiff has proved his case and is entitled to the following orders:
- a. General damages for trespass is hereby awarded to the Plaintiff in the amount of Ksh 2,000,000/=.
 - b. A permanent injunction is hereby issued restraining the Defendant whether by itself, its servants, agents and/or anyone acting under its authority from dealing, entering, taking possession, constructing, demolishing, selling, charging, advertising, transferring and/or interfering whatsoever with all that parcel of land known as Title No. Nakuru Municipality Block 4/395.
 - c. An order is hereby issued for the removal and/or demolition of the wall and developments on the parcel of land known as Title No. Nakuru Municipality Block 4/395 at the Defendant’s costs.
 - d. Costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF JULY 2024.

M. A. ODENY

JUDGE

