



**Soy & 3 others v Indakwa & another (Environment & Land Case
32 of 2012) [2024] KEELC 6609 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 32 OF 2012**

FM NJOROGE, J

OCTOBER 8, 2024

BETWEEN

**JOEL KIPSANG SOY 1ST PLAINTIFF
DAVID KIPKURUI KOECH 2ND PLAINTIFF
JOSEPH TANUI MENGICH 3RD PLAINTIFF
PATRICK BOSIRE 4TH PLAINTIFF**

AND

**AINEA O INDAKWA 1ST DEFENDANT
COUNTY GOVERNMENT OF TRANS-NZOIA 2ND DEFENDANT**

JUDGMENT

Background

1. The plaintiffs filed this suit vide a plaint dated 8/3/2012. The defendants filed a defence incorporating a counterclaim dated 30/10/2017 on 20/3/2018. The plaintiffs filed a reply to defence and counterclaim dated 28/11/2019 on the same date. Hearing took place on various dates in the year 2019. The plaintiffs called five witnesses and the defendants called three.

Pleadings.

Plaint.

2. The plaintiffs claimed in their plaint that they are the absolute and sole owners of plots of land known as Kaplamai/Kachibora Block 7(Motosiet) /333, Kaplamai/Kachibora Block 7(Motosiet) 374, Kaplamai/Kachibora Block 7(Motosiet) 375 and Kaplamai/Kachibora Block 7(Motosiet) 376. They further claim that the defendants are of the contention that the plaintiffs are in occupation of Plot No



166 which plot is reserved for a market, and which claim they deny. They also claim that the defendants, without any legal basis or reasonable grounds, on 28th November 2011, instructed an auctioneer's firm to demolish the 1st plaintiff's business premises erected on plot no 333 while purporting to distrain for rent in respect of plot no 166 by reason of which he sustained damage in the sum of Kshs 400,000/= as well as loss of business.

3. The plaintiffs seek the following orders:
 - a. A declaration that the plots known as Kaplamai Kachibora Block 7(Motosiet) /333, Kaplamai/Kachibora Block 7(Motosiet) 374, Kaplamai/Kachibora Block 7(Motosiet) 375 and Kaplamai/Kachibora Block 7(Motosiet) 376 respectively belong to the plaintiffs absolutely;
 - b. Orders of permanent injunction against the defendants from (sic) interfering with the plaintiffs' peaceful occupation, altering /interfering from (sic) boundaries, altering records at the lands office of the above plots and/or interfering with the above plots in any manner detrimental or prejudicial to the plaintiffs;
 - c. General damages and special damages of Kshs 415,000/- plus Kshs 1000/- daily (exclusive of Sunday) being loss of business till date of judgment.
 - d. Costs and any other relief that the court may deem fit to award.

Defence and Counterclaim.

4. The defendants denied the plaintiffs' claim stated in their defence and stated that the subject plots have been unlawfully excised from plot no 166; that the plaintiffs are guilty of concealment of material facts, misrepresentation and fraud as plot no 166 still exists to date; that if any distress was levied then it was in respect of plot no 166; that it is not true that the defendants sent the district planner Trans Nzoia to the suit plots to change boundaries; that the Physical Planner only visited the suit land in connection with the 1st defendant's resolutions over plot no 166 (which is public land and which the plaintiffs can not have any interest in since it has been held by the 1st defendant as a trustee of the government); that the plaintiff's claims are baseless and attempts at unjust enrichment; that the plaintiffs unlawfully invaded plot no 166 using their positions as officials of Motosiet Trading Centre;
5. In their counterclaim the defendants restated that plot no 166 was converted into an open air market for use by the residents of Motosiet and the general public; that defendant is trustee of plot no 166; that commencing May 2011 the plaintiffs invaded plot no 166 claiming to be the owners thereof. The defendants averred that the suit plots were hived off from plot no 166 and that the plaintiffs erected structures on them without the defendant's approval hence unlawfully interfering with the open air market resulting in the issuance of a notice to cease construction. They restated the claims of fraud and misrepresentation and concealment of material facts and averred that the plaintiff's titles to the suit land ought to be cancelled. They averred that the plaintiffs' actions are contrary to public interest as they will deny the general public of the use of an open air market among other utilities. The defendants thus prayed for the following orders:
 - a. A declaration that ploy 166 belongs to the government and the plaintiffs are trespassers;
 - b. Cancellation of titles nos Kaplamai Kachibora Block 7(Motosiet)/333, Kaplamai Kachibora Block 7(Motosiet)/374, Kaplamai Kachibora Block 7(Motosiet) /375 and Kaplamai Kachibora Block 7(Motosiet)/376



- c. A permanent injunction restraining the defendants in the counterclaim jointly and severally from entering, constructing and/or otherwise laying claim from (sic) land known as Kaplamai Kachibora Block 7(Motosiet)/333;
- d. Costs;
- e. Any other relief the court may deem fit to grant.

Evidence

6. PW1, Joel Kipsang Arap Soy testified orally on 8/5/2019 and adopted his witness statement filed on 12/3/12. His evidence is that he is the owner of a titled plot no 333, that the 2nd plaintiff owns plot no 374, the 3rd plaintiff plot no 375 and the 4th plaintiff plot no 376. He produced originals of the four titles as exhibits. He stated that a group of people led by one Simeon Langat sued the four plaintiffs herein in a separate case and the court ruled against them. That suit was Kitale HCCC No 91 of 2010. He produced some court documents relating to that case as exhibits. He further stated that the council, the predecessor to the County Government of Trans Nzoia at one time gave him a notice dated 30/5/2011 threatening demolition of his house. However, the notice referred to plot no 166- Motosiet. According to him, plot no 333 is adjacent to plot no 166. The 2nd defendant had written a letter dated 6/6/2011 recognizing PW1's title and stating that it bore no relationship with plot no 166, that it was about a kilometer away from plot 166 and that PW1 should remove his structures from the latter plot. PW1 insisted that he obtained the plot legally as he was included in the area list as per entry no 333. The other plaintiffs' entries matched their plot numbers and their names are also in the area list. PW1's building plans were approved by the Council, the District Architect, the District Surveyor, the District Public Health Officer, the District Physical Planning Officer and the District Land Officer. Upon completion of the structure the County Council granted PW1 a single business permit commencing on 30/5/11 for which he paid Kshs 6000/=. However, his house was nonetheless later demolished on 28/11/2011. The Officer Commanding the local police station, who was at the scene of the demolition said that it was the Council had sent the persons who demolished the house. Upon following up, he found that a case which he and his co-plaintiffs herein had never known of, Misc. Application No 10 Of 2011, had been filed in the magistrate's court and an order had been issued. The plaintiffs herein were the defendants in that case while the County Council of Trans Nzoia was the applicant. He alleged that the demolition was contrary to the terms of the court order issued therein. He then issued the Council with a demand notice. He produced the demand notice and a valuation report, stating that the valuation report cost him Kshs 15,000/=.
7. Upon cross-examination by Mr. Wafula PW1 stated that the original parcel from which his plot was hived was LR No 5340. He admitted having been a director at the Motosiet Farm; he stated that though the market space was catered for in the area list, he did not know its dimensions. He asserted that his plot neighbours the market. He denied encroaching on the market land.
8. Upon cross-examination by Mr Ngeywa PW1 stated that he was not aware as to whether the auctioneers similarly visited the other three suit plots besides plot no 333; that no buildings had been erected on the 3 other plots; that he has not rebuilt the house that was demolished. He admitted that plot no 166 is a public utility.
9. PW2 Joseph Kibiwott Kimengich testified orally on 8/10/2019 and adopted his witness statement filed in the record and adopted in toto the evidence of PW1.



10. PW3 David Kipkurui Koech testified orally on 8/10/2019 and adopted his witness statement filed on 12/3/2012. He adopted in toto the evidence given by PW1. Upon cross examination by Mr Wafula he stated that he was not present when the demolition was done.
11. PW4 Patrick Kebeno Bosire testified orally on 8/10/2019 and adopted his witness statement filed in the record. He further adopted in toto the evidence of PW1.
12. Upon cross-examination by Mr Wafula PW4 stated that he was not present when the demolition occurred.
13. PW5 Patrick Kariuki testified on 24/10/2019. He stated that he is a land economist, a registered and licensed valuer practicing under the name Mwamba Valuers. He averred that he did a valuation report for the plot no 333, having visited the site on 5/12/2011. He found a structure that had been demolished on the suit plot. A section thereof was permanent and another was temporary. According to him the value of the demolished property was Kshs 400,000/=. He produced the valuation report as an exhibit.
14. Upon cross-examination by Mr Wafula PW5 stated that he never established as to whether the demolished structure had been in use as at the time of demolition.
15. By consent of the parties a building plan was produced as P. Exh 11 and at that juncture the plaintiffs' case was marked as closed.

Defendants' evidence.

16. DW1 testified on 27/4/2021 and adopted his witness statement dated 17/9/2020 as part of his evidence-in-chief. He stated that in the year 2010 he received a complaint from the area Councillor that the plaintiffs had grabbed or encroached on a public utility plot, that is plot no 166; that the Council held meetings at the market with the then market committee. He produced a certificate of official search dated 3/3/2011 showing that the proprietor was the Government of Kenya and that the market plot measures 1.48 ha. The area Councillor brought a written motion to the Country Council of Trans Nzoia which was deliberated on by the Town Market Planning Committee which resolved that the court's guidance be sought to demolish the structures erected on the public land. The resolution was also adopted by the Trans Nzoia County Council full council meeting. The Council then wrote to the 4 plaintiffs directing them to remove their structures but they defied the order. All this time DW1 was acting in his official capacity as the Clerk to the Nzoia County Council and he was only implementing its decisions. He maintained that the 4 plots should be reinstated to the public.
17. Upon cross-examination by Mr Barongo he stated that the Council demolished a structure located on plot 166. According to him the council believed that the suit plots overlap plot no 166. He admitted that the suit land originally belonged to one Cherige but denied knowledge that Cherige's wife had sued over plot no 166. He stated that there were complaints from area residents and the council had to respond to them. He only acted upon a Council resolution. According to him the 1st plaintiff's structure was illegal.
18. In re-examination he stated that the suit plots would ordinarily have been located far away from the market land but they were instead superimposed on the market plot. No commercial plot was created on plot no. 166. It remained just single, open space. He stated that when the letters dated 6/6/2011 and 20/9/2010 were written, it had been believed that plot no 333 was far away from the market land. Later, they got information that the plot had been carved out of the market land. The development approvals issued in respect of plot no 333 and not plot no 166. In addition, change of user would have been necessary prior to construction. To him, the auctioneers demolished structures on plot no 166.



19. DW2 Job Kiplagat Tum testified orally on the same date as DW1 and adopted his witness statement dated 17/9/2020 as part of his evidence-in-chief. He stated that when he was Councillor he received complaints from Motosiet farm members that some persons who later turned out to be the plaintiffs herein had carved out 4 plots from the public utility land meant for the market.
20. Upon cross-examination by Mr Barongo DW2 stated that he forwarded the complaint to the County Council and was not aware of any case in court in relation thereto. He does not know the mother title to plot no 166 or the four suit titles in this case; all that he knows is that plot no 166 was meant for a market and that the suit plots were superimposed on it. The full council meeting was not aware that the plaintiffs had titles to the suit plots by the time it sat to discuss them.
21. Upon re-examination by Ms Efedha, DW2 stated that the land had been donated by one Cherige; that the County Council gave temporary allocations for commercial plots nos 1-20 only.
22. DW3 Simon Kipmalel Langat testified on the same date as the two other defence witnesses above. He adopted his witness statement filed on 27/1/2019 as part of his evidence-in-chief. He stated that he had filed the suit in P. Exh 5 because he and other members of the farm knew that the land belonged to the government yet the plaintiffs had encroached thereon. He and others took a report to the County Council and withdrew from the case when the County Council took up the matter.
23. Upon cross-examination by Mr Barongo DW3 stated that DW2 was his Councillor once; that DW3 owns plot no 13 allocated to him by the Council; that the plot has no title; that the farm was formerly ADC land which the members purchased; that the members never demanded a market; that Mr Cherige donated the land for a market; that it was the Council that demarcated plots nos 1-20 inside plot no 166; that their suit was however dismissed as their advocate abandoned it and the members returned to the Council and continued pursuing the matter. He stated that the plaintiffs' titles are not genuine.
24. Upon re-examination by Ms Efedha he reiterated a Mr Cherige donated 5 acres while one Rosalind donated 1 acre in 1977, to total to 6 acres for the market centre. The 20 commercial plots and the section reserved for the market are within the 6 acres. Allotment letters were issued for the commercial plots but no title deeds were issued. After the plots were created Mr Cherige sold them to individuals in 1977. The land that remained after the plots were carved out measured 1.48 ha. Only plots nos 1-20 which had allotment letters were supposed to be within the market centre. The plaintiff's plots were not supposed to be there. However, the plaintiffs built on plot no 166 and the members of public protested to the County Council. They were issued a notice which they ignored hence the resultant demolition.
25. At that juncture the defence case was marked as closed.

Submissions.

26. The plaintiffs filed submissions on 6/7/2021 while the 2nd defendant filed submissions on 21/7/2021. I have upon a comprehensive perusal of the record not found any submissions filed on behalf of the 1st defendant. However, I have also taken note that the Deputy Registrar of the court did not visit the site but sent the County Surveyor and the Land Registrar, vide an order issued on 18/3/2022, to visit the land and prepare a report thereon but it appears that the report was nevertheless not prepared.

Determination.

27. The plaintiffs' claim is that they are the absolute and sole owners of plots of land known as Kaplamai Kachibora Block 7(Motosiet) /333, 374, 375 and 376; that the defendants are of the contention that



the plaintiffs are in occupation of plot no 166 which plot is reserved for a market, and which claim they deny. They also aver that on the basis of the claim that their land is superimposed on a public utility plot, namely a market, the defendants trespassed on plot no 333 and demolished the structures erected thereon.

28. The plaintiffs' point out that the suit plots and plot no 166 which was reserved for a market were created at the same time and using the same area list and on that basis aver that it is not possible to conclude that they have encroached on the public utility plot.
29. This court has examined the record produced by the plaintiffs with great care. Whereas it is correct that the suit plots and plot no 166 emanated from the same area list, it is to be noted that three of the plots, that is 374, 375 and 376 conveniently appear at the tail end of that area list produced as P. Exh 10.
30. The Plaintiffs also produced P. Exh 5(c). From a careful study of the said exhibit, it is clear that there exists a large rectangular shaped plot no 166 lying between plots nos 167 and 186. It is clear that the focus of the sketch in P. Exh 5(c) is that rectangular block of land in the sketch inset known as plot no 166 and its subdivisions. It is noted that the numbering sequence of the subplots within the plot no 166 is quite irregular and suggestive of some mischief. There is a road carved out of that land which surrounds all the rectangular subdivisions. Several of the outer boundaries of the subdivisions about the said encircling road. It appears that in that rectangular block the batch of plots comprising nos 349-368 were the first lot that was carved out of plot no 166. The validity of those plots is not the subject of the present litigation. It also appears that later on, some plots not part of that batch were later included and given numbers that never fell into sequence with the batch. These were plots nos 333,374,375,376, 377 and 378. The validity of the titles to plots nos 333,374,375,376 is in question in this suit. Whereas the defence evidence established that the first batch was allotted to members of public by the County Council, it cannot be ascertained from the plaintiffs' evidence as to how such irregularity in the numbering of their four plots came into being; they did not assert that they were allocated the land by the County Council or by the Motosiet Farm. A critical statement was made by one of the plaintiffs as follows:

“That the 4 respondents were given extra plots at the market place after their respective parcels were ran short of their entitled shares among others.”

31. That statement was made by the 2nd plaintiff in this suit in paragraph 8 of a sworn affidavit which the plaintiffs filed in Kitale HCCC No 91 of 2010. At paragraph 2 of that affidavit the 2nd plaintiff herein also stated expressly as follows:

“That I have been granted authority by the 1st, 3rd and 4th respondents to swear on their behalf and on my behalf as per copy marked “DK1””

32. “DK1” mentioned above is a written authority to swear affidavit dated 12/11/2010 executed by the 1st, 3rd and 4th plaintiffs herein, granting to the 2nd plaintiff herein capacity to swear affidavits in Kitale HCCC No 91 of 2010 on their behalf as well as on his own behalf. It is therefore the case that the 2nd, 3rd and 4th plaintiffs having adopted the evidence of DW1 (the 1st plaintiff) they wholly endorsed the statements made in that affidavit as set out herein above. Those statements do not assist the plaintiffs' case herein. In fact, they irreparably damage it. Plot No 166 had been donated by one Cherige for the creation of a market centre and thus became public land to be administered for public purposes only by the Government of Kenya. It was claimed in Kitale HCCC No 91 Of 2010 that plot no 166 was placed under management of the County Council of Trans Nzoia. By conceding in their sworn evidence that the four suit plots that they claim were hived out of plot no 166 which had been reserved for a market



- and by failing to demonstrate all the steps either the Government of Kenya, the County Council or the Motosiet Farm followed to allocate them the plots, they fatally damaged their case. One thing that must be noted is that the area list was prepared by the Farm leadership. PW1 admitted that he was part of that leadership. The claim that he can be part of that leadership and miss out on allocation of land in the farm, to the extent of relying on a public utility to obtain land in his name, is incredible and is not supported by any evidence. Besides, no evidence was produced by the other plaintiffs to demonstrate that they missed land while Motosiet Farm was allocating land to its members.
33. This court is inclined to believe the plaintiffs' own evidence in the form of documents in this regard, but that evidence is adverse to their case. The plaintiffs produced P. Exh 5(e) which is an affidavit of the 1st plaintiff in Kitale HCCC NO 91 of 2010. It is quite ironical that while an ordinary Motosiet Farm member, Mr Cherige demonstrated genuine altruism in donating plot no 166 for the creation of a market centre, part of the leadership of the same Farm would, simultaneously with that donation, fail to get land to the extent of preying on the same land that Mr Cherige had donated and carving out plots for themselves therefrom. That act of excision could not happen unless an irregularity had occurred in the Farm records and the land registry records.
34. It was stated by the Court of Appeal in the case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR that where title was under challenge, it was incumbent upon the title holder to prove the legality of its acquisition. This court hardly thinks that the plaintiffs, whose titles to the suit plots have been challenged herein, have established the legality of the manner of their acquisition of the said titles. In this court's view, the plaintiffs' titles to the four plots emanated from thin air by way of manipulation of the area list and other farm records which they in their leadership capacities fraudulently presented to the Land Registrar. The protest by the plaintiffs in Kitale HCCC No 91 Of 2010 was that the plaintiffs herein who were defendants in that case, were directors of Motosiet Farm. It is only the plaintiffs in their capacity as leaders in Motosiet Farm, in conjunction with land registry officials and survey office officials, who could have influenced atrocious and illegal action such as carving out plots from a public utility plot and causing freehold titles to issue in their names and in the name of the 4th plaintiff respectively without following any procedure known to law. While saying this I am conscious that from the decisions in *Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others* [1996] eKLR and *Veronica Njeri Waweru & 4 others vs City Council of Nairobi & 2others* [2012] eKLR, it is clear that land surrendered by an individual for public utility purposes remains devoted to that public utility aspect and can not be irregularly appropriated by or alienated to private individuals in the manner the plaintiffs obtained title to the suit plots in this case. To allow such private acquisition of lands to stand is to allow anarchy to reign in the public land resource sector where racketeers will unduly enrich themselves at the expense of the public and the innocent persons who decide, or are compelled by planning requirements, to surrender their land or part thereof for public purposes. The upshot of the foregoing is that this court finds that the plaintiffs have failed to establish their claim in this suit and it is hereby dismissed with costs to the defendants.
35. For the avoidance of doubt I issue the following final orders:
- a. The plaintiffs' suit is hereby dismissed;
 - b. The plaintiffs' titles to plots nos Kaplamai Kachibora Block 7(Motosiet)/333, Kaplamai Kachibora Block 7(Motosiet)/374, Kaplamai Kachibora Block 7(Motosiet) /375 and Kaplamai Kachibora Block 7(Motosiet)/376 are hereby cancelled;
 - c. The Land Registrar shall rectify the register by expunging from the land register all entries relating to the plaintiffs' titles to plots nos Kaplamai Kachibora Block 7(Motosiet)/333,



Kaplamai Kachibora Block 7(Motosiet)/374, Kaplamai Kachibora Block 7(Motosiet) /375 and Kaplamai Kachibora Block 7(Motosiet)/376;

- d. The County Surveyor shall rectify the registry index map to expunge those plots from the map to restore the area of plot no 166 to its status before the plots nos Kaplamai Kachibora Block 7(Motosiet)/333, Kaplamai Kachibora Block 7(Motosiet)/374, Kaplamai Kachibora Block 7(Motosiet) /375 and Kaplamai Kachibora Block 7(Motosiet)/376 were carved out;
- e. The Deputy Registrar of this court shall submit the physical originals of the cancelled titles for laceration by the Land Registrar as he expunges the entries in the register and they shall not be released to the plaintiffs;
- f. The plaintiffs shall pay to the defendants the costs of this suit and interest thereon at court rates till date of payment.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 8TH DAY OF OCTOBER 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

