



REPUBLIC OF KENYA



Okeyo & 7 others v County Government of Kisumu & another (Environment & Land Case 222 of 2017) [2023] KEELC 17134 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 222 OF 2017**

E ASATI, J

MAY 4, 2023

BETWEEN

JOHN JACKTONE OKEYO 1ST PLAINTIFF
FRED JOHN OUMA 2ND PLAINTIFF
ANASTASIA BEATRICE ATIENO OKUMU 3RD PLAINTIFF
MARY ATIENO OTIENO 4TH PLAINTIFF
LAZARO OTIENO OPINO 5TH PLAINTIFF
MARTIN ANDIEGO ANDIEGO 6TH PLAINTIFF
FRANCIS ODUOR MBAJA 7TH PLAINTIFF
BENTER ADHIAMBO MAGUKE 8TH PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT
CITY MANAGER KISUMU COUNTY 2ND DEFENDANT

JUDGMENT

Introduction

1. This suit was filed on 7th July 2017 vide the plaint dated 30th June 2017. Later the plaint was amended and replaced with the amended plaint dated 30th June 2020 and filed in court on 17th August 2020. The plaintiffs' claim against the Defendants is for:
 - a. A permanent injunction restraining the defendants by themselves or their servants/agents from compulsorily acquiring the plaintiffs' parcels of land Kisumu/manyatta 'B'/2829 (1st Plaintiff),kisumu/manyatta "B"/1853 (2Nd Plaintiff), Kisumu/manyatta "B"/2566 (4Th



Plaintiff), Kisumu/manyatta “B”/2829, Kisumu/manyatta “B”/3272 (5 Plaintiff), Kisumu/manyatta “A”/2080(6th Plaintiff), Kisumu Kasule/4648 (8th Plaintiff), Kisumu/manyatta “A”/806 (3rd Plaintiff), Kisumu/ Manyatta “A”4255 (7th Plaintiff) And Kisumu/manyatta “B”/2566(9th Plaintiff).

- b. An order do issue to compel the Defendants to compensate the Plaintiffs for loss of actual structures, land and loss of future earnings from loss of structures on the land parcel numbers Kisumu/manyatta ‘B’/2829 (1st Plaintiff),kisumu/manyatta “B”/1853 (2nd Plaintiff), Kisumu/Manyatta “B”/2566 (4th Plaintiff), Kisumu/manyatta “B”/2829, Kisumu/manyatta “B”/3272 (5 Plaintiff), Kisumu/manyatta “A”/2080(6th Plaintiff), Kisumu Kasule/4648 (8th Plaintiff), Kisumu/manyatta “A”/806 (3rd Plaintiff), Kisumu/ Manyatta “A”4255 (7th Plaintiff) And Kisumu/manyatta “B”/2566(9th Plaintiff).
 - c. Costs of the suit.
 - d. Any other suitable and/or alternative relief this honourable court may deem fit and just to grant.
2. The Defendants only filed a Notice of Appointment of Advocates dated 24th July 2017 by the firm of Amondi & Co Advocates and nothing more.

The evidence

3. The Plaintiffs called one witness, one John Jacktone Okeyo, the 1st Plaintiff who testified as PW1. He adopted his witness statement dated 30th June 2017 and filed in court on 7th July 2017 as his evidence. In the said witness statement, he had stated that he is the owner of land parcel No. Kisumu/manyatta “B”/2829. That in or about the month of May 2015 the county government of Kisumu contracted Engineer Otieno Odongo and Company to survey Nyamasaria-Sije-Carwash Road with the purpose of tarmacking it. That the surveyors who were on the ground did their work, marked the affected plots but without substantively engaging the plot owners. That this was done quietly and in a secretive manner. That when the plot owners realized what was going on they demanded an explanation from the county government of Kisumu.
4. That the county government of Kisumu called consultative meetings with some stakeholders with a view to build consensus. That in the last of such meetings, the resolutions were that the road be re-designed to measure 9.5m in diameter so that no many people would be affected. That the issue of compensation be resolved. That however, the county government of Kisumu ignored the resolutions and remarked the plots for forceful acquisition. That a demand notice ref. DO/GEN/1/2015 sent to the county government elicited no response.
5. The witness produced various documents as exhibits namely; demand Notice dated 27/7/2015, title deeds for Kisumu/Manyatta “A”/806, Manyatta “B”/3272, Manyatta “B”/1853, Kasule/4648, Manyatta “B”/2566 Certificate of official search for Manyatta “A”/806, Manyatta “B”/1853, Manyatta “A”/4255, Kasule/4648, Manyatta “B”/ 2566, Manyatta “B”/3272 Copy of National Identity Cards for Anastasia B. A. Okumu, John Fred O. Okello and Francis O. Mbuja, Photographs, copy of authority to sue, letter dated 22/6/2017 addressed to the County Secretary county government of Kisumu.
6. PW1 testified further that the plaintiffs were not consulted when the road was being constructed. That the road is now complete and that the construction caused destruction to buildings. That he together with the other claimants have not been compensated. That he had been authorized by the other Plaintiffs to testify on their behalf. He prayed for an order for compensation. On cross examination



by Counsel for the Defendants he stated that he was not consulted about the construction of the road and that he did not have a copy of the agreement for compensation.

Submissions

7. After the close of the Plaintiffs' case, Counsel for the Plaintiffs filed written submissions on the case. Counsel submitted that the Defendants have no legal mandate to use the suit lands in any manner. Counsel relied on the provisions of section 26(1) of the [Land Registration Act](#) and the case of Jennifer Kobilu Kandie vs James Ondiek [2019]eKLR for this submission. He submitted further that the intended acquisition of land and consequent demolition is illegal, un-procedural, unlawful and defeats justice. That if the 1st Defendant is not barred from the same the Plaintiffs stand to suffer loss. Relying on the cases of Philip Ayaya Aluchio vs Crispinus Ngayo [2014]eKLR and Nakuru Industries Limited vs Mehta & Sons [2016]eKLR, Willesden Investments Limited vs Kenya Hotel Properties Limited NBI HCCC No.361 of 2000 and Mikidadi vs Khaigan and Another [2004]eKLR, Counsel submitted that the Plaintiffs were entitled to an award of general damages for trespass in the sum of Kshs 100,000,000/=, exemplary damages to be determined by the court, permanent injunction and costs.

Analysis and determination

8. The doctrine of compulsory acquisition of land also known as eminent domain refers to the power of the state to compulsorily acquire privately owned land for public use, ordinarily subject to compensation. In the present constitutional dispensation, the legal framework for compulsory acquisition is found primarily in [the Constitution](#) of Kenya 2010 and the [Land Act](#) particularly part VIII thereof.
9. In the present case, there is no evidence that the Defendants compulsorily did acquire or intended to compulsorily acquire the plaintiffs' land. There is no evidence connecting the title deeds produced as exhibits to the alleged road. There is no evidence as to how each of the suit lands has been affected by the road or how much of each of the Plaintiffs' land has been or is being threatened to be compulsorily acquired. There was no surveyor's report produced to show the relationship of the suit lands and the road, no valuation report to show the amount of damage or loss. The photocopies of photographs produced are not only so faint and illegible but have nothing to show that they are photographs of the site complained of.
10. Under sections 106 to 109 of the [Evidence Act](#) the burden of proof is on the Plaintiffs to prove their claim regardless of whether the Defendants filed Defence or adduced evidence. Section 107(1) of the [Evidence Act](#) provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”



11. The Plaintiffs have not discharged this burden. In the case of Charter House Bank Limited (Under Statutory management –vs- Frank N. Kamau [2016] e KLR the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

12. The relief sought are firstly, an order of permanent injunction restraining the Defendant from compulsory acquisition of the Plaintiffs’ land. PW1’s evidence was that the construction of the road was already complete. There is therefore nothing left to injunct. Court orders are not made in vain. The second relief sought was compensation for the compulsorily acquired land. As already indicated there is no evidence of compulsory acquisition of land. Counsel submitted for payment of an amount of Kshs.100,000,000/- as general damages for trespass. This was however, not supported by the pleadings or evidence.
13. My finding is that the Plaintiffs have not proved their claim on a balance of probabilities. The suit is dismissed. No order as to costs as the Defendants did not file defence or adduce evidence.

Orders accordingly.

JUDGEMENT READ AND DATED AT KISUMU, DELIVERED VIRTUALLY THROUGH TEAMS VIDEO CONFERENCING PLATFORM THIS 4TH DAY OF MAY 2023.

E. ASATI,

JUDGE

In the presence of:

Maureen - Court Assistant

Omondi Advocate for the Plaintiffs

No appearance for the Defendants.

