



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 610 OF 2013

SAMUEL H. KANYI 1ST PLAINTIFF

ISHMAEL GICHANGA KAGUONGO2ND PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KERUGOYA DEFENDANT

JUDGMENT

1. The Plaintiffs filed a further amended Plaint on 9th November, 2017 whereby they are seeking the following orders against the Defendant:
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· The Defendants do pay the Plaintiffs the real value of their plots as valued by Zan consult Registered Valuers in both plots i.e. Plot Number Kiine/Sagana/373/A75 as at to-days date as follows:-

PLOT NO. KIINE/SAGANA/373/A75

Current Open Market Value Kshs. 5,250,000/=

Cost toward Plan drawingKshs. 170,000/=

Cost of building material damaged/lost Kshs. 257, 750/=

Cost of fence broke timber yard Kshs. 125,000/=

Cost of stand premium and ground rent Kshs. 2, 880/=

TOTAL Kshs. 5,905,710/=

PLOT NO. KIINE/SAGANA/373/268 BE COMPENSATED AS FOLLOWS: -

Current Open Market Value Kshs. 5,250,080/=

Cost of the fence bindle for and timber shed Kshs. 125,450/=

Value of timber business for year based on average

Monthly profit Kshs. 151,200/=

Cost of stand premium and ground rent Kshs. 2, 880/=

TOTAL Kshs. 5,529,530/=

GRAND TOTAL Kshs. 11,415,240/=

- Costs of this suit with interest at court rates
- Any other or better relief of this Honourable Court may deem fit to grant.

2. Pursuant to leave granted by this Honourable Court on 25th October, 2018 the Defendant filed Her statement of Defence dated 2nd November, 2018.

3. The matter was heard viva voce on diverse dates between 18/02/2020 and 12/05/2021 and at the close of the defendant's case on the said on 12th May 2021, the parties through their advocates on record agreed to file written submissions in further support of their respective positions.

4. The plaintiffs filed their written submissions on 4th June, 2021 and a reply to the defendants' submissions on 6th July 2021 respectively.

5. The Defendant on the other hand filed her written submission on 21st June 2021.

PLAINTIFFS' CASE: -

6. The Plaintiffs called three witnesses who adopted their witness statements and produced the documents as listed in their list of documents dated 6th October, 2015.

7. The plaintiffs' case is that in 1988, they were jointly allocated by the defendant Plot Number Kiine/Sagana/268 for a period of 99 years whereon they set up a timber business which used to generate for them a profit estimated at Kshs. 50,000 per month.

8. They testified that they were paying the rent and annual rates. Upon allocation of the said plot by the defendant, they planned to do construction and they bought building materials worth Ksh.275, 150/- They also embarked on drawing the architectural plan and actual drawing which costed them Kshs. 120,000/- and Kshs. 50,000/- respectively.

9. They testified that as they prepared to build on the suit land, the real owner emerged and instituted Suit Number 154 of 1991 at the High Court of Kenya at Nyeri against all those who had been allocated plots in his land.

10. They testified that before the High Court at Nyeri, they were ordered to vacate the plot whereupon they lost a lot of timber yard. The said stated that after the case was heard, Judgment was given against the county council who were ordered to pay costs.

11. They testified that they later applied to the County Council for compensation but failed to do so.

12. They prayed that the Defendant be ordered to compensate them and pay costs for the loss incurred.

DEFENDANT'S CASE: -

13. The Defendant called one witness who adopted his written statement dated 22nd October 2019.

14. In the said statement, the witness stated that he is employed as the Assistant Surveyor 1.

15. He stated that according to the records in the Ministry of lands Housing and Urban Development, land parcel No. Kiine/Sagana/373 did not give rise to plot no. A75 or plot No. 268 and that purported plots are non-existent and were never allocated by the defendant.

16. He stated that he was aware that the Defendant had not written to the plaintiffs to confirm availability of land for compensation of the plaintiffs.

17. He stated that the defendant would suffer gravely in the event the prayers sought are granted as the same would lead to unjust enrichment of the plaintiffs.

PLAINTIFFS' SUBMISSIONS: -

18. The plaintiff submitted that during the hearing of the Nyeri case and after realizing that they had allocated private land/plots to innocent persons who had embarked on developing the plots, the Defendant wrote to them promising compensation with allocation of other alternative plots.

19. They submitted that the promise by the defendant was not honoured thereby compelling them to institute this suit.

20. They submitted that they have proved their claim and produced evidence including a valuation report which had not been challenged by the defendant.

21. They submitted that the defendant did not offer reasonable defence to their claim and that the same remains unchallenged and/or uncontroverted

22. They prayed that judgment be entered in their favour as prayed.

DEFENDANT'S SUBMISSIONS: -

23. The defendant submitted that the plaintiffs had not produced the applications for allocation of the suit plot/land as well as the allotment letters indicating that the suit land had been rightfully allocated to them.

24. She further submitted that the plaintiffs had also not produced receipts to prove payment of rates and rent as required by law.

25. She submitted that it was established during the hearing that the plaintiffs did not undertake due diligence before acquiring the plots in question and were therefore reckless and not deserving the others sought.

26. She submitted that as far as the claim for compensation is concerned, the plaintiffs chose not to collect their belongings during the eviction exercise and can only have themselves to blame since they also confirmed in their testimony that they were not prevented from collecting their belongings.

27. She also submitted that receipts and records for the alleged profit of Ksh. 50,000 per month had not been produced as well as those of the building plans.

28. She submitted that the court ought not to rely on the valuation report produced from an unqualified person who gave estimates based on what he was verbally told existed and relied on no documentary evidence while preparing the said valuation.

29. She prayed that the plaintiff's case be dismissed as the plaintiffs cannot purport to enforce the judgment in the Nyeri matter in this case.

ANALYSIS: -

30. I have considered the pleadings and rival submissions and find that the following issues comment for determination: -

a. Whether the Plaintiffs were allotted the plots in dispute by the defunct Kirinyaga County Council.

b. Whether the Plaintiffs are entitled to compensation.

c. Who should bear the costs.

WHETHER THE PLAINTIFFS WERE ALLOTTED THE PLOTS BY THE DEFUNCT KIRINYAGA COUNTY COUNCIL: -

31. The plaintiffs claimed that they were allotted the suit lands by the defunct Kirinyaga County Council in the year 1988.

32. In her submissions, the Defendant contend that the plaintiffs did not produce the application for allotment and the letter of allotment of the said plots as well as receipts for payment of rates and rent to prove that the suit lands had indeed been rightfully allotted to them

33. During cross examination, the Plaintiffs testified that they had the said application and letter of allotment even though the same was not produced.

34. It is trite law that whoever alleges must prove.

35. I have looked at the letters addressed to the Plaintiffs by the County Council of Kirinyaga which are listed as numbers 1 and 2 in the Plaintiffs' bundle of documents. The said letters were granting the plaintiffs authority to develop the said plots subject to complying with the requirements of the Council's Building By-laws.

36. I have also looked at the judgment delivered on 3rd February 2009 in Nyeri High Court Civil Case No. 15 of 1991 which is listed as number 5 in the list of documents. The case for the defendants therein who are the plaintiffs herein was that the Kirinyaga County Council had allotted them the suit land and thus were occupying it legally and not as trespassers.

37. At page 8 of the said judgment, it is evident that the clerk of the defunct Kirinyaga County Council testified as a witness in support of the case for the Defendants who are the Plaintiffs herein.

38. It is therefore untruthful of the Defendant's witness to claim that the said plots do not exist and that the same were not allotted to the plaintiff.

39. Given that required standard of proof is proof on a balance of probabilities, I am convinced from the materials tendered by the Plaintiffs that indeed they were allotted the suit lands.

WHETHER THE PLAINTIFFS ARE ENTITLED TO COMPENSATION: -

40. The plaintiffs' case was that upon allocation, they prepared to build and thus they brought building materials worth Ksh.275, 150/-,

embarked on drawing whereby the architectural plan and actual drawing cost Kshs. 120,000/- and Kshs. 50,000/- respectively.

41. They testified that as they prepared to build on the suit land the owner instituted Suit Number 154 of 1991 at the High Court of Kenya Nyeri against all those who had been allocated plots in his land.
42. They testified that before the High Court at Nyeri, they were ordered to vacate the plot whereupon they lost a lot of timber yard. The said case was decided against the county council who were ordered to pay costs.
43. They testified that they later applied to the County Council for compensation who had failed to do the same.
44. The defendant's position as far as the claim for compensation is that during the eviction the plaintiffs chose not to collect their belongings and can only have themselves to blame since they also confirmed that they were not prevented from collecting their belongings.
45. The defendant submitted that receipts and records for the alleged profit of Ksh. 50,000 per month had not been produced as those of the building plans.
46. The plaintiff submitted that during the hearing of the Nyeri case, the defendant having realized that they had allocated plots to innocent persons who were embarking on developing the plots wrote to them promising compensation by allocating alternative plots. The said promise was not honoured thereby forcing them to institute this suit.
47. From the letters listed as items number1 & 2 and produced as p-exhibit NO.1 and 2 in the Plaintiffs bundle of document, I am convinced that indeed the Plaintiffs had embarked on developing the plots after they were granted authority to develop the same upon complying with the requirements of the Council's Building By-laws.
48. I am also convinced that from the Judgment in the High Court case (NYERI) mentioned above, it is not in doubt that the Plaintiffs were indeed evicted from the plots allegedly allocated to them by the defunct County Council of Kirinyaga.
49. The Plaintiffs seek for compensated as per the Valuation Report listed as number4 in the Plaintiff's bundle of documents amended on 06/11/2017
50. The defendant submitted that this Honourable Court ought not to rely on the valuation report produced by an unqualified person who gave estimates based on hearsay on what he was verbally told existed and relied on no documentary evidence while preparing the said valuation.
51. The Plaintiffs in Reply to Defendant's Submission filed on 6th July 2021 contend that the Defendant is prevented from degrading the valuer who gave evidence in court since the said valuer gave his proper address, qualification and all other necessary details required for a professional to produce.
52. During cross examination of PW3, he admitted that he did not have a practicing licence and that he based the report on the costs as explained by the clients (plaintiffs herein) and that there were no supporting documents such as books of accounts relied on.
53. **Section 21 of the Valuers Act** provides as follows:
 - (a) *No individual shall carry on business as a practicing valuer unless he is a registered valuer;*
 - (b) *no partnership shall carry on business as practicing valuers unless all the partners whose activities include the doing of acts by way of such practice are registered valuers;*
 - (c) *no body corporate shall carry on business as valuers unless the directors thereof whose duties include the preparation of valuations in respect of any type of movable or immovable property are registered valuers.*
54. It is evident from the above provision that *an individual can only carry on the business of a practicing valuer if he is a registered valuer. There was no evidence showing that PW3 is a registered valuer.*
55. *In the case of **Thomas Kimagut Sambu v National Land Commission & 2 others [2018] e KLR of the Honourable Court held as follows: -***
 - “15. ... the intention of parliament in framing Section 21 in mandatory terms and inclusion of a section creating an offence and punishment for contravening the section was to exclude persons who are not qualified and registered as valuers from practicing as such.
 16. *Based on the foregoing it is my finding that the valuation by Prime Land Limited is incurably defective and inadmissible for contravening Section 21 of the Valuation Act. Having so found, I do not find it necessary to delve into the merits of the report. Suffice it to say that parties who seek to rely on expert witnesses ought to be more diligent in ensuring that the witnesses meet all legal requirements.”*
56. From the foregoing, it is evident that the Valuation Report tendered as evidence is incurably defective and thus inadmissible in evidence

57. It is therefore my view that even if this Honourable court were to order compensation, there is no material to enable it arrive at the same. This is especially because the plaintiffs are claiming special damages.

58. In the case of **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] e KLR** the Court of Appeal held that: -

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) e KLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) e KLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (Ur). In the latter case this Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.

The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.”

CONCLUSION: -

59. From the foregoing it is my considered view that the Plaintiff’s suit is without merit as the same has not been proved to the required standard of balance of probabilities. The same is hereby dismissed with costs to the defendant. It is so ordered.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA
THIS 4TH DAY OF MARCH, 2022.**

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HON. E.C CHERONO

ELC JUDGE

In the presence of:-

1. Ms Nyangati holding brief for Kibanya for Defendant
2. Plaintiff/Advocate – absent
3. Kabuta, Court clerk – present.