



**Kamau & 7 others v County Government of Kiambu (Environment & Land Case 9 of 2019) [2022] KEELC 14513 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 9 OF 2019  
JG KEMEI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**JAMES KAMAU ..... 1<sup>ST</sup> PLAINTIFF  
LUCY MUGO ..... 2<sup>ND</sup> PLAINTIFF  
JOSPHAT IRUNGU ..... 3<sup>RD</sup> PLAINTIFF  
WILLIAM MAINA ..... 4<sup>TH</sup> PLAINTIFF  
KINYUA KIHOTO ..... 5<sup>TH</sup> PLAINTIFF  
JANE MWANGI ..... 6<sup>TH</sup> PLAINTIFF  
JOHN GATHERU ..... 7<sup>TH</sup> PLAINTIFF  
ALBERT THAKA ..... 8<sup>TH</sup> PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KIAMBU ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs instituted this suit against the defendant vide a plaint dated January 15, 2019 and prayed for judgment against the defendant for;
  - a. A permanent injunctive order restraining the defendants and/or their agents, employees from demolishing Kahawa Sukari Plots No 3113, 297, 3114, 1194, 3096, 295, 3132 and LR 3/536.
  - b. An order compelling the defendant to issue the plaintiffs the relevant permits and approvals to operate business shops on Kahawa Sukari Plots No 3113, 297, 3114, 1194, 3096, 295, 3132 and LR 3/536.
  - c. Costs of the suit.



2. The plaintiffs' case is that they are the legal proprietors of Kahawa Sukari Plots No 3113, 297, 3114, 1194, 3096, 295, 3132 and LR 3/536 (hereinafter the suit properties) having been in occupation thereon for more than 20 years. That the plaintiffs set up shops in the residence since there were no shops to service the residents and the defendant duly issued them with business permits and licenses to that effect. That on December 18, 2018, the plaintiffs were shocked to receive notices of demolition from the defendant impugning their various shops as illegal erections on the said plots. The plaintiffs challenge the said notices as being arbitrarily issued and without according an opportunity to be heard and if not stopped, they will be rendered homeless and without sources of income.
3. The defendant entered appearance through its County Attorney and filed a statement of defence dated October 1, 2019. It denied the plaintiffs' claim as pleaded and in particular that the plaintiffs are the registered owners of the suit properties. That the issuance of permits and license to the plaintiffs does not convey any rights of occupancy and ownership. That the developments done on the suit properties were done without permissions, approvals and/or following the conditions stipulated under part V of the *Physical Planning Act* hence the demolition notices. That the plaintiffs were granted 7 days grace to period to remove their illegal structures failing which the defendant would enter the suit land and execute the enforcement notices. The defendant termed the suit frivolous, vexatious and an abuse of court process and urged the court to dismiss it with costs.
4. On behalf of the plaintiffs, James Kamau the 1<sup>st</sup> plaintiff testified solely as PW1. He relied on his witness statement dated January 15, 2019 as his evidence in chief and produced the document as listed in the list of documents of even date as PEx 1-3. He testified that he bought plot Kahawa Sukari 3113 in 1989 and built his home thereon where he resides with his family. That he also set up shops on the property upon obtaining necessary permits from the defendant to serve the estate residents. That on December 18, 2018 the county physical planner visited the suit properties and issued demolition notices to him and the rest of the plaintiffs.
5. On cross-examination, PW1 stated that para 7 of the demolition notice required an aggrieved person to refer the matter to Liaison Committee though they did not appeal to that Committee. He conceded that they did not have any approval from the county government.
6. In re-exam, PW1 explained that the notice shows that one may appeal to the High Court or the Liaison Committee. That he did not have an approval because the welfare being Kahawa Sukari declined to issue approvals first before the Council's approval.
7. The plaintiffs' closed their case at that point as well as the defendant who did not call any witness.
8. Parties elected to file their final submissions. The plaintiffs filed their submissions dated June 8, 2022 through the firm of Chege & Mageto Advocates whereas Legal Counsel JJ Cheserek filed the defendant's submissions dated June 22, 2022.
9. The plaintiffs drew three issues for determination; whether the defendant's action was unlawful and infringed the plaintiffs' rights under articles 40 & 47 of the *Constitution* of Kenya; whether the plaintiffs are entitled to the reliefs sought and who bears costs. It was submitted that the purview of permanent injunction was discussed in the case of *Kenya Power & Lighting Co Ltd v Sheriff Molana Habib* (2018) eKLR that such an injunction fully determines the rights of the parties before court. That it is granted upon the merits of the case after adduction of evidence. They highlighted the provisions of articles 40 & 47 *Constitution* of Kenya and section 38 *Physical Planning Act* and maintained that the enforcement notices ought to have been issued after proper consultations with the plaintiffs. That the impugned notices were issued pursuant to a legal instrument which was not in force at the time of putting up the



structures as the Physical Planning Act was enacted in 1996 yet the plaintiffs have been in occupation of the suit properties since 1980s.

10. The plaintiffs relied on the Supreme Court case of Samuel Kamau Macharia & anor v Kenya Commercial Bank Ltd & 2 others on application of laws and argued that the issuance of the enforcement notices was unlawful and un-procedural. They implored the court to allow their case as prayed with costs.
11. The defendant drew three issues for determination to wit; whether the planning enforcement notice was challenged in the right forum; whether the suit raises a reasonable cause against the defendant and whether the prayers sought are merited. On the first issue, it was submitted that PW1 conceded not appealing to the Liaison Committee in accordance with sections 13 and 15 of the repealed Physical Planning Act and as such this court lacks jurisdiction to entertain the suit.
12. Secondly the defendant submitted that the suit does not raise any reasonable action against it as PW1 confirmed that the developments on the suit properties were done without approvals from the defendant. Last but not least, the defendant was emphatic that the plaintiffs are not entitled to the orders sought as the court lacks jurisdiction on the basis of the doctrine of exhaustion of statutory remedies. The court was urged to dismiss the suit with costs in line with this court's decision in Thika ELC No 81 of 2020, Angela Mbugua & 4 others v KO Holdings Ltd & 2 others where the court struck out the plaintiffs' suit for want of jurisdiction.
13. The main issue for determination is whether the plaintiffs' suit is merited. Before delving to that, the defendant has resisted this honorable court's jurisdiction to entertain the suit as filed because the plaintiffs did not exhaust the statutory remedies under the repealed Physical Planning Act. This is not the first time the defendant has impugned the court's jurisdiction in this matter. Vide a preliminary objection dated February 25, 2019 the defendant objected to the court's jurisdiction to entertain this matter. The preliminary objection was canvassed by written submissions and the court rendered its ruling on June 18, 2019 and found the preliminary objection unmerited and dismissed it with costs. There is no evidence of any appeal or review of the said ruling and therefore the issue of jurisdiction is settled.
14. It is trite that he who alleges must prove. Sections 107 and 108 of the Evidence Act cap 80 provide for burden of proof and who is to prove it that;
  - “ 107. Burden of proof
    - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. Incidence of burden  
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
15. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the defendant “on a balance of probabilities.”



16. The plaintiffs according to para 3 of their plaint averred that they are the legal proprietors of the suit properties and have been in occupation thereon for over 20 years. In his testimony, PW1 produced a copy of Planning Enforcement Notice SNo 08730 directed to him as the proprietor of plot no 1323 accusing him of putting up a commercial development without approval. The said notice required him to demolish the structure and return the ground to its original state. Notably in his plaint and witness statement, PW1 pleaded and testified that his plot is No 3113 and not plot 1323 cited in the enforcement notice. The evidence tendered in court is not in tandem with the pleadings filed herein.
17. On cross-examination, PW1 confirmed not having the requisite approval from the defendant. There is no evidence on record for similar notices served upon the rest of the plaintiffs as claimed in the plaint.
18. Additionally, the plaintiffs pleaded that the defendant has all along been issuing business permits and licenses to them to operate their shops on the suit properties. The supporting evidence to that end is PEx3 - copies of business permits issued to Symon Kinyua Kihooto, the 5<sup>th</sup> plaintiff for plot No 3096 for the years 2011, 2012, 2016, 2017, 2018, 2019, 2020 & 2021; 2019 business permit for plot 1 in favor of Elizabeth Njoki Irungu who is not a party herein; 2019 2020 & 2021 permits for plot 3114 issued to Margaret Wambui who is also not a party in the suit. PW1 did not tender his own approval to run his business, if at all. The other exhibits are the certificates of lease in the 3<sup>rd</sup> plaintiff's name issued on November 10, 2004 and an allotment certificate for plot 3096 in favor of the 5<sup>th</sup> plaintiff.
19. In the case of *Njenga v Njenga* (1991) KLR 401 Bosire J (as he then was) held that an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principle. The plaintiff bears the legal burden to prove his case by way of cogent evidence to warrant an order for permanent injunction.
20. Lastly in the case of *Kenya Power & Lighting Co Limited v Sheriff Molana Habib* [2018] eKLR it was held that 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.
21. It is observed that the 2<sup>nd</sup> – 8<sup>th</sup> plaintiffs did not led evidence in support of their case. There is no evidence that the 1<sup>st</sup> plaintiff held any authorization from the rest to testify on their behalf. Save for the 2<sup>nd</sup>, 3<sup>rd</sup> (copy of title was annexed) and 5<sup>th</sup> Plaintiff (allotment plot certificate) none of the plaintiffs led evidence to support their averment as contained in para 3 of the plaint that they are the registered owners of the suit lands Kahawa Sukari plot Nos 3113, 297, 3114, 1194, 3096, 295, 3132 and LR 3/536.
22. In addition, the enforcement notice on record is against plot No 1323 which plot does not appear as part of the suit lands. There is no cause of action against parcel No 1323.
23. The totality of the forgoing is that the plaintiffs did not discharge the burden of proof required of them in this case.
24. The suit is for dismissal with no orders as to costs.
25. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**



**JUDGE**

**Delivered online in the presence of;**

Ms Kiogothi HB Ms Chege for 1<sup>st</sup> – 8<sup>th</sup> Plaintiffs

Defendant – Absent

Court Assistants – Phyllis Mwangi / Oliver

