



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 335 OF 2014

CHARLES KINYUA KAGIO.....1ST PLAINTIFF

ESTHER NJERI KAGIO.....2ND PLAINTIFF

FRANCIS KIBE WANJOHL.....3RD PLAINTIFF

=VERSUS=

THE HONOURABLE ATTORNEY GENERAL ON BEHALF OF THE

MINISTRY OF STATE FOR PROVINCIAL AND INTERNAL SECURITY AND

MINISTRY OF STATE FOR DEFENCE.....DEFENDANT

JUDGMENT

1. The dispute in this suit stems from demolitions carried out by the Government of Kenya on parcels of land around Moi Air Base, Eastleigh, Nairobi, in November 2011. The three plaintiffs in this suit claimed to be developers and owners of some of the structures which were demolished. Aggrieved by the demolitions, they brought this suit on 27/6/2012, through a plaint dated 28/5/2012, seeking the following

reliefs:

a) Special damages with interest as follows:-

First Plaintiff.....Kshs. 54,404,000

Second Plaintiff.....Kshs. 196,960,000

Third Plaintiff.....Kshs 73,576,000

b) General damages and aggravated damages to be assessed by the court.

c) Costs of the suit with interest from date of award.

2. At the commencement of the hearing of the suit on 7/12/2017, Mr Ngaii Gikonyo, counsel for the three plaintiffs, orally applied to withdraw the claim by the 3rd plaintiff, Francis Kibe Wanjohi, on the ground that the said 3rd plaintiff had died and none of his personal representatives had come forward to pursue the claim. The request was granted. What therefore remains to be determined in this Judgment are the claims by the 1st and 2nd plaintiffs respectively. The 1st and 2nd plaintiffs are son and mother. They are son and widow, respectively, of the late Fredrick Kagio Kinyua.

Plaintiffs' Case

3. The case of the 1st plaintiff was contained in the joint plaint dated 28/5/2012; the reply to defence dated 22/8/2012 the written witness statement dated 15/6/2012; the oral and documentary evidence tendered at the hearing; and the joint written submissions dated 11/7/2020. In summary, his case was that he was at all material times the registered proprietor of Land **Reference Number 209/12602 situated in Section 3 Eastleigh, Nairobi**. He was given the property by his later father, Fredrick Kagio Kinyua, in 2008. Upon the property being registered in his name, he charged it to **M/s Savings and Loans Kenya Limited** in October 2008 to secure a loan of Kshs7,500,000. The loan was obtained

to finance the construction of a block of flats on the said land. The relevant building plan were approved by the City Council of Nairobi. He completed construction works in 2009 and rented out the flats to tenants. The building he erected had five floors. At all material times, he was getting monthly rental income of Kshs 294,000/-. In October 2009, the suit property was valued by M/S Propertywise at Kshs 35,000,000.

4. The 1st plaintiff further contended that on the morning of 22/11/2011, agents of the Government of Kenya cordoned off the area, descended on the block of apartments with bulldozers and demolished it. By the time his lawyers procured a prohibitory court order, demolition had been completed. He suffered total loss. He blamed the Government of Kenya for the loss and sought special and general damages from the Government.

5. The 1st plaintiff particularized her loss as follows:

a) Loss of Property..... Kshs 35,000,000

b) Loss of Income from

1/12/2011 to 31/5/2012..... Kshs 1,764,000

c) Loss of Income from 31/5/2012

for 5 years..... Kshs 17,400,000

Total Kshs Kshs 54,404,000

6. The case of the 2nd plaintiff was contained in the joint plaint dated 28/5/2012; the joint reply to defence dated 22/8/2012; her written statement dated 15/6/2012; the oral and documentary evidence tendered at the hearing; and the joint written submissions dated 1/7/2020. Her case in summary was that she was at all material times the proprietor of two parcels of land, namely, **Land Reference Number 209/7259/235** and **Land Reference Number 209/7259/235**, both situated in Biafra Estate, Nairobi. The two properties were 99 year leases from the City Council of Nairobi. With the authority of the City Council, she erected on the said parcels of land two blocks of flats each with five floors. At all material times, she was getting a monthly rental income of Kshs 1,060,000 from the two blocks of flats.

7. Like the 1st plaintiff, she contended that agents of the Government of Kenya descended on the two blocks of apartments and demolished them without prior notice to her. She suffered total loss which she particularized as follows:

a) Loss of the PropertiesKshs 127,000,000

b) Loss of Income from

1/12/2011 to 31/5/2012 at a

monthly rent of Kshs 1,060,000.....Kshs 6,360,000

c) Loss of Income from 31/5/2012

for 5 years.....Kshs 63,600,000

8. The two plaintiffs contended that the acts of the then Ministry of State for Provincial and Internal Security and the then Ministry of State for Defence were illegal, unjustified, callous, malicious, abuse of power, reckless, negligent, abuse of the rights of the plaintiffs, and unconstitutional. They added that the demolitions were done without any warning or notice to the plaintiffs. Consequently, they sought the above reliefs.

Defendant's Case

9. The defendant's case was contained in the statement of defence dated 6/8/2012; the witness statement by Major A. O Aloka (as he then was) dated 4/9/2013; oral and documentary evidence tendered at the hearing of the case; and the joint written submissions dated 18/8/2020. In summary, the defendant denied all the averments made in the plaint and put the plaintiffs to strict proof.

10. Without prejudice to the above denial, the defendant contended that if at all the plaintiffs had constructed or erected any structures near Moi Air Base, Eastleigh, the structures were illegal, contrary to public policy, and a violation of the International Civil Aviation Convention on the Regulation of Flight Airspace and the said structures were a threat to national security and could not be protected by the law. It was the defendant's case that any construction near the Moi Air Base, Eastleigh, was subject to the International Civil Aviation Convention which was locally implemented by the Government of Kenya through its various agents on civil aviation. He contended that the plaintiff's structures were illegal and contrary to public policy, hence their removal by the Government was lawful.

Analysis & Determination

11. I have considered the parties' respective pleadings, evidence, and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties to this suit did not agree on a common statement of issues to be determined by the court. Based on the pleadings, evidence, and submissions placed before court, the following are the five key issues falling for determination in this suit: (i) **Whether the demolitions giving rise to this suit were carried out by the Ministry of State for Provincial & Internal Security and/or the Ministry of State for Defence;** (ii) **Whether the structures relating to this suit were duly approved and lawfully existed within the framework of the then applicable laws and regulations;** (iii) **Whether the defendant is liable for the alleged demolitions;** (iv) **If the answer to (iii) above is in the affirmative, are the pleaded reliefs available to the plaintiffs against the defendant?;** and (v) **Who should bear costs of this suit?** I will make brief sequential pronouncements on the five issues in the above order.

12. The first issue is whether the demolitions giving rise to this suit were carried out by the two Ministries identified in the plaint. The defendant pleaded at paragraph 7 of his defence that agents of the two Ministries did not take part in the demolitions. However, DW1, Col Apollo Aloka, subsequently testified that Land Reference Number 209/12602 was located adjacent to the threshold of Runway No 6 and right on the fence of the Air Base. He added that the land was located within a transitional surface. It was his evidence that no obstacle should be more than 8 metres high in a transitional surface. It was his further evidence that previously, the land had a multi-storey building.

13. With regard to Land Reference Numbers 209/7259/234 and 209/7259/235, DW1 testified that the two plots were inside the protected surfaces of Moi Air Base and fell within the approach funnel into the Air Base Aerodrome. It was his evidence that no obstacle was supposed to be in the approach funnels but the two plots had multi storey buildings on them.

14. DW1 confirmed in his evidence-in-chief that the multi-storey buildings on the three plots were removed on 22/11/2011 at the instance of a Multi-Agency Task Force of the Government of Kenya because they posed grave risk to flights into and out of Moi Air Base. He added that the buildings were also a threat to the security of the Head of State whose Aircraft was domiciled at Moi Air Base.

15. In addition to the evidence of DW1, Mr Charles Kinyua Kagio [the 1st plaintiff] who testified as PW1 stated that he witnessed the demolitions. When he went to the scene, he found "hundred of armed security men from Kenya Airforce, Regular and Administration Police, who had cordoned off the area". There were several bulldozers demolishing buildings and people were running about trying to salvage whatever they could.

16. From the above evidence of PW1 and DW1, there is no doubt that the demolitions giving rise to this suit were carried out by a Multi-Agency Task Force under the armed command of personnel from the two Ministries on whose behalf the Attorney General has been sued. It is therefore my finding that the two Ministries participated in the demolitions and the Attorney General was properly sued on their behalf.

17. The second issue is whether the structures relating to this suit were duly approved and lawfully existed within the framework of the applicable laws and regulations. The impugned demolitions were said to have taken place in November 2011. The 1st plaintiff testified that he erected a five floor storey block of apartments on **Land Reference Number 209/12602** between the years 2008 and 2009. Construction works were completed in 2009. On her part, the 2nd plaintiff did not specify when she erected the multi-story blocks of apartments on **Land Reference Numbers 209/7259/234** and **235**. She however exhibited two Nairobi City Council Leases, both dated September 2003. It would be logical, therefore, to proceed from the premise that the five-storey blocks relating to the 2nd plaintiff's two parcels of land were erected between 2003 when she got the City Council Leases and 2011 when they were demolished.

18. One of the key applicable laws at the material time was the **Physical Planning Act of 1996**. Under the said **Act**, together with the Regulations made thereunder, every physical development in the City of Nairobi was subject to approvals by the City Council of Nairobi. Regrettably, the two plaintiffs did not tender evidence of any approvals granted by the Council in relation to the demolished structures. To this court, this was a grave omission on part of the plaintiffs because the fulcrum of the defendant's defence was that the demolished structures were illegal, contrary to public policy, and contravened the requirements of the **International Civil Aviation Convention**. It was therefore the duty of the plaintiffs, under **Section 107 of the Evidence Act**, to tender evidence of approvals under the Physical Planning Act and under any other applicable law to prove the lawfulness of the demolished structures. They did not discharge that burden.

19. Secondly, the 1st plaintiff's title relating to **Land Reference Number 209/12602** contained various Special Conditions relating to approvals. Under Special Condition No 1, no buildings were to be erected on the land without the prior written approvals from the Commissioner of Lands and the Local Authority. No such prior written approvals were exhibited by the 1st plaintiff.

20. Thirdly, under Special Condition No 5, the land and the buildings thereon were to be used for "one private dwelling house (excluding a guest house)". Evidence by PW1 was that he erected a five storey block of apartments on the suit property with 3 ground floor shops, 5 two-bedroom flats, and 8 one-bedroom flats. No change of user was exhibited by the 1st plaintiff to demonstrate that there was a duly approved change of user or that the new structures were approved by the relevant authorities.

21. With regard to the 2nd plaintiff, her leases indicated that what she was granted by the City Council of Nairobi were dwelling houses within Pumwani Relief Scheme Tenant Purchase Housing Scheme. Clause 4 of the Leases prohibited the 2nd plaintiff against making alterations or additions to the demised premises without the written approval of the Council. No evidence of approvals authorizing change of user and/or erection of the five storey blocks of apartments were exhibited by the 2nd plaintiff to challenge the defendant's defence to the effect that the demolished structures were illegal.

22. The totality of the foregoing is that the plaintiffs cannot be said to have discharged their burden of demonstrating to the court that the structures giving rise to this suit were duly approved and lawfully existed under the relevant legal frameworks and regulations.

23. The Attorney General focused on the absence of approvals under **Section 9** of the repealed **Civil Aviation Act [Cap 394]**. I will not rest my finding on that limb of the defence because the Attorney General was obligated to place before this court evidence of a gazette notice published by the relevant Minister under **Section 9** of the **Repealed Civil Aviation Act [Cap 394]** to indicate that the land on which the demolished structures were erected was within a declared area. He did not exhibit the gazette notice.

24. The totality of the foregoing is that there is no evidence to demonstrate that the structures relating to this suit were duly approved and lawfully existed under the applicable legal frameworks and regulations. That is my finding on the second issue.

25. The third issue is whether the defendant is liable for the impugned demolitions. The Attorney General was sued on behalf of two Ministries. For liability to attach against the Attorney General, the plaintiffs were obligated to demonstrate that the demolished structures were duly approved, lawfully existed, and should not have been removed by the Government. The plaintiffs have not discharged that obligation. In the circumstances, the court does not have a proper basis for holding the Attorney-General liable for the removal of the structures.

26. In light of my finding on the second and third issues, it follows that none of the reliefs sought by the two plaintiffs in this suit is available to them.

27. Lastly, this suit is a direct result of failures on part of regulatory state agencies. The structures giving rise to the demolitions which culminated in this suit would not have been erected had the relevant state agencies discharged their functions vigilantly. The plaintiffs have suffered partly as a result of that state of affairs. I will not, in the circumstances, award costs to the Attorney General.

Disposal Orders

28. In the end, it is my finding that the 1st and 2nd plaintiffs have failed to prove their case against the defendant as required under the law. Their suit is accordingly dismissed for lack of merit. For avoidance of doubt, the suit by the 3rd plaintiff was withdrawn on 7/12/2017. Parties will bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Gikonyo for the Plaintiffs

Ms Fatma holding brief for Mr Eredi for the Defendant

Court Assistant: Hilda