



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CAUSE NO. 650 OF 2016

GODFREY NJOROGI NDUNG’U.....1ST PLAINTIFF

FRANCIS GACHAGO KINGORI.....2ND PLAINTIFF

NELSON OUKO ODINGA.....3RD PLAINTIFF

(Suing on their own behalf and on behalf

of 32 other members of Materetha Self Help Group)

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT

PETER KAMAU MUGI.....2ND DEFENDANT

CHARLES OBOI.....3RD DEFENDANT

CHEGE KIMONDO.....4TH DEFENDANT

JOSEPH NTHENGE.....5TH DEFENDANT

ONESMUS MAKUA.....6TH DEFENDANT

JULIUS NGOLI.....7TH DEFENDANT

NDOLO KITUO MTHULI.....8TH DEFENDANT

NATIONAL LAND COMMISSION.....9TH DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint dated 10th June 2016 amended on 19.2.2018. The plaintiffs’ case as per their pleadings is that in the year 1994, 5 acres of land was set aside for the Soweto Open Air Market situated in Kayole and members were allocated stalls measuring 10 by 10 feet and there were issued with certificates of stall ownership by the then chairman Mr. Okeyo Mbata. In the year 1996, the market space was subdivided by surveyors creating space for: Soweto Police Station, Soweto Social Hall, plots referred to as *Mradi wa Mwenje*, and Soweto Air market. However, the above named amenities reduced the market space and traders were left to squeeze in the small space left where they were to put up temporary structures.

2. It was further pleaded that the 2nd to 8th defendants dispossessed them (plaintiffs) of the land and put up permanent structures in total disregard use of public land. The plaintiffs stated that they have written to relevant administrative authorities over the years regarding the issue of the illegally constructed structures, dispossession of their allocated stalls and survey of the suit land but their letters have gone unresponded. Based on this, the plaintiffs sought the following orders:

i. A declaration of this Honourable Court that the land on which Soweto Open Air Market sits is public land and the 2nd to 8th defendants to demolish the structures they have developed on Soweto Open Air Market ground.

ii. An order of this Honourable Court directing that the 1st defendant to survey Soweto Open Air Market ascertaining its actual acreage and, to issue a Land Reference Number and to have it cleaned and restored to hygienic environment fit for business trading as it ought to be.

iii. An order of this Honourable Court directing the 9th defendant to cause the registration and to issue a Land Reference Number over the suit parcel intended for Soweto Open Air Market.

iv. Costs of this suit.

3. The 1st defendant filed its statement of defence dated 10.8.2016, pleading that the plaintiffs have no proprietary interests in the suit land, adding that it holds the suit land in trust as a public utility. Equally, the 2nd to 8th defendants denied the claim of the plaintiffs vide their statement of defence dated 3.10.2016. They contended that they are the *bonafide* proprietors of the suit properties as allocated to them and were not in breach of any laws.

4. On 23.11.2017, the plaintiff's application dated 24.7.2017 was allowed in which the National Land Commission (NLC) was brought on board via amendment of the plaint. The plaintiffs were directed by the court to serve the amended plaint with summons to enter appearance upon NLC. On 26.2.2018, the plaintiffs stated that they had not managed to serve NLC and thereafter, the issue of such service fizzled away, never to be re-visited. Only a mention notice was served upon NLC, the court will hence proceed as if the entity known as NLC was never joined as a party in these proceedings.

5. During the trial, the 2nd to 8th defendants were served via substituted service, but they did not turn up for the hearing. Equally, the 1st defendant did not turn up for the hearing. The suit hence proceeded as an undefended claim.

6. PW1- Godfrey Njoroge Ndung'u adopted his statement dated 10.6.2016 as his evidence. He introduced himself as the Chairman of Materetha Self Help Group. He states as follows in his statement:

(i) THAT back in 1994, under the Chairmanship of one Mr. Okeyo Mbata (Deceased), each member of the Soweto Open-Air Market was required to pay the sum of Kshs.300/= after which he/she would be shown where to build a stall from where to conduct business.

(ii) THAT I personally gave my Kshs.300/= to the Chairman and I was allocated stall Number 325 on which I constructed a temporary structure from where I conduct business.

(iii) THAT in the year 1996 or thereabout, our then Chairman, the late Okeyo Mbata came into the market accompanied by his then secretary, one Mr. Joseph Nthenge, the 5th Defendant herein and a surveyor carrying with them equipment for survey of land and they went to sub-divide the land on which Soweto Open-Air Market sits.

(iv) THAT as a result of the said sub-division, space was created within the original market ground to create room for Soweto Police Station, Soweto Social Hall, and what is popularly referred to as the "Mradi wa Mwenje" plots.

(v) THAT as a result the remainder of the market ground was much smaller as compared to the high number of traders of Soweto Open-Air Market. The Chairman informed traders that the remaining ground would be sub-divided at a later date to accommodate all traders but this never came to pass and the market ground remains unsurveyed to date.

(vi) Consequently, and over the years, the 2nd to the 8th Defendants have illegally constructed permanent buildings on the market ground running Bars, Guest Rooms, Churches, Commercialized Toilets etc for their own selfish gain and with the full knowledge of the 1st defendant. We have brought this issue to the attention of the 1st Defendant and other relevant authorities but no action has been taken whatsoever.

7. In support of their case, pw1 produced the documents in their bundle dated 3.2.2017 running from pages 14 to 38 as their exhibits 1-5. Pw1 also availed a map separately as exhibit 6.

8. PW2, Nelson Ouko Odinga adopted his statement dated 10.6.2016 as his evidence. He stated that he owned 2 stalls where he had built temporary structures. However, his stalls were later illegally sold, his structures were demolished and the 2nd defendant constructed a stall. Efforts to report the matter to the chief did not bear fruits.

9. PW3, Francis Gachango Kingo also adopted his statement dated 10.6.2016 as his evidence. He avers that on 26.2.2011, his stall was illegally acquired by the 2nd defendant. Similarly, he reported the matter to the chief.

10. The plaintiffs filed written submissions dated 27th October 2021 in which they highlighted the history of the suit land and outlined the issues for determination as: *i. Whether the land is public land? ii. Whether the 2nd to 8th defendants have encroached on the suit land? iii. Whether the plaintiffs are entitled to the orders sought? iv. Who is entitled to costs?*

11. On the issue of whether the suit land is public land, it was submitted that the definition of public land was outlined under **Article 62** of the **Constitution** and that the National Land Commission had the powers to review grants of public land to establish their legality as per **Section 14** of the **National Land Commission Act**. It was further submitted that the plaintiffs had clearly indicated that the suit land had been set aside for a market and the 2nd to 8th defendants had not adduced evidence to controvert this claim. Counsel added that the

defendants' in their pleadings had affirmed that the 1st defendant held the land in trust for the public. As such, it was clear that the land was public land and it should be used to benefit the community.

12. On the issue of encroachment, it was submitted that the defendants did not have any right to build on the suit land which was meant for public use. He added that they had adduced evidence to show that the defendants had been summoned by area authorities, whereby, they were directed to stop the construction, but this was not heeded to. In turn, this denied the public their right to the land. In support of this point, reference was made to the case of **Shalien Masood Mughal v Attorney General & 5 others [2014] eKLR**.

13. On whether the plaintiffs were entitled to the orders sought, It was submitted that the defendants had not availed any evidence that refuted the plaintiffs claim and therefore the orders sought were merited. It was further submitted that the case was technically undefended citing Motex Knitwear Mills Limited vs Gopitex Knitwear Mills Limited [2009] eKLR where Lessit J citing Autar Singh Bahra & Another vs Raju Govinjl (I HCC 548 of 1998) stated as follows; "...Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on its behalf. That means that not only does the defence rendered fail but also that the plaintiff's case stand unchallenged..."

14. Reference was also made to the case of Isaac Gathungu Wanjohi & Another v Attorney General & 6 others [2012] eKLR where the holding was that; "...protections afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6)..." and Kenya Guards Allied Workers Union v Security Guards Services & 38 others where Nyamu J. (as he then was) stated, "...Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts..."

15. On costs, it was submitted that costs follow the event and the plaintiffs were entitled to costs. Reference was made to the case of Republic vs Rosemary Wairimu Munene (Exparte Applicant) vs Ihururu Dairy Farmers Cooperative Society Ltd, where the Court held that: "...The basic rule on attribution of costs is that costs follow the event..."

Analysis and determination

16. Having considered the pleadings, submissions, evidence adduced in court by the plaintiffs and the defendants' statements of defence, together with the legal framework and prevailing jurisprudence, this court finds that the following are the issues falling for determination:

i. Whether the suit land is public land;

ii. Whether the defendants have encroached on the suit land and developed illegal structure's

iii. Whether the defendants should demolish the structures developed on the suit land;

iv. Whether the plaintiffs are entitled to the prayers sought in the plaint.

17. The definition of public land is to be found in **Article 62 (1) of the constitution** and includes; "unalienated government land and land which no individual or community ownership can be established by any legal process. **Article 62 (2)** thereof stipulates that:

"Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.."

18. **Article 62 (4)** provides that;

"Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use".

19. **Section 107 of the Evidence Act** provides that;

"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".

20. **Section 109** of the aforementioned act further 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 by any law that the proof of that fact shall lie on any particular person".

21. Thus he who alleges bears the burden of proving, see -**Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**.

22. No documents have been availed to indicate that the land in question is public land. In particular, there is nothing tangible to show that the open air market was indeed public land designated as Soweto open air market. The document produced by pw1 as exhibit 6, which he identifies as a map is not only illegible, but the same has no bearing on the classification or status of the suit land. In paragraph 5 and 6 of the statement of PW1, he has alluded to survey works undertaken on the suit land. I deliberately captured the verbatim averments of PW1 in his statement where it is clear that the said survey works was but a rudimentary form of sub-division not anchored in any legal frame work. Thus

this court cannot make a declaration to the effect that the suit land is public land simply because the plaintiffs have stated so.

23. The plaintiffs have stated that the Soweto Air Market, has been encroached upon by the 2nd – 8th defendants who have put up permanent illegal structures to the detriment of the community. The plaintiffs claimed that they were allocated spaces at the Soweto open air market in the year 1994, where they were issued with Certificates of Stall ownership as evidence of their proprietorship. The said certificates were produced in court which bear some numbers and signed by the chairman.

24. From materials adduced in this court no party has produced compelling evidence on the allocation of the said stalls. It is not lost on court that the plaintiffs have produced several correspondences to different administrative authorities complaining of illegal allocation of the stalls and construction of permanent structures in the market land but no action has been taken. However, what emerges is that the nature and extent of the interests of the plaintiffs is not clearly defined. The documents availed by the plaintiffs do not confer proprietary interests in the land. The plaintiffs did not demonstrate that any process was initiated to allocate them what they call public land through the legal regime that governed such processes as at the time of the alleged allocation.

25. The NLC is the current entity with the constitutional and statutory mandate to alienate or dispose off public land and this position was buttressed by the Supreme Court of Kenya in advisory opinion **In the Matter of the National Land Commission [2015] eKLR**:

“[222] The Land Act defines “alienation” as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal”.

26. The plaintiffs made a no show in terms of bringing NLC on board, yet this is the entity which could have shed light on the status of Soweto Open Air Market, how it came to be and how it should be utilized if indeed the suit land is public land.

27. This court has been called upon to make a fair and just determination of a case that is marred with glaring gaps and questions that remain unanswered. Even on a balance of probability, these gaps make it a daunting task for the court to reach a fair and conclusive determination. This appears to be a case of groups having competing private interests on what could possibly be public land, a common scenario in land that remains unregistered and not properly surveyed. In the case of **Fatuma Adan Dullo & 4 others v Cabinet Secretary Ministry of Lands and Physical Planning & 2 others [2020] eKLR**, I stated as follows in regard to land which appears to be open space;

“One more point of concern is that as long as community land remains un-surveyed and un-demarcated, then conflicts of great magnitude will continue to thrive. This is because such land may be viewed as Res-nulliis (it’s no body’s, it’s no one’s property, it is open access)”.

28. To this end, there is indeed a need to have proper survey and registration of unalienated public and or community land so as de-escalate the individual, groups and community conflicts particularly in densely populated places like Kayole. This however does not imply that prayer 2 of the plaint is merited, seeing that there is no finding that the suit land is public land, while NLC is missing in action. In the final analysis, I proceed to dismiss this suit and each party is to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kuria for the Plaintiff

Court Assistant: Edel Barasa