



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 89 OF 2012

JOHN GITHUI GATUA (suing as personal representative of

MICHAEL KABURIA THEURI (Deceased).....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TURKANA.....1STDEFENDANT

MEJA LODUNG.....2ND DEFENDANT

JUDGMENT

Introduction.

1. The plaintiff in this matter commenced the suit by way of a plaint dated **14/5/2012**. The same was amended on **25/2/2015**. In that amended plaint he sought the orders which I replicate verbatim here below:

a. A declaration that plot no 269 and 2 other adjoining plots on Lodwar Lorugum road next to Kenya Commercial Bank building allocated on 10th November 1981 and on 25th April 1985 and 23rd September 1985 belong to the estate of Michael Kaburia theuri –deceased.

b. An order of eviction of the 2nd defendant from plot number 269 and the other 2 adjoining plots next to Kenya Commercial Bank on Lodwar Lorugum Road.

c. An order of injunction directing the 1st defendant to forthwith pull down and remove all the temporary stalls it has licensed to be built on the said plot no 269 and 2 other plots allocated to Michael Kaburia Theuri –deceased, and to stop using the said plots as an open market for fish grocery and green grocery and liquor and to stop in any way from interfering with the possession use and occupation of the said plots by the dependants of Michael Kaburia Theuri deceased.

d. General damages;

e. Special damages of Ksh 20,040.

2. The 1st defendant filed its defence dated **17th October 2012** on the same date. It later filed an amended defence dated **13/3/2015** on **19/3/2015**.

3. The 2nd defendant filed a defence dated **1/10/2012** on **2/10/2012**.

The plaintiff's claim.

4. The plaintiff's claim is that his late father was allocated 3 plots at California market in Lodwar town during plot allocation meetings held on **10/11/81, 25/4/85 and 23/9/85** and he was issued with letters of allotment for the plots. The 1st defendant succeeded the county council of Lodwar which had allocated the plots. The 1st defendant then caused surveying and demarcation of all the allocated plots and beacons were fixed. According to the plaintiff the three plots are demarcated on the ground and they adjoin each other and were occupied by the plaintiff's late father and his family till his death; however in the years **2010** and **2011** the defendants wrongfully entered the said plots and took possession thereof save the portion occupied by the family of the deceased. The 1st defendant thereafter converted the plots into an open air

market and licenced small scale traders to erect temporary structures around the family dwelling and the said traders are conducting trade in various commodities thereon; the 1st defendant has also removed the markings and beacons to the plots, filled in the pit latrine and sought to evict the plaintiff allegedly to pave the way for allocation of the land to other persons. The 2nd defendant also erected a structure on a part of the deceased's land. The plaintiff states that the defendant's action, amounts to a continuing trespass, which has occasioned him loss and damage, hence the prayers set out at the beginning of this judgment.

The 1st defendant's defence.

5. The 1st defendant's denied having ever surveyed demarcated or allocated the suit plots to the plaintiff's father. It alleges that the area where the suit plots are located is a public land set aside for building an open market and the plaintiff's late father was one of the persons allocated plots in the area to build temporary sheds; that the plaintiff has encroached on public land the 1st defendant holds in trust for the public and should not be restrained from implementing county government projects; that the government had set aside funds for the purpose of putting up a modern market and no that no damage was occasioned to the plaintiff's family's property. The defence also protests at what it terms as inadequate description of the suit plots in the plaint.

The 2nd defendant's defence.

6. The 2nd defendant denied the plaintiff's claim and averred that he is the sole allottee of plot **293** at California market having purchased it from one *Esther Mutonyi* who was allocated the same on **3/2/1997**; he avers that he is in occupation of that plot. He denies having interfered with plot number **269** or its boundary; he also avers that he also purchased another plot from one rose *Wanjiru Karumba* on **10/4/2008**.

The Plaintiff's Evidence.

7. The plaintiff testified on **2/10/2019** and on **7/11/2019**. His evidence is that in the year **2010** and **2011** the 2nd defendant began erecting structures on part of plot **293**; that the plaintiff was born on the suit plot; that his father showed him the beacons to the suit plots; he produced allotment letters for the plots: **261**, **269** and **293** as well as the receipts issued to his father upon allocation. He reiterated the contents of the plaint that the 1st defendant allowed the 2nd defendant and the traders to trespass on the suit plots; he also averred that after an injunction was issued by this court in the years **2016** the defendants partially demolished his house and brought down his fence and built a road in the middle of the plots. He repaired the house at a cost of **ksh 20,040/=**; he produced photographic evidence of activities of the defendants at the site. The family had been paying rates for plot no **269**; he produced the rates receipts; at one point the municipality declined to accept the payments due to this pending case; that the minute number on the 2nd defendant's letter of allotment issued in **2010** matched that on his father's allotment letter issued in **2007** and that that was in his opinion evidence of forgery; that the plots are not located on market land and there has never been a market on that site; that the market is currently being constructed about **300** metres away; he produced a transfer dated **4/4/1979** between his late father and one *John Karumba Njau*. He claimed that the roads on the plan produced by the 1st defendant were not in place before this case commenced; when cross examined as to why the allotment letter for plot **293** did not bear a number he stated that it was because part of the document was eaten by a cockroach; upon cross examination he stated that the area called California market where the plots are situated covers a large part of the Lodwar town; that the plot **269** was apparently allocated in Karumba's name for a general kiosk.

Evidence of the defendants.

8. The principal witness for the 1st defendant was **DW1 Davies Wekesa Munialo** who testified on **27/11/2019**. He disowned the signature on what was filed in court as his witness statement and so this court will take no regard for the written statement but to his oral evidence. His evidence is that he is the Director Of Physical Planning in the 1st defendant; that the plaintiff's semi-permanent structure is located on a road reserve; that following the 1st defendant's need to upgrade the Central Business District of Lodwar it came up with a development plan aimed at upgrading a number of its social and economic amenities including California Market for the benefit of Lodwar residents; that plots in California market were allocated for business purposes only and no permanent structures were allowed thereon; that the purpose of the restriction to temporary structures was that the plots could be repossessed and re-planned at any time; that in **2016** the 1st defendant wished to upgrade the California market as it was a disorganized and crime infested site with plenty of illicit alcohol and trade and was inaccessible by motor vehicles; that access roads created under the former planning regime were targeted and reopened and security lights installed; that there was a stakeholder meeting at which the alleged encroachers had been given time to move away and those who failed to do so would be evicted; that the California Market Advisory plan was created; that an advertisement for the plan was issued in **2016** and a public notice to that effect placed in public places around the California Market; that that notice announced that structures falling on the proposed road should be voluntarily removed by owners or in default be removed by the authority; that the plaintiff is the sole person who refused to remove his structures as required; that they had encroached onto a **9** metre road; the market was also to be separated from the Bank by a road for security reasons; that all old allotment letters in Turkana show **23/9/1992** as the date the committee met and issued the letters; that the council indeed met on that date and resolved to issue allotment letters; that the plots were meant for the erection of temporary structures; that the land belongs to the county government and that occupants pay rates to it. Upon cross examination **DW 1** stated that though he is aware of the provisions of the physical planning Act he never advertised the California market plan in the Kenya gazette; that he has not confirmed the allocation to the 2nd defendant of plot **293** in the register; that his office used the previous development plan to develop the new plan; that the earlier plan had no detailed planning though it had captured the Market; that **3** meetings were held with the stakeholders; that the county government demolished the plaintiff's structures; that the county council allocated plots outside Lodwar while the Municipal Council allocated plots within Lodwar; that the plan was publicized in a nationwide newspaper; that the county government was not intent on repossession of plots but to modernize the market; that another reason for demolition of the plaintiff's structure was security in respect of the adjacent bank which had on several occasions lodged related complaints; that the 2nd defendant was one of the committee members who issued the notice.

9. Upon re-examination he stated that the **2016** plan focused on the California Market, but was lifted off the Lodwar Integrated Development plan which he never produced. He admitted that the county government had no power to arbitrarily repossess land. he alleged that of all the

persons served with notices the plaintiff alone raised complaints.

10. The 1st defendant then closed its case.

11. **DW2, Meja Lodung**, the 2nd defendant, testified on **27/11/2019**. His evidence is that he is resident at California market in Lodwar, that he has a business there; that he owns plot no **293** in the market; that he has been paying rates in respect thereof; he produced the rates, the allotment fee and the allotment letter receipts. The plot had been allotted to one *Esther Mutonyi*; she sold the same to him in an agreement dated **15/1/10**. It was witnessed by the chief and a village elder. That the allotment letter to *Ms Mutonyi* was issued by the count council which gave way to the municipal council which issued new letters reflecting the its name; that **plot 293** is opposite **plot 261** and the two are separated by a road; that he has not encroached on the plaintiff's plot as claimed; that the 1st defendant demolished the plaintiff's property but he never participated; that he is not an employee of the 1st defendant; that the minutes cited in all allotment letters are the same; upon cross examination he admitted that he resides at the market.

12. Upon cross examination he admitted that the agreement does not bear plot no **293**; that *Ms Mutonyi* had not paid for the plot;

13. Upon re-examination he stated that he approached the Lodwar Municipal council and they approved his payment of all the arrears of rates till **2010**. He does not know when the plot was allocated number **293**.

14. The 2nd defendant then closed his case.

Submissions of the parties.

15. The plaintiff filed submissions on **3/2/2020** and the 1st defendant on **29/1/2020**. The 2nd defendant filed his on **15/1/2020**. I have considered the pleadings, the evidence and the submissions.

Issues for determination.

16. The issues that arise for determination in this suit are as follows:

a. Was the plaintiff's late father the owner of 3 plots at California market in Lodwar town

b. Have the defendants trespassed on the said plots?

c. What orders should issue?

17. The issues are discussed as hereunder.

a. Was the plaintiff's late father the owner in possession of 3 plots at California market in Lodwar town?

18. The evidence of the plaintiff consisted of plot allotment letters and receipts issued by the Lodwar Municipal Council and the County Council of Turkana.

19. The 1st defendant's counsel cited **Marcus Mutual Muluvi and another vs Philip Tonui and another (2012) eKLR** and **Shiva Mombasa Ltd vs Kenya Revenue Authority (2005) eKLR** and submitted that the letters of allotment issued to the deceased did not amount to titles or confer proprietary interest in the plots to him. He also faulted the letters of allotment to the deceased on numerous other grounds: that one is in respect of a plot claimed by the plaintiff and the 2nd defendant; that they do not have plot numbers; that the plaintiff has not demonstrated that the plots that he occupies are the subject matter of this case; that there was lengthy delay between the dates of the meetings authorizing allocation and the date of issuance of the letters; that the plaintiff never demonstrated that he met the conditions on the letters at all.

20. In the same very breath the 1st defendant's counsel stated that plots numbers **293** and **261** *belong to* the 2nd defendant and one *Lomuya Ejiye* respectively and that Plot number **293** *is in actual possession* of the 2nd defendant.

21. The 2nd defendant's counsel submitted that plot no **293** was not pleaded in the plaint and, citing the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule, Nairobi Civil Appeal No 219 of 2013** that the plaintiff is bound by his pleading.

22. I must first examine the documents used by the plaintiff and the 2nd defendant to lay claim on the suit plots as *Lomuya Ejiye* has not been enjoined in this suit.

23. The application for a transfer of a plot from one **John Karumba Njau** to the deceased was produced as **PEXh 10**. Two letters of allotment addressed to the deceased, dated **10/11/1981** and **25/4/1985** were produced as **PEXh 2** and **PEXh 4** respectively. Though **PEXh 10** is a copy, the other two documents are originals. The documents appear quite old. On the face of **PEXh 2** and **PEXh 4** there is affixed the seal of county Council of Turkana. Payments for **PEXh 2** and **PEXh 4** were made on the same day on **20/1/93**. The original receipts bear the name of the County Council of Turkana. **PEXh 2** and **PEXh 4** are signed by the same person, one *P.G Gathere* who is described as the Clerk to the Council. **PEXh 2** is on the face of it in respect of a plot in town while the **PEXh 4** is in respect of a plot at California market. This court is

convinced that all the three documents are genuine. The only drawback is that parts of the documents, including the slot reserved for plot numbers, appear to have fallen off or wasted in one way or another in the course of time. No doubt 25 -30 years which, going by the dates on the documents is the apparent age of the documents, is quite a lengthy period of time and the documents may have wasted. **PEXh 6** is a letter of allotment in respect of Plot No **269** issued in the name of the deceased by the Lodwar Municipal Council.

24. The plaintiff's evidence is that all the three plots lay adjacent to one another and that they were all occupied by the deceased's family before the defendants allegedly trespassed onto them. The defendants do not deny that the deceased's family as in occupation of land near the Kenya Commercial Bank until the 1st defendant moved into the parcels for its purposes.

25. **DEXh 4** is a letter of allotment in favour of *Esther Mutonyi* which is dated 3/2/1987 and bears no plot number. **DEXh 10** is an agreement vide which the 2nd defendant purported to purchase his plot from *Esther Mutonyi*, and the plot was later christened plot no **293** in **DEXh 1** has no plot number. **DEXh 4** and **DEXh 10** therefore rank among documents such as **PEXh 2**, **PEXh 4** and **PEXh 10** which have no plot numbers. It is quite apparent that haphazard allocation of plots without issuance of numbers was rampant in the days of the County Council of Turkana, a phenomenon that the Municipal Council of Lodwar took upon itself to rectify as is evident in **PEXh 6** and **DEXh 1** which are more recent documents with plot numbers. However undesirable the situation may have been, despite that absence of numbers on the allotment letters, each allottee appears to have been fully aware of the physical location of their plot to the extent that they were able to dispose of them vide agreements and the buyer was subsequently able to obtain a letter of allotment in his name from the local authority.

26. It is clear from the plaintiff's evidence that though the deceased had been shown the plots in the 1980s, the 2nd defendant dispossessed him of land he had occupied in the year **2010** or thereafter.

27. In view of the foregoing, the 1st defendant can not be heard to affirm the validity of the 2nd defendant's documents in this suit while disputing the plaintiff's documents which appear to be from the same source save that the 2nd defendant's documents are more recent. The 2nd defendant's documents, that is **DEXh 1**, **DEXh 4**, and **DEXh 5**, having been acquired after the plaintiff's documents, rank second in value to the plaintiff's and must be rejected. I uphold the plaintiff's counsel's submission supported by the decision in **Rukaya Ali Mohamed Vs David Gikonyo Nambacha and another Kisumu HCCA No 9 of 2004** that once the allotment is issued and the allottee meets the conditions therein the land in question is no longer available for allotment. Besides, the defendants did not in their evidence cast doubt on the authenticity of **PEXh 2** and **PEXh 4**.

28. This court is therefore convinced that the deceased was allocated two plots vide **PEXh 2** and **PEXh 4** and that he also purchased another plot from one *John Karumba Njau* and was issued with an allotment letter for that plot and that he occupied all the three plots. He had therefore acquired interest in and was therefore properly in possession of the three plots as at the time of his death, and so were his successors.

b. Have the defendants trespassed on the said plots?

29. The 1st defendant does not deny carrying out works in the California market for its purposes. The 2nd defendant does not deny that he is in occupation of a plot that was earlier on before the works carried out by the first defendant in the possession of the plaintiff. The only defence that the 1st defendant appears to raise is that the plot occupied by the 2nd defendant belongs to him. The 2nd defendant avers in his defence that the plaintiff never pleaded the number of **Plot 293** in his amended plaint. I have already addressed the issue of lack of numbers and validity of the plaintiff's documents in paragraphs 25 -26 hereinabove and that content, however relevant to the present discussion, needs no reiteration at this stage. Trespass into the plaintiff's plots is therefore admitted by the defendants who have resorted to a raft of justifications and excuses which as seen above do not hold water.

30. Even if they had been admitted into evidence which they were not, the documents labelled "**DMFI-1**" and "**DMFI-4 A**" are woefully inadequate for the defendants' evidentiary purposes in this suit inasmuch as they do not show the actual positions on the map of the plots subject matter of this suit, or of the land occupied by the plaintiff vis a vis the land claimed by the 2nd defendant and *Lomuya Ejiye*.

31. It would have been apt for the defendants, led by the 1st defendant, to produce the old plan of Lodwar Town showing the layout of plots in California market. Failure to produce the said plan must adverse inference that such production would have been adverse to the 1st defendants' and possibly the 2nd defendant's defence. (See the case of **Eldoret HC Criminal Case 1 Of 2000 Republic –Versus Sammy Kipkoech Kitur Samuel Meli**.) In the case of **Criminal Appeal No 106 Of 1983 Between Geoffery Nguku And Republic** the court stated as follows:

“After considering the case of Kingi v Republic, and Bukenya & Others v Uganda, both appearing in 1972 volume of the East African Law Reports at pages 280 and 549 respectively, we accept that the presumption that the evidence, if produced, would be unfavourable to the party concerned is not confined to oral testimony, but can also apply to evidence of a tape recording which is withheld. We consider that there was a misdirection by the learned judges of the High Court when they said that it was a different proposition to relate the presumption to an inanimate object “about which the evidence is that it was incapable of assisting the court.”

32. Also, in the absence of that evidence it is not possible to accept the allegations that the plaintiff, being in possession of letters of allotment validly issued, and having lived on the land for about **20** years before the material events began, had no interest in the suit plots or that he had encroached onto any road.

33. The 1st defendant's counsel has passionately urges that the land is public land. He submits that all public land within Turkana County belongs to the County Government which holds it in trust for the people of Turkana County and no individual can lay claim to it. This appears to be doublespeak for in the same breath which the 1st defendant condemned the plaintiff's claim to the suit plots, it affirmed

ownership by the 2nd defendant of a plot *taken away from the plaintiff by the 2nd defendant.*

34. Counsel for the 2nd defendant also submitted that the land is a market and it can not be used for a private purpose; however the 2nd defendant seems to have turned a blind eye to the residential purposes the 2nd defendant, whose ownership it supports, has by his own admission in his sworn evidence, used a plot in the market for.

35. I must construe the facts of this case in the light of the provisions of **Article 62** of the constitution which provides public land to be land which falls under categories set out thereunder. In this case the land at the market had been allocated to the plaintiff and others and I do not find that it falls under that category.

36. The 1st defendant should have subjected the plaintiff to the same treatment as the other plot holders who have letters of allotment in the same market, and any action against each and every one of those allottees must be justifiable before the law. In the light of the defendants' conduct, it is not surprising that the plaintiff senses a sort of discriminatory attitude against him.

37. In the circumstances of this case I find that the intrusion of the defendants into the plaintiff's plots has not been justified and amounts to trespass it should therefore cease.

c. What orders should issue?

38. I find that the plaintiff has established his claim on a balance of probabilities against both defendants. I therefore grant the plaintiff's claim and I enter judgment in his favour against the defendants jointly and severally. Consequently, I issue the following orders:

a. A declaration that the estate of Michael Kaburia Theuri (deceased) is entitled to plot no 269 and 2 other adjoining plots on Lodwar Lorugum road next to Kenya Commercial Bank building which the plaintiff was in occupation of before intrusion by the defendants.

b. An order that the plaintiff shall be reinstated by the defendants into the suit plots described in (a) above and that the 2nd defendant shall remove himself from the suit plots failure to which he shall be forcibly evicted.

c. An order of injunction directing the 1st defendant to forthwith pull down and remove all the temporary stalls it has licensed to be built on the suit plots and to stop using the suit plots as an open market for fish grocery and green grocery and liquor and to stop in any way from interfering with the possession use and occupation of the said plots by the dependants of Michael Kaburia Theuri (deceased.)

d. The plaintiff is awarded Special damages of Ksh 20,040/= as against the 1st defendant.

e. The costs of the suit shall be paid to the plaintiff and borne by the defendants jointly and severally.

Dated, signed and delivered at Nairobi via Teleconference on this 20th day of May, 2020.

MWANGI NJOROGE

JUDGE

Judgment read in the presence of:

Mr Barongo for the 2nd defendant;

Mr Barongo holding brief for Mr Githui for the 1st defendant.

N/A for the plaintiff.

Hon Mercyline Lubia, DR.

MWANGI NJOROGE

JUDGE