



**Norow v Barkadle (Environment & Land Case 1 of 2018)  
[2021] KEMC 10 (KLR) (15 April 2021) (Judgment)**

Neutral citation: [2021] KEMC 10 (KLR)

**REPUBLIC OF KENYA  
IN THE HOLA LAW COURTS  
ENVIRONMENT & LAND CASE 1 OF 2018**

**PA NDEGE, PM**

**APRIL 15, 2021**

**BETWEEN**

**AFTIN NORROW ..... PLAINTIFF**

**AND**

**HAMDI BARKADLE ..... DEFENDANT**

**JUDGMENT**

**Introduction: Background, Parties and Pleadings**

1. The disputing parties herein are residents of Hola in Tana River County. Following several years of marginalisation, most of the lands in the region are unregistered and are at the mercy of county land officers who process allotments, transfers and receive payment therefor in terms of land rents. According to the plaintiffs, Aftin Mohamed Norow'S case, he is the beneficiary, allottee and or registered owner of all that existing commercial plot NO. TRCG/LZ/R/1607 measuring approximately 0.0613 Ha situated at Hola secondary manyatta. The plot is registered in his name as confirmed by a letter ref. TRCG/TP/5/575 dated 7<sup>th</sup> February, 2017 from Tana River County government. That sometimes back in the year 2006, the defendant herein approached him to allow him use the plot as 'zizi la ng'ombe' as the plot was still lying idle without being developed. That the plaintiff allowed him to use the plot on humanitarian grounds, but that the defendant has now illegally laid claim on the same and has therefore refused to give vacant possession to the plaintiff to enable him develop the plot, thus giving rise to the present dispute between them. The dispute has been presided over by the National Lands Commission (NLC), Tana River County Land Management Board, which did a report dated 1st September, 2016 which was in favour of the plaintiff's claim, after which the plaintiff paid all the applicable fees, rents and rates. That despite several verbal notices, the defendant has refused, failed and or ignored the plaintiff's pleas to let him have back his plot hence rendering this suit imperative.
2. The Plaintiff is therefore praying for:



- a. Permanent injunction restraining the defendant by himself, his agents, servants, representatives, assigns or any other person claiming under him from interfering with, intruding into, encroaching, trespassing and/or adversely dealing with the plaintiff's plot No. TRCG/LZ/R/1607 measuring approximately 0.0613 situated at Hola Secondary Manyatta within Tana River County (the suit premises)
  - b. A declaration that the plaintiff is the legal owner of the disputed plot.
  - c. An eviction order against the defendant and the same to be enforced by OCS Hola police station upon hearing and determination of this suit.
  - d. Costs of this suit.
  - e. Any other relief this Honourable Court may deem fit to grant
3. In his Statement of Defence dated 21.05.2018, the defendant denied all the allegations raised by the plaintiff in his suit and invited him to strict proof thereof. There was an Amended Statement of Defence purported to have been amended on 23/07/2018, in which the defendant denied all the allegations raised by the Plaintiff in his suit papers herein, and instead averred that the suit property was on 13/06/2001 confirmed by the then County Council of Tana River to be registered in the name of Amina Abdalla Dama who has paid for the same on 30/1/2001 vide receipt No. T791897. That he is the son of Amina Abdallah Dama, the recognised original owner and that, therefore, he has no capacity to be sued on behalf of his said mother. He therefore prayed that the suit be dismissed with costs to the plaintiff. The amendment was however done without leave of the court as required and is therefore a nullity. As submitted by the learned counsel for the plaintiff, the Statement of Defence herein remains as unamended.

### **The Procedure**

4. After some preliminary matters were dispensed with, hearing commenced and concluded on 29.10.2020. Both parties testified and called their respective witnesses. Parties then filed and exchanged their written submissions. All the other adjournments and the reasons therefor have been well captured in the records of proceedings and as such, do not require any additional explanation herein.

### **Facts of The Case**

5. The Plaintiff herein, PW1, Aftin Mohamed Noor, informed the court that the plot herein is his, having purchased it from a neighbour, Mohamed Omar. That he allowed the defendant herein, a neighbour, to use it for keeping cows while still waiting to develop it. That on 09.10.2015, he told him that he wanted him to hand over the parcel back to him because he wanted to develop it. That the defendant refused. He therefore decided to involve the elders who resolved in the absence of the defendant, who had been summoned but refused, that the land parcel belonged to him. He produced the minutes of the elders' meeting as PEX. NO/ 1. Further deliberations were done at the National Lands Commission which returned a verdict that the plaintiff was the owner of the plot. He produced the minutes of the deliberations as PEXH. NOS 3A and 3B. That when he went to put beacons and demarcations on the land, the defendant resisted, forcing him to bring this suit.
6. In cross-examination, the plaintiff confirmed that his parcel is TRCG/LZ/R/1607. He also produced a letter from the Chief Officer in charge of Lands from the County Government, as PEXH. No.2, confirming that the defendant was duly summoned to the office of the Chief Officer so as to participate in the deliberation of the dispute herein.



7. PW2, Ali Dhadho Santur, is a community elder and the vice chairman of Tana River County Peace Committee. He also stated in his statement which he adopted on oath<sup>1</sup> that he has lived in the community herein for long and is therefore conversant with the land dispute herein. He stated that the land parcel in dispute herein was declared by the community elders to have been bought by the plaintiff from Mohamed Omar. That the defendant herein dismissed the elders which forced the dispute to be escalated to the county government's ministry of lands, which also, after independent deliberations, established that the parcel belonged to the plaintiff.
8. PW3, Abdi Ismail Gedi, is a member of Tana River District Committee and was aware of the land dispute herein. He stated in his statement which he adopted on oath<sup>2</sup>, that they called both parties herein, and also Mohamed Omar who had sold the land to the plaintiff. That Omar confirmed that he had sold the land to the plaintiff in 2005. That Omar went ahead to show them the boundaries of the land. That the dispute was then escalated to the Ministry of Lands at the county government who also ruled that the land parcel belonged to the plaintiff. He confirmed that the defendant's plot is separate from the plaintiff's herein; and that they were therefore shocked to realise that the defendant has encroached into the plaintiff's parcel.
9. PW4, Khalif Osman Buru<sup>3</sup>, also a peace committee member, and an elder, has always known that the parcel herein, TRCG/LZ/R/1607, belonged to the plaintiff herein. That the family of the defendants were using the parcel to shelter their cattle. He was surprised when the dispute herein arose. That they were however able to sit down as a committee where they learnt that the plaintiff had initially purchased the parcel herein from Mohamed Omar. That they summoned Omar who came and justified the plaintiff's claims. They therefore reached the verdict that the land parcel belongs to the plaintiff. In cross-examination, he confirmed that they tried to involve the defendant herein in their deliberations, but that he turned hostile and abusive.
10. The defendant herein, DW1, Hamdi Barkhale, produced various documents and receipts stating that the parcel herein belongs to his mother, Amina Abdullahi<sup>4</sup>. He also stated that the plot number for his mother's parcel, which he insists is the subject parcel herein, is 1620 and not 1607, as alleged. That he stays with his mother in the parcel and that the livestock therein are hers.
11. DW2, Amina Abdullahi, is the defendant's mother. She also stated that the plot herein is hers. That she was allocated the same in 2001. In her statement which she adopted herein as DEXH. NO. 3, she states that the plaintiff has fraudulently been issued with document showing him as the owner of the plot herein from 2017, yet he is a total stranger to the property herein.

## Submissions

12. Both parties filed their written submissions. For the plaintiff, it was submitted that the plaintiff's right to property envisaged under Articles 40(1) and 64 of *the Constitution*, 2010, has been infringed by the Defendant who wrongfully claims ownership and adamantly refuses to give vacant possession. That on all levels of the dispute resolution mechanism, prior to the institution of this suit, all the relevant authorities held that the Plaintiff is the owner of the disputed plot. That the National Lands Commission, an independent Commission which is mandated under Article 67 of *the Constitution*

<sup>1</sup> Produced herein as PEXH. NO. 6

<sup>2</sup> Produced herein as PEXH. No.7

<sup>3</sup> Adopted his statement which he produced as PEXH. NO. 8

<sup>4</sup> Testified later as DW2



to among others: ‘...to initiate investigations, on its own initiative or on a complaint, into present or historical injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts...’. in fulfilling its mandate, as a quasi-judicial body within the context of Article 169(1) of *the Constitution*, reached a verdict after conducting its investigations that the plot in dispute herein belongs to the Plaintiff. It was further submitted for the Plaintiff that the Defendant has exhibited deliberate dishonesty in his pleadings and evidence. That the Defendant at paragraph 10 of his Statement of Defence pleaded that he has been in peaceful possession of the suit parcel herein, only to change in his evidence that the plot belongs to his mother.

13. For the Defendant, it was submitted that the testimonies of the plaintiff and his witnesses were not in consistent as to whether the Plot No. TRCG/LZ/1607 or TRCG/LZ/R/1620 are an overlap of each other or not. That the documents adduced by the plaintiff herein shows that he paid for the plot in 2017, several years after the same was allocated to the defendant. That the plaintiff’s allegation that he purchased the suit premises from one Mohamed Omar was not supported by any proof (agreement). That in the absence of a sale agreement, the plaintiff’s allegations of purchasing the said disputed plot is unfounded, speculative, an afterthought and/or unproven. That consequently, it is implied in law that the said property was never purchased by the plaintiff, from any person whatsoever. That even the alleged seller was never called to court to testify over the purported contract. That the evidence tendered by the defendant in DW1 and DW2, demonstrates that the Plaintiff applied unlawful means to enter the disputed plot and when he was refused access, he turned to this court to be declared the owner. That the allegations that the Defendant was allowed to use the disputed plot temporarily or on humanitarian grounds were mere contentions which could not be ascertained and/or proved. That the testimonies of the plaintiff witnesses who were called to the site to ventilate over the dispute herein amounts to hearsay as it was their first time to visit the site. That it appears that the Plaintiff at the time of the purported purchase of the land, never conducted any search to ascertain and/or verify if at all there was a legally registered owner. That if he had done so, he would have established that the defendant’s mother had already been registered as the owner from 30.01.2001. That moreover, the plaintiff failed to apply himself to the dictates of the Law of Contract, particularly section 3(3) at the time when he allegedly purchased the disputed plot.

### **Issues, Burden and Standard of Proof**

14. There was no conference held to frame the issues for determination herein. From the pleadings and the evidence adduced herein, I do find that the main issue for determination herein is the ownership of, or the right of use, and occupation, of the plot herein which is Plot No.1607. The facts and evidence to be considered in determining the issue are well summarised hereinabove.
15. There is however the issue of the Amended Statement of Defence filed herein. The Plaintiff, citing the case of Abdul K. Khan Vrs Mohamed Roshan [1965] EA. Pg. 289 as quoted in the case of Catherine Koriko & 3 Others Vrs Evaline Rosa [2020] eKLR, has submitted that the amendment is invalid, null and void, for being inconsistent with the original pleading and actually altering the nature of the defence. He felt short of urging me to strike out the Amended Statement of Defence.
16. Order 8 Rule 1 (1) of the Civil Procedure Rules provides thus “A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed”. It is therefore clear that the law gives a party the right to amend any of its pleadings without leave once before close of pleadings. When are pleadings said to be closed?



17. Order 7 Rule 7 (1) of the Civil Procedure Rules provides;

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defense within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defense and file an affidavit of service.

18. From this provision, pleadings close fourteen days (14) after the service of the defense or last of the defenses on the Plaintiff. After closure of the pleadings a party may only file subsequent pleadings with the leave of the Court. In the present case the defense was filed on 22<sup>nd</sup> June, 2018. Regardless of when the same was served, pleadings ought to have closed soon thereafter. I have perused the proceedings herein and I have failed to find any instance where leave to amend was sought and granted herein. Moreover, as correctly submitted by the learned counsel for the plaintiff, the amendment ought not to have been allowed at that stage given that it departs substantially from the original defense, introducing a new defense, thus defeating the essence of the principle of fair trial. I thus do hereby ignore the amended statement of defense, and for purposes of this suit the defense shall be the Statement of Defense filed on 22.06.2018.

19. It is trite that issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules. In order to determine the issues between the parties herein, one needs to look mainly at the plaint (see *Philmark Systems Co. Ltd Vrs Andermore Enterprises* [2018] eKLR). The Defendant's original defense herein was however a general denial.

20. The principle is however that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. 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, (Section 107 of the *Evidence Act*). The burden of proof in this suit or proceeding shall therefore lie with the plaintiff herein to prove that he owns the plot as pleaded, and that the defendant herein has wrongfully and unlawfully trespassed thereupon.

21. The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Justice Mativo in the above case stated that the standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approval Lord Denning in *Miller -vrs- Minister Of Pensions* [1947] 2 ALL ER 372 as follows: -

The... (Standard of proof) ... is well settled. It must carry a reasonable degree of probability ... If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not.'

### Determination

22. Have the plaintiff proven ownership or the right to possession or occupation on his part to the required standards? The land herein, from the evidence adduced appears to be public land. This is by virtue of Article 62 (1) (d) and (e) of the current Constitution<sup>5</sup>. The management of such public land has been placed under the mandate of the National Lands Commission. Section 12 of the Lands Act, 2012, however provides for the allocation of public lands. *The Constitution* at Article 60(1) (g); and

<sup>5</sup> 62. (1) Public land is—...; (d) land in respect of which no individual or community ownership can be established by any legal process; (e) land in respect of which no heir can be identified by any legal process; ...



the Lands Act, 2012, at section 4(2) (g), enjoin all state officers, such as myself, in the discharge of our functions and exercise of our powers as relate to the land laws, the Commission and any public officer, state officer, shall be guided by the value and principle of encouraging the communities to settle land disputes through recognised local community initiatives so long as they are consistent with the Constitution.

23. I have received evidence of the village committees and NLC's involvement in settling the dispute herein. I find no other evidence to challenge the mandate of the committee. None was adduced by the defendant who appears not to have co-operated with them. I do not see anything or act illegal or unconstitutional, more so going by the principles of land management provided for in Article 60 of the Constitution. I have also seen a summoning letter from the county department of lands (chief officer) which recognises the existence of the dispute herein. The defendant was summoned to the county offices with all his evidence so as to have this dispute resolved at that stage. I have also seen further letters from the County Government of Tana River (PEXH. No. 4) recognising the ownership of the land parcel herein, TRCG/LZ/R/1607 to the plaintiff herein. It confirms that the parcel has been recorded under his name. The same is dated 07.02.2017. This evidence, corroborated by the several dispute settlement mechanisms herein, including the NLC (PEXH NO 3B), all confirms that the land parcel herein belongs to the plaintiff. The evidence from the plaintiffs' witnesses therefore proves to the required standard that the defendant herein is not the owner or the allottee of the parcel claimed. The defendant however ought to have co-operated with the village committees, and as provided for section 4(2) (g) of the Lands Act, 2012, and was duty bound to assist the committees to find an amicable solution to the dispute herein.
24. I do therefore have no option but to comply with the provisions of Article 60(1)(g) of the Constitution, as operationalised by Section 4(2)(g) of the Lands Act, 2012, and do hereby adopt the finding of the Village Committees, the land administrators, and the NLC and do hereby find that the plaintiff herein was rightly recognised as the owner of the land parcel herein. He therefore has the right to occupy, possess and develop the plot.
25. I thus find that the defendant herein unlawfully, arrogantly or ignorantly took possession of the land parcel herein. The defendant should therefore get out of the land parcel herein to allow the plaintiff herein to quietly occupy, possess and use the parcel that he has proved to the required standard to be his. This is in line with the decision in *Wamwea Versus Catholic Diocese of Muranga Registered Trustee* [2003] KLR 390.
26. The village committees, local land administrators and the NLC are the best organ to resolve these kinds of disputes at the local level. The defendant therefore has a duty to co-operate with them and not appear to be creating chaos and /or inciting violence. If he has issues with the committee, then he ought to have channelled the same with the local administrators, or to the court and not appear to be taking the law into his own hands. It should not be seen that this court will encourage wilful disobedience to lawful authority. Our land regime is based on the law. I do hereby declare that the defendant herein, having no proof that he legitimately, or rightfully, owns or occupies the land parcel herein, is a trespasser and should therefore move out. In fact, by virtue of rule 4 as read with rule 10, both of Order 2, Civil Procedure Rules, 2010, he cannot rely on the fact that he is in occupation of the suit premises herein as a defence herein. He also failed to particularise his claim of fraud on the part of the plaintiff or the land officials. His claim of fraud cannot therefore stand as a defence herein. I, on the other hand, do find that the plaintiff has successfully discharged his burden of proof to the required standards herein. This is not a 50:50 case. It is not a tie. The evidence of the Village peace committees, the NLC verdict when consider together with PEXH. NO.4, tilts the case in favour of the plaintiff as opposed to the defendant herein.



27. For the avoidance of doubt, this judgment and orders relate and apply to the suit property as pleaded in the plaint and proved by the plaintiff's evidence and exhibits, being plot No. TRCG/LZ/R/1607. It does not relate to plot no. 1620, as claimed by the defendant. This suit belongs to the plaintiff and the defendant has not raised any counterclaim herein. I have also not been convinced by way of evidence that the 2 numbers relate to the same plot.
28. There was however no evidence of a proper demand notice being issued to the defendant before the suit herein was instituted. There was no such pleading in the Plaint, save for verbal notices which were however not proved. No demands letter was filed nor produced herein. The defendant having denied in his Statement of Defence that no demand was issued to him herein, it was incumbent upon the plaintiff to prove the same. On how he ended up in court, the plaintiff simply testified as follows: '...We were refused to put beacons in the land. I then came to court. I brought the allegations in court. I sued the defendant. I was given a date<sup>6</sup>. It may not be that implausible to conclude herein that the plaintiff rushed to court with the instant suit before exhausting other remedies. Given that he has nevertheless still ended up proving his claims herein, I do order that each party shall bear his own costs.

### **Final Disposal Orders**

29. A Permanent injunction be and is hereby issued restraining the defendant by himself, his agents, servants, representatives, assigns or any other person claiming under him from interfering with, intruding into, encroaching, trespassing and/or adversely dealing with the plaintiff's plot No. TRCG/LZ/R/1607 measuring approximately 0.0613 situated at Hola Secondary Manyatta within Tana River County (the suit premises)
30. A declaration be and is hereby issued that the plaintiff is the owner of the disputed plot No. TRCG/LZ/R/1607.
31. An eviction order is hereby issued against the defendant and the same to be enforced by or under the supervision of the OCS Hola police station upon payment of any requisite fee for private use of police. The eviction to be undertaken in a humane manner taking care of the rights and plights of women, children, the elderly and sick; and any other vulnerable member of the society.
32. Each party to bear his own costs

**DATED, SIGNED AND DELIVERED AT HOLA IN OPEN COURT THIS 15<sup>TH</sup> DAY OF APRIL, 2021**

**ALOYCE-PETER-NDEGE**

**PRINCIPAL MAGISTRATE**

In the presence of;

Plaintiff Counsel: Absent

Defence counsel: Muchiri h/b Michira

Plaintiff: Present

Defendant: Present

<sup>6</sup> Refer to the plaintiff's evidence in chief at pp. 42 and 43 of the handwritten notes

