



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 14 OF 2015

KEFA NYAGA KARIUKI.....1ST PLAINTIFF

JOHNSON KARIUKI NGUNE.....2ND PLAINTIFF

JEDIDAH MUTHONI NYAGA.....3RD PLAINTIFF

ISAIA NJERU J. MBAKA.....4TH PLAINTIFF

JAMES KINYUA NJONA.....5TH PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF EMBU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 7th November 2008 and amended on 21st May 2015 the Plaintiffs sought the following reliefs against the Defendant;

a. That the excess claimable land illegally surrendered and unlawfully acquired by the Defendant under paragraph 7 herein measuring in total 0.78 ha (1.92 acres) of lands LR Gaturi/Githimu/706, 780, 704, 703 be surrendered by the Defendant and be transferred to the Plaintiffs as prayed in paragraph 7 above. (sic)

b. That in the alternative, the Defendant be ordered to pay compensation to the Plaintiff for the value of the claimable land measuring 0.78 ha (0.192) acres to be valued and assessed jointly by the Government Valuer and a private valuer to be appointed by the Plaintiffs.

c. Costs and interest of this suit.

2. According to the plaint, the Plaintiffs were proprietors of Title Nos. Gaturi/Githimu/703, 704, 706 and 780 (hereinafter *the suit properties*) which were of diverse acreage. It was pleaded that when the Plaintiffs applied for sub-division of the suit properties the approval was granted subject to surrender of some land for access roads, open spaces, riparian reserve and other special purposes. It was contended by the Plaintiffs that what they surrendered was excessive hence they sought to re-claim the excess or obtain compensation for it.

3. The Defendant filed a written statement of defence dated 2nd July 2015 in which the Plaintiffs' claim was denied in its entirety. The Defendant pleaded that the portions of land in question were legally and procedurally surrendered to the then Municipal Council of Embu for public purposes namely, riparian reserves, access roads, open spaces and special purposes.

4. When the suit was set down for trial, the 4th Plaintiff testified on his own behalf and on behalf of the rest of the Plaintiffs. He adopted his witness statement filed with the original plaint as his sworn testimony and produced the documents listed in the Plaintiffs' undated list of documents filed on 9th November 2017.

5. It was the 4th Plaintiff's case (who testified as PW 1) that when his late father presented a sub-division scheme for his parcel of land, the scheme was approved by the predecessor of the Defendant. He stated that the portion of land surrendered was more than was necessary. His late father then decided to reclaim the excess land. It was his case that the Town Planning Committee had allowed his late father to re-plan the riparian reserves but in the end the excess land was never returned.

6. The second witness for the Plaintiff was Grishon Njoroge who testified as PW 2. He was a valuer by profession and he is the one who prepared the valuation report dated 19th February 2018 on behalf of all the Plaintiffs. He testified that upon visiting the site he observed that

some of the surrendered land had public facilities thereon such as a hospital, an ECD Center, and CDF office whereas some areas were still vacant. Some portions had also been converted into a road reserve. He put the total value of the claimed land at Kshs 51,400,000/- only.

7. The 3rd witness was P.M. Kinyua who testified as PW 3. He was a registered Physical Planner who prepared an “advisory plan” for re-planning the riparian reserve and open spaces which were surrendered by the Plaintiffs. He stated that the Plaintiffs had collectively surrendered about 43% of their land to the Defendant upon sub-division. He stated that the minimum area which should be surrendered under the **Physical Planning Act 1996** was 20% and that there was nothing illegal about the surrender of the larger percentage which the Plaintiffs had surrendered. He further stated that an advisory plan was just like an audit and that in his view the Defendant’s resolution on preparation of an advisory plan did not authorize recovery of the surrendered land by the Plaintiffs.

8. The Defendant did not choose to call any evidence at the trial even though its advocate informed the court that he had one witness. Consequently, the Defendant’s case was closed without any evidence being tendered on its behalf.

9. Upon conclusion of the trial, the Plaintiffs were granted 30 days within which to file and serve their written submissions whereas the Defendant was given 30 days upon service by the Plaintiffs to do the needful. The record shows that the Plaintiffs filed their submissions on 10th December 2018 but there was no indication of the Defendant having filed any submissions.

10. The parties do not appear to have filed an agreed statement of issues for determination. The record shows that the Plaintiffs filed their version of issues on 21st March 2016 whereas the Defendant did not file any. The court shall therefore frame the issues as provided for under the **Civil Procedure Rules**. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules** a court may frame issues for the determination from the pleadings, documents and statements made on oath by the parties. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the land surrendered by the Plaintiffs to the Defendants upon sub-division of the suit properties was excessive and illegal.
- b. Whether the Defendant’s Town Planning Committee ever approved the re-planning of the riparian reserve and recovery by the Plaintiffs of any excess land.
- c. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.
- d. Who shall bear the costs of the suit.

11. The court has considered the entire evidence on record on the first issue. The court has also considered the Plaintiffs’ submissions thereon. The Plaintiffs were not really contesting the surrender of land upon subdivision of the suit properties. They were aggrieved because they believed that they surrendered more than was necessary for the purpose. They contended that they were made to “illegally” surrender excessive land to the Defendant during the approval of their sub-division schemes. The court has noted that the schemes which the Plaintiffs produced were approved by the Defendant’s predecessor and the Commissioner of Lands in 1980.

12. The court has also considered the evidence of the registered Physical Planner (PW 3) who was called by the Plaintiffs. His evidence was critical to the determination of the 1st issue by reason of his expertise in urban and regional planning. He stated that the *minimum* percentage of surrender is 20% but there was nothing illegal about a surrender of 43% as happened in the instant case. He stated that it was really a matter of agreement between the plot owners and the approving authority as long as the minimum threshold is satisfied.

13. The court finds nothing irregular or illegal about the conditions imposed upon the Plaintiffs for approval of their sub-division schemes for the suit properties. The material on record shows that although the Plaintiffs’ schemes were approved in 1980, they did not lodge any complaint or seek a review or re-planning until 2005 or thereabouts. That was about twenty five (25) five years later and only upon realizing that some property owners within their locality had surrendered a smaller portion of land upon sub-division.

14. The court is thus far from satisfied that there was any violation of the Plaintiff’s property rights with respect to the approval of their sub-division schemes in 1980 and the consequent surrender of a portion of the suit properties to the Defendant as open spaces, access roads, riparian land and special purpose land. The court finds there was nothing illegal about the surrender since the law provided for a *minimum* and not a *maximum* percentage of land to be surrendered upon sub-division. The first question is, therefore, answered in the negative.

15. The 2nd issue is whether the Defendant’s Town Planning Committee approved the re-planning of the riparian reserve and recovery by the Plaintiffs of any excess land. The court has considered the entire material on record on this issue as well as the submissions on record. The Plaintiffs appeared to rely on MIN/TPWH/12/2005 in their contention that there was such approval. The resolution contained in the said minute states as follows;

“That the Applicants seek the services of a Registered Planner to re-plan the riparian reserves as the issue was advisory rather than sub-divisions.”

16. The court has noted that pursuant to that resolution, the Plaintiffs engaged PW 3 to prepare an “advisory” Plan. He prepared an advisory plan which was produced as exhibit P. 14. In part 2.0 of the said its plan objectives were stated as follows;

- “- Establish the size and extent of the land affected by riparian reserves
and open spaces

- Give a breakdown of the land surrendered and the intended purposes.

- Make general recommendations that may form the basis of making a decision on the pending appeal and formulation of a policy relating to surrender of land for public purposes within the municipality.”

17. It is thus evident that PW 3 did not prepare a revised sub-division scheme for approval by the Defendant. It was just an advisory plan for the specific objectives specified in part 2.0 thereof. The evidence further shows that when the said advisory was placed before the Town Planning Committee of the Defendant’s predecessor on 5th December 2006, it was expressly rejected by the Committee. An extract of MIN/TPWH 73/2006 which was produced by the Plaintiffs captured the Committee’s resolution as follows;

“i. That the application by Joseph K. Mutabi and others on re-planning of riparian reserve be rejected.

ii. That the amendment is not valid as it has been superseded by the earlier Act on sub-division of land and the requirement of surrendering open spaces and special purposes land to the Council.”

18. The court has also considered the oral evidence of PW 3 at the trial hereof. He informed the court that the Defendant’s Committee did not approve recovery by the Plaintiffs of the land they had surrendered by its resolution of 2005 which merely asked the Plaintiffs to seek advisory services from a registered Physical Planner. On the basis of the totality of the evidence on record, the court is not satisfied that the Defendant’s Town Planning Committee had acceded to the Plaintiff’s request for recovery of part of the land they had surrendered in 1980. On the contrary, there is adequate evidence on record to demonstrate that the Plaintiffs’ request was expressly rejected.

19. The 3rd issue is whether or not the Plaintiffs are entitled to the reliefs sought in the amended plaint. The Plaintiffs are seeking to recover what they consider to be excess claimable land which was surrendered to the Defendant’s predecessor in 1980. In the alternative, they claim monetary compensation for the value of the excess land. Since the Plaintiffs have failed to prove their claim with respect to the 1st and 2nd issues, it would follow that they are not entitled to those reliefs. There would be no legal basis for granting the prayers sought.

20. The 4th and final issue is on costs of the suit. Although the costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should be awarded the costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Jannohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful party should be deprived of costs in this suit. The Defendant shall be awarded the costs of the suit.

21. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to prove their case to the required standard. Accordingly, the suit is hereby dismissed with costs to the Defendant.

22. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 7TH day of MARCH, 2019.

In the presence of Ms Rose Migwi holding brief for Mr Muguku for the Plaintiff and in the absence of the Defendant.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

07.03.19