



Ghassim (Suing on behalf of Nyari Residents Welfare Society) v Mzee & 3 others (Environment and Land Case Civil Suit 977 of 2001) [2018] KEELC 4879 (KLR) (26 July 2018) (Judgment)

Neutral citation: [2018] KEELC 4879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 977 OF 2001**

**AK BOR, J
JULY 26, 2018**

BETWEEN

RAHMAT GHASSIM (SUING ON BEHALF OF NYARI RESIDENTS WELFARE SOCIETY) PLAINTIFF

AND

**BEN ATHUMANI MUNGAI MZEE 1ST DEFENDANT
LYDIA NYAMBURA MUNGAI 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT
NAIROBI COUNTY GOVERNMENT 4TH DEFENDANT**

JUDGMENT

1. The Plaintiff filed suit against the Defendants as Chairman of Nyari Residents Welfare Society, seeking a permanent injunction to restrain the 1st and 2nd Defendants from constructing in or remaining on LR No Nairobi Block 94/220 and 222 and that any building already constructed be demolished. In addition, the Plaintiff seeks to have the leases and certificates of lease issued in respect of Nairobi Block 94/220 and 222 cancelled. In the initial suit a representative of the Institution of Surveyors of Kenya participated in the suit as the 2nd Plaintiff. A notice of withdrawal of claim was filed by this party on 0 September 9, 2011 leaving the Plaintiff to pursue the claim alone.
2. In the Further Re-amended Plaint filed pursuant to leave granted by court on July 25, 2017 the Plaintiff substituted the National Land Commission and the Nairobi County Government for the Commissioner of Lands and the City Council of Nairobi who had been sued as the 3rd and 4th Defendants respectively.
3. The Plaintiffs are owners of residential houses on plots measuring half an acre each in Nyari Estate within Nairobi. The Commissioner of Lands granted leases to the Plaintiff and the other residents of



- Nyari subject to the enjoyment of various physical amenities which included roads, public recreational areas, commercial shopping area, parking and access roads. The commercial shopping centre was provided with a public parking and an access lane. The Plaintiffs aver that it was an implied condition of the leases that the Commissioner of Lands would not allocate the individuals the public spaces which were reserved for the benefit and enjoyment of the residents of Nyari Estate.
4. On or about 1999, the Commissioner of Lands in breach of this condition allocated Nairobi Block 94/220 to William Ng'ang'a, Susan Wachira and Charles Kariuki who in turn transferred this parcel of land to the 1st and 2nd Defendants with the approval of the Commissioner of Lands. The Plaintiff maintains that the allocation was fraudulently done since no public notice was issued to the residents and there was no compliance with the procedure under the Government Lands Act in the alienation of the two plots. The Plaintiff argued that the Commissioner of Lands should have required the residents of Nyari to surrender these parcels of land before allocating them to any person.
 5. According to the Plaintiff, Nairobi Block 94/220 and 222 comprised the parking and access area to the shopping area which is Nairobi Block 94/226 up to 234. These two (2) plots measure 0.1501 ha each which is approximately a quarter acre each instead of being half acre plots like the rest of the estate.
 6. The Plaintiff filed suit when the 1st and 2nd Defendants started putting up a house on plot number Nairobi Block 94/220. The Plaintiffs averred that the construction was being undertaken without the approval of the local authority and that the 4th Defendant had breached its public duty to approve and supervise building plans and constructions within the city of Nairobi by failing to stop the 1st and 2nd Defendants from putting up a house on this plot.
 7. The Plaintiff pleads that the residents of Nyari are likely to suffer irreparable harm and damage as they will not have access to the shopping centre and that further, the action will set a precedent for the subdivision of all other plots constituting open spaces in the estate which will lower the value and unique character of the estate.
 8. The Plaintiff averred that the 3rd Defendant acted unlawfully and did not follow the procedure for allocating public land and hence the certificate of lease issued to the 1st and 2nd Defendants should be cancelled.
 9. The 1st and 2nd Defendants denied the Plaintiff's claim and urged that they are bona fide purchasers for good value of LR No Nairobi Block 95/220 having purchased it from William Ng'ang'a, Susan Wachira and Charles Kariuki. The Defendants argued that the parking and access road in the estate were clearly marked out and the Suit Property was part of the approved subdivision plan by the Commissioner of Lands.
 10. The 3rd Defendant filed its defence on January 28, 2002 and equally denied the Plaintiff's claim. It denied that there was an express or implied condition that the Commissioner would neither allocate to individuals the public spaces referred to nor that the spaces would only be maintained for the public and that no individual would alienate those parcels of land.
 11. The 3rd Defendant argued that if the land was allocated to individuals then that was done within the parameters of law without breach of any conditions. The Defendant urged the court to dismiss the Plaintiff's suit with costs.
 12. The 4th Defendant filed its statement in April 2008. The 4th Defendant admitted that it has a duty to approve applications for development and grant development permissions but denied breaching its duty or failing to stop the 1st and 2nd Defendants from putting up a house in the Suit Property. The 4th Defendant reserved its right to take necessary action against the 1st and 2nd Defendants if it is proved



- that they constructed without the requisite approval. The 4th Defendant averred that it was improperly sued.
13. The Plaintiff testified in the case. He stated that he was the chairman of Nyari Residents Welfare Society whose membership comprises residents of Nyari Estate which is situated within Nairobi. Members of Nyari Residents Welfare Society own leasehold parcels of land measuring half an acre each. Each parcel of land has a standard lease issued by the Commissioner of Lands and the parcels of land are held subject to the express and implied conditions in the leases.
 14. The residents of the estate also enjoy other physical amenities including roads, public recreational areas, a commercial shopping area with parking and access and sanitary lanes. The commercial shopping centre is on parcel numbers 226 to 234 and is served by public parking and sanitary lanes. The public areas and amenities within the estate are enjoyed by all members and have a direct impact on the value and attractiveness of the plots in the estate. He produced a copy of the survey plan showing the shopping centre and explained that the purpose for having a parking or access lane to the shopping centre was to ensure that the residents had access to the shopping centre and the business people could access their shops for delivery of goods. The sanitary lanes were to provide for sewers or drainage. The access road would also be useful as it would make the shopping centre accessible in the event of a fire outbreak or other misfortune. The public spaces were enjoyed by all the residents and were not subject for alienation except in accordance with the law.
 15. Sometime in July 1999 the residents noticed some construction being undertaken on part of the parking or access road to the commercial shopping centre. Inquiries revealed that the Commissioner of Lands had subdivided the land to create parcels numbers 220 and 222. Plot number 220 was allocated to William Nganga, Susan Wachira and Charles Kariuki who in turn transferred it to 1st and 2nd Defendants.
 16. The Plaintiff felt the allocation and transfer was fraudulent because it was calculated to deprive members of the estate of the parking and access road; was done secretly without issuing a public notice; did not follow the procedure set out in the Government Lands Act; and that the residents were not required to surrender the land before it was allocated. The Plaintiff pointed out that parcels numbers 220 and 222 measured a quarter acre each instead of half acre like the rest of the estate.
 17. The Plaintiffs wrote letters of complaints to the developers, the City Council of Nairobi and the Commissioner of Lands. The City Council wrote back to the Plaintiff indicating that they had stopped the construction and charged the developer in Criminal Case Number M2830/02. Despite this the construction continued prompting the Plaintiff to file this suit. The Plaintiff produced copies of the letters of complaint written to the City Council, Commissioner of Lands and the Developer. The letters were copied to several other entities.
 18. The Plaintiff produced a copy of the amended Registry Index Map (RIM) showing the location of plot numbers 220 and 222 in the shopping centre. The Plaintiff also produced a copy of the letter from Nairobi City Council, City Planning Department dated July 26, 2002 confirming that it had stopped the development of the road reserve between LR No 94/226 and 94/242 by notice under by-law 252 (1) dated 16/4/2002 and that the matter was in the City Court under Criminal Case Number M2837/02. The plaintiff also produced a copy of his lease in respect of Nairobi Block 94/217 measuring 0.2107 ha together with the certificate of lease issued on January 7, 1993. He also produced copies of his advocates' letters addressed to the 4th Defendant.
 19. It was his evidence that Nairobi Block 94 was demarcated in 1982. The land was previously coffee farms which were subdivided to create plots. He stated that the average size of the plot was half an acre or



- one acre except the commercial plots which measure an eighth of an acre. He maintained that plots numbers 220 and 222 were not in the original subdivision plan. He stated that Nyari residents believed these plots formed part of the road that was to serve as an access to the estate's shopping area.
20. He later learnt about a suit filed by the 1st and 2nd Defendants against the City Council of Nairobi. Although he conceded that no road had been blocked, he maintained that the access to the shops had been closed and the road parallel is much smaller and was only intended to serve the houses next to it. He contended the whole road was left out at the time of subdivision and creation of the estate which shows that it was a public road intended to serve the residents. He stated that the finding of surveyors was that the suit land was a road reserve. The residents were not party to the suit filed by the 1st and 2nd Defendants in the High Court.
 21. The 1st Defendant gave evidence and confirmed that the 2nd Defendant is his wife. He bought LR No 94/220 in Nyari Estate with his wife from William Ng'ang'a, Susan Wachira and Charles Kariuki. They were taken to the land by Susan Wachira. The property was allocated to them vide the letter of allotment dated July 1, 1999. The area indicated in the letter of allotment which he produced in evidence was 0.1501 ha and the stand premium stated was Kshs 45,000. He also produced a copy of an agreement for sale dated October 18, 2000 showing that they bought the suit land for Kshs 600,000/=.
 22. It was his evidence that they paid the stand premium and other charges indicated in the letter of allotment by a banker's cheque for Kshs 58,000/=. The receipts he produced dated April 6, 2001 and July 10, 2003 are for Kshs 18,750 and 15,778 respectively. He also produced a copy of the approved building plans. He produced copies of the charge sheet in respect of the City Court matter which required him to demolish the development for having constructed unauthorized structures without plans from Nairobi City Council. He produced a copy of the bail receipt for Kshs 50,000/= which was refunded on October 30, 2003. He produced a complete RIM together with the survey plan showing parcel number 220. The copy of certificate of official search dated February 21, 2005 confirms that a title was issued to him with his wife on February 12, 2001.
 23. He also produced a copy of the judgement in Nairobi HC Misc Civil Application No 1358 of 2002 R v City council of Nairobi, Ex parte Ben Athumani Mungai Mzee and Lydia Nyambura Mungai in which JB Ojwang J granted an order of mandamus compelling the Director of City Planning, Nairobi City Council, to discharge his duties under the Physical Planning Act Cap 286 by considering the applicants' development plan No DN000461 in respect of their property known as Nairobi Block 94/220 situated at Nyari Nairobi. The court also granted an order of prohibition enjoining the City Council of Nairobi not to interfere with the developments on plot number Nairobi Block 94/220 pending compliance with the order for mandamus. The judgement was delivered on September 17, 2004 and the decree issued on September 29, 2004.
 24. He also produced copy of the letter dated February 7, 2001 forwarding the lease document for stamping and registration together with a letter from the Ministry of Lands and Settlement dated February 24, 2003 which stated that Nairobi Block 94/220 is a residential property measuring 0.1501 ha leased for 99 years from 1st July 1999 at the annual rent of Kshs 9,000/=. The letter confirmed that a certificate of lease in respect of this land was registered and issued on February 12, 2001 and the registered owners were Mr and Mrs Ben A Mungai Mzee. The Defendant also produced copies of receipts issued by the Ministry of Lands for payment of consent and transfer fees paid on October 23, 2000 as well as the lease over this land which was registered on February 12, 2001.
 25. The 1st Defendant confirmed that he worked at the Lands office in 1989. He was a Collector of stamp duty and Registrar of Titles and was therefore well versed with land law regimes. He knew the procedure for acquisition of public land under the Government Lands Act. He maintained that the



procedure was followed in allocating Nairobi Block 94/220 to the persons who sold him this land. He had retired by 1999.

26. He gave the steps that were taken in allocating public land. He stated that to allocate public land, the President's consent was required. He confirmed that plot no 220 abuts plots numbers 226 and four other plots according to the survey plan and it abuts plot number 235 and 224 on the left side. He stated that he was not aware that plot 220 was supposed to be a road and reiterated that it was a residential plot. He stated that he was a junior officer at lands office and did not use his position to acquire the suit plot. He purchased the plot and stressed that he did not use other people to have the plot allocated to them then later transferred to him.
27. He did not produce any proof of payment of the consideration under the sale agreement and relied on the sale agreement as proof that he paid the consideration stated. He did not involve the Plaintiff when he filed Nairobi HC Misc Civil application No 1358 of 2002 because in his view the residents did not own the land and had nothing to do with it. He was aware that the residents had lodged a complaint against him over the suit plot. He confirmed that they did not have the records of the roads at lands office.
28. Parties filed submissions and they also filed separate issues. The issues for determination are as follows;
 - i. Did the Commissioner of Lands comply with the Government Lands Act and other Laws in allocating the Suit Property to the Parties who sold it to the 1st and 2nd Defendants?
 - ii. Is the Suit Property on a road reserve?
 - iii. Has the Plaintiff and the Residents of Nyari Estate been denied physical amenities and use of the road to the shopping centre?
 - iv. Does the Plaintiff have any justifiable claim against the 1st and 2nd Defendants?
 - v. Is the Plaintiff's suit against the 1st and 2nd Defendants res judicata?
 - vi. Do the 1st and 2nd Defendants hold a good title over the suit property?
 - vii. Should the court grant the orders sought by the Plaintiff in the Further Re-amended Plaintiff?
29. It was the Plaintiff's evidence that he has been residing in Nyari Estate and that the plots in Nyari Estate which measure half an acre each were surveyed and subdivided in 1982 much earlier than the suit plot. The Plaintiff argued that the suit property was created in 1999 and was excised from an open space which had been reserved as a public access road.
30. It is not in dispute that Nairobi City Council stopped the 1st and 2nd Defendants from further constructing on the Suit Property. The Defendants filed Nairobi HC Misc Civil Application No 1358 of 2002 and obtained orders barring the City Council from interfering with the development on their plot. The court order compelled Nairobi City Council to discharge its duties under the Physical Planning Act by considering the application for approval of the development plans of the 1st and 2nd Defendants.
31. The Plaintiff argues that the Commissioner of Lands failed to comply with the legal requirements set out at Sections 9 to 15 of the Governments Lands Act. The steps include causing the land to be subdivided into plots and sale of the town plots by public auction after the Commissioner determines the rent payable. The time and place of the sale had to be published in a gazette at least four weeks before the date of the sale. The Plaintiff also challenged the manner of transfer of the suit property maintaining that as Registrar of Titles at Ardhi House the 1st Defendant knew that the procedure was



- not followed. There was no evidence of payment of stand premium and no evidence was provided of the payment of purchase price. The Plaintiff urges the court to cancel the certificate of title and give an order for demolition of the structure on the Suit Property.
32. The Plaintiff produced survey plan F/R No 200/74 for plot number 221. This plot is at the far end of the line of plots comprising the shopping centre. The survey plan shows a 15 metre road that runs parallel to the shopping centre on the left and a 9 metre road to its right. That survey plan was prepared in March 1990. Survey Plan No F/R 202/6 which was prepared in respect of the subdivision of plots numbers 220 to 234 show the creation of plot numbers 220 and 222 ostensibly from the road reserve on the left of the shopping centre while the 9 metre road to its right remained intact. F/R 256/27 which was prepared after the subdivision and creation of 241 and 242 only shows a road to the right of plot number 242 which is indicated as 220. This survey plan was prepared on 24/3/1994 and does not show that 220 is a residential plot. F/R No 336/4 which was prepared in 1998 in respect of parcel number 262 shows a 15-metre-wide road to the right of this parcel of land. That road abuts plots numbers 232 and 233 which are on F/R No 202/6.
 33. The Defendants challenged the Plaintiff's authority to file the suit on behalf of Nyari residents. They denied that such a society exists. The 1st and 2nd Defendants submitted that the Plaintiff failed to prove fraud against them in the acquisition of the Suit Property. On whether the Suit land was on a road reserve, the 1st and 2nd Defendants maintained that this issue was litigated in Criminal Case No 652 of 2003 where the 1st Defendant had been charged with the offence of building on a road reserve without approvals. The 1st and 2nd Defendants averred that the Magistrate found that the Suit Property had been lawfully allocated to the 1st Defendant. They contended that the orders sought cannot be issued since construction had been completed.
 34. They did not attach a copy of the decision of the Magistrate. The charge sheet shows that 1st Defendant was required to demolish the unauthorised construction of a double storey residential unit built up to the first floor level without plans from the Nairobi City Council. The bail receipts produced by the 1st Defendant do not constitute evidence that the Magistrate made a finding that plot No 220 was a residential plot and not a road reserve. The charge related to the 1st Defendant's failure to obtain the Council's approval for development.
 35. The 3rd Defendant maintained that the Plaintiff had failed to conclusively prove that a provision existed in his lease stating that the Commissioner of Lands would not allocate the spaces within the estate including the Suit Property or that they would be maintained for public use. It also submitted that the orders sought cannot be issued against it since it is only the Chief Land Registrar who can cancel leases and not the 3rd Defendant.
 36. Section 3 of the Government Lands Act empowered the President, subject to any other written law, to make grants or dispositions of any estates, interests or rights over unalienated government land. This power was delegated to the Commissioner of Lands for certain specified public purposes set out in the Act which do not include residential plots. Section 9 gave the Commissioner of Lands discretion to dispose of plots within a township which were not required for public purposes. The Act set out the procedure to be followed in the allocation of those plots.
 37. The 1st and 2nd Defendants were granted a lease by the Commissioner of Lands over plot no 220 further to the letter of allotment which was allocated to persons whom they claim sold to them. The suit plot in the court's view was already alienated or set aside for use as a road in Nyari Estate and was therefore not available for alienation as the Commissioner of Lands purported to do. The Commissioner of Lands breached the provisions of the Government Lands Act together with the Local Government Act when



- he purported to allocate plot numbers 220 and 220 in Nyari to individuals for residential purposes yet it was already set aside for public purposes.
38. The 4th Defendant submitted that Plaintiff failed to prove fraud against it. It also submitted that after the 1st and 2nd Defendants sued it in High Court Civil Application No 1358 of 2012, the court issued orders restraining the 4th Defendant from interfering with the development of the Suit Property.
 39. The court has looked at the judgement of Ojwang J. delivered on September 17, 2004. The court granted an order of mandamus compelling the Director of City Planning to discharge his statutory duties under the Physical Planning Act by considering the Applicant's development plan No DN 000461 in respect of their property being plot no 220 situated at Nyari, Nairobi. There was no evidence adduced to show that following the decision of Ojwang J, the Nairobi City Council did consider the 1st and 2nd Defendant's application for approval of its development or that the 1st Defendant obtained the Council's approval for development after the court directed the Council to consider the 1st Defendant's application.
 40. The court did not make a finding that plot no 220 was a residential plot. The residents were not parties to that suit. The court only dealt with the issue of the Council's failure to consider the 1st and 2nd Defendant's application for development approval. The issues for determination in this suit are not res judicata.
 41. Section 29 of the Physical Planning Act gave the Nairobi City Council power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area. It also gave it power to consider and approve development applications and grant permission for development. Section 29 (f) enjoins the local authority to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.
 42. The grant of approval for development is not automatic. Section 33 of the Physical Planning Act gives the local authority's Director of Physical Planning the discretion to grant the development permission in the approved form or refuse to grant the permission while stating the reasons. Nairobi City Council was under an obligation to notify the 1st Defendant if it refused to grant the development approval within 30 days and give reasons for the refusal.
 43. The 1st Defendant did not produce a copy of the development permission contemplated by Section 33. Section 33 empowers the Council to refuse to grant approval for development where it is satisfied that the land in question an open space which the Council is required to reserve and maintain pursuant to Section 29 (f) of the Physical Planning Act.
 44. The part development plan No E/16 Sheet NE 42 from the Valuation Section NCC which the Plaintiff produced which shows the plots in Nyari Estate does not show that plot numbers 220 and 222 existed. Where these plots are created on F/R No 202/6 is shown on the part development plan as a road.
 45. The 1st and 2nd Defendants maintained that they lawfully acquired the Suit Property which the Plaintiff maintains is part of a road. Looking at F/R No 200/74 which has parcel no 221, there is a 15 metre road to the left of this plot and a 9-meter road on the other side. This survey plan confirms that plot numbers 220 and 222 were created from the 15 metre road in the estate that was to serve the shopping centre. F/R No 256/27 prepared in respect of parcel no 242 in 1993 shows that 220 is part of a road and not a residential plot. This leads to the conclusion that plot numbers 220 and 222 were created out of the road intended to provide access to the residents to the shopping centre in the estate.



46. Section 185 of the Local Government Act that was in force in 2001 at the time this suit was filed gave the municipal council power to permanently close, divert or alter the line of any street or road vested in it. The notice had to be given in the Gazette and on all the owners whose land abutted the road proposed to be closed. For a proposal to close the road, a notice had to be served on a Minister responsible for town planning.
47. Under Section 182 of the Local Government Act, every municipal council had the general control and care of all public streets situated within its area. The streets or roads were vested in the local authority in trust to maintain for the use and benefit of the public. The section empowered the municipal council to make, alter, repair or temporarily close the public streets. Section 192 defined 'vesting' in relation to a road as the transfer of possession of the surface of the land forming the road as well as the material below and the surface above. There is no evidence that this procedure was followed by the City Council.
48. Section 85 of the Government Lands Act protected proclaimed and reserved roads, thoroughfares and outspans. They were to remain free and uninterrupted unless they were closed or altered by a competent authority. 'Reserved roads' included the land which was described as being reserved for a road.
49. The 1st and 2nd Defendants did not demonstrate that the legal procedure for closing the road permanently set out in the Local Government Act was followed. The allocation of the land that formed part of the road in Nyari Estate by the Commissioner of Lands was unlawful. The 1st and 2nd Defendants do not therefore hold good title over plot no 220 situated in Nyari Estate.
50. The court finds that the LR No Nairobi/ Block 94/220 and Nairobi/ Block 94/222 were illegally created out of the road abutting plot numbers 221, 227, 227 to 234, and 236 on the one side and plots 245, 224, 262 and 242 on the other side.
51. The court grants prayers 1 and 2 of the Further Amended Plaintiff dated July 31, 2017. The Plaintiff is awarded the costs of the suit to be borne by the 1st and 2nd Defendants.

DATED AND DELIVERED AT NAIROBI ON 26TH JULY 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kimani for the Plaintiff

Mr. Mutanda holding brief for Mr. Gitonga for the 1st & 2nd Defendants

Ms. Otieno for the 4th Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 3rd Defendant

