



REPUBLIC OF KENYA  
ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 121 OF 1996

PETER MUDIDA.....1<sup>ST</sup> PLAINTIFF

ROSE MUDIDA.....2<sup>ND</sup> PLAINTIFF

VERSUS

THE MIGORI TOWN COUNCIL.....1<sup>ST</sup> DEFENDANT

MADINA SHARIF HUSSEIN

W/O OMARI SHARIF IBRAHIM.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. The plaintiffs filed the instant suit vide a plaint filed in this court on 4<sup>th</sup> April 1996. The plaint was amended severally with the leave of the court and the plaint upon which this judgment will be based is the Further Amended plaint dated 11<sup>th</sup> July 2014 filed in court on 15<sup>th</sup> July 2014. The plaintiffs by the plaint averred that they were the proprietors of Plot Nos. 49 and 50 in Migori Township which they had partially developed in accordance with the approved building plans. The plaintiffs' state that they applied to be allocated the plots and that the same were duly allocated to them vide Town Planning Minute 48/86 (64) of 9<sup>th</sup> December 1986.

2. The plaintiffs further aver that the Migori Town Council, the predecessor of the Migori County Government, the 1<sup>st</sup> defendant herein caused a redesign of the plan which affected the plaintiffs said plot nos. 49 and 50 with the result that plot no. 49 was relocated to the position of Plot No. 51 owned by one Richard Odiori Ndigula rendering the 1<sup>st</sup> plaintiff unable to utilize the same. Plot No. 50 belonging to the 2<sup>nd</sup> plaintiff was altogether wiped out of the plan. The plaintiffs claim that they have been deprived of their said plots without any compensation. The plaintiffs by the plaint seek the following reliefs:-

- a. **A mandatory injunction to be issued restraining the defendants, their agents and/or servants from interfering with the plaintiffs said property and/or alienating the same by way of unlawful acquisition or alteration of existing building plans.**
- b. **General damages**
- c. **Costs of this suit.**
- d. **Interest on (b) and (c) above at court rates.**
- e. **An order that the defendants redirect storm water from the plaintiffs Plot No. 49.**
- f. **Any other relief the honourable court may deem fit and just to grant.**

3. Upon service of the summons to enter appearance the 1<sup>st</sup> and 2<sup>nd</sup> defendants appeared and filed their respective defences. The 1<sup>st</sup> defendant filed a written statement of defence and counterclaim dated 9<sup>th</sup> May 1996 while the Attorney General (the 2<sup>nd</sup> defendant) filed a statement of defence dated 6<sup>th</sup> May 1996. The plaintiffs rather in unclear circumstances filed an amended plaint dated 19<sup>th</sup> May 1997 through the firm of T.T.M Aswani Advocate where the name of the 2<sup>nd</sup> defendant was deleted. The

remaining defendant, Migori Town Council equally filed a fresh written statement of defence on 10<sup>th</sup> July 1997 through the firm of J. A. Onjala Advocate and this defence did not contain a counterclaim. Both the amended plaint and statement of defence filed by Migori town Council were admitted on record and subsequent proceedings were conducted on the basis of these pleadings. The plaintiffs however further amended their plaint to include a new 2<sup>nd</sup> defendant one Madina Sharif Hussein w/o Omar Shariff Ibrahim who was stated to be the proprietor of Plot No. 48 adjoining the plaintiffs plot Nos 49 and 50. This defendant as per the record did not appear or file any defence.

4. The 1<sup>st</sup> defendant by its defence filed on 10<sup>th</sup> July 1997 admitted allocating the plots to the plaintiffs but averred that it had the mandate to regulate and implement the physical planning of the township and that whatever actions that were taken by the 1<sup>st</sup> defendant were lawful and in exercise of its mandate. The 1<sup>st</sup> defendant contended that it could not be held responsible for changes made to the physical plan by the central government and which changes were being implemented at the behest of the central government.

5. The suit was fixed for pretrial directions on 24<sup>th</sup> November 2015 when only the plaintiffs' counsel attended and the plaintiffs had for their part complied with Order 11 of the Civil Procedure Rules but the defendants were yet to comply. The court directed that the defendants comply with Order 11 of the Civil Procedure Rules within 21 days of their being served with the day's order. The court proceeded to fix the suit for hearing on 14<sup>th</sup> March 2016 on a priority basis given the age of the suit.

6. On 14<sup>th</sup> March 2016 the plaintiffs' counsel appeared for the plaintiffs and the defendants did not appear and neither were they represented by counsel inspite of having been served with a hearing notice. The defendants also neither filed any documents and/or any witness statements. The plaintiffs advocate Mr. T. T. Aswani requested and the court agreed with him that this was a fitting case to be determined on the basis of the filed documents and witness statements and written submissions. The court directed the plaintiffs to file and serve their written submissions on the defendants and that the defendants to have liberty to file response submissions within 21 days of being served with the plaintiffs submissions. The plaintiffs' submissions were filed in court on 18<sup>th</sup> April 2016 and were served on the defendants on 11<sup>th</sup> May, 2016. Neither of the defendants had filed any response submissions by 19<sup>th</sup> September 2016 when I reserved judgment for delivery on 25<sup>th</sup> November 2016.

#### 7. Analysis of the Evidence;

The 1<sup>st</sup> plaintiff Peter Mudida filed his witness statement dated 11<sup>th</sup> November 2015 which was admitted in evidence. The plaintiffs further filed a list of documents numbered 1-63 dated 11<sup>th</sup> November 2015. The copies of the documents attached thereto numbered from page 1 to 131 were admitted in evidence in support of the plaintiffs' case.

8. It is the evidence of the plaintiffs' that they were allocated by the Migori Town Council two plots Nos. 49 and 50 in Migori Town following application. The plaintiffs have tendered a receipt for the application fee of kshs. 450/= dated 1<sup>st</sup> July 1985 (Doc No. 3 list of documents) at page 3 bundle of documents. The plaintiff has further tendered Appendix "A" being Doc No. 4 on the list of documents showing market plots within Migori market approved vide Town Planning Markets and Housing Committee Minute 48/86 of 9<sup>th</sup> December 1986 which shows the 1<sup>st</sup> plaintiff and 2<sup>nd</sup> plaintiff were allocated plot nos. 49 and 50 which were designated as "**Retail Shops**" (document at page 4-8 of bundle of documents). The plaintiffs state that they applied for and obtained approved development plans of the South Nyanza County Council who are predecessors of the 1<sup>st</sup> defendant on 27<sup>th</sup> March 1987 (Copies of approved plans are exhibited at pages 12-17 of the bundle of documents). The approval was for the construction of commercial cum residential buildings. The plaintiffs commenced construction after obtaining the approval.

9. The plaintiffs aver that notwithstanding that they had obtained the requisite approval for the development, the Town Clerk of Migori Town Council vide a letter dated 26<sup>th</sup> May 1993 wrote to the 2<sup>nd</sup> plaintiff notifying her that she had constructed a permanent structure on Plot No. 50 without approval from the Council and ordered stoppage of any further development until the matter was resolved. That although the plaintiff responded to the town council vide a letter dated 20<sup>th</sup> June 1993 (at page 25 bundle of documents) indicating they had approved building plans the council vide its letter of 25<sup>th</sup> July 1993 (at page 26 bundle of documents) ignored the plaintiffs protestations and insisted further construction works on the plots had to cease threatening appropriate action would be taken against the plaintiffs if stoppage was not effected. The Council thus trashed the building plans that the same council or its predecessor had approved in 1987 for Plot No. 50 and in 1989 for Plot No. 49 respectively.

10. The plaintiffs further aver the 1<sup>st</sup> defendant in utter disregard of the plaintiffs' property rights in 1995 caused an access road to be planned which encroached onto part of the plaintiffs' plots resulting in the demolition of the plaintiffs' fence and the destruction of the plaintiffs' construction materials that were on site. The plaintiffs further aver that during the construction of the access road the 1<sup>st</sup> defendant caused the storm water from the adjacent plot 48 to be directed to plot No. 49 belonging to the 1<sup>st</sup> plaintiff rendering the plot unusable. The acts by the 1<sup>st</sup> defendant of annexing parts of the plaintiffs' plots to form part of the access road and directing storm water onto the 1<sup>st</sup> plaintiff's Plot No. 49 led the plaintiffs to institute the present proceedings for the adjudication of the dispute by the court.

11. The plaintiffs state that all efforts to have the dispute resolved were unsuccessful owing to the non-cooperation of the 1<sup>st</sup> defendant's predecessors. The court on 10<sup>th</sup> July 1997 by consent of the parties directed the status quo respecting the plaintiffs Plot Nos. 49 and 50 to be maintained pending receipt of a report from District Surveyor, Migori, who was directed to visit the said plots to determine the extent of the 1<sup>st</sup> defendant's encroachment on the plots if at all. The surveyor made a report to the court vide a letter dated 15<sup>th</sup> December 1997 exhibited at page 60 in the plaintiffs' bundle of documents. The surveyor in the letter stated the plaintiffs had constructed two permanent structures/buildings, one of which was a shop building measuring 10metres by 9metres and the other a building measuring 3metres by 7metres. The surveyor stated the structures had been

constructed before the ring road within Migori town had been planned. The plaintiffs position was that the planned road was cutting through Plot No. 49 and that prompted **Hon. Justice Wambilyangah** on 30<sup>th</sup> November 2000 to direct the physical planner to replan the road so as to ensure that it did not pass through the plaintiffs' land as per the court order exhibited at page 81 in the plaintiffs bundle of documents. The Town Clerk had earlier vide a letter dated 22<sup>nd</sup> September 2000 to the District Physical Planner confirmed that the relocation of the road would not interfere with the other developments. Letter exhibited at page 79 of the bundle of documents. The letter in part states:-

**“The re-location of the road will not interfere with other physical development hence it will be a safe measure to end the case between the council and the Mudida family.”**

12. Clearly it was on the basis of this letter which was copied to Onjala & Co, Advocates for the 1<sup>st</sup> defendant which informed the order made by **Wambilyangah, J** on 30<sup>th</sup> November 2000. The Physical Planner vide a letter addressed to the Registrar, High Court received by the court on 13<sup>th</sup> February 2001 confirmed that the road had been re-planned to avoid the plaintiffs' plot. Letter exhibited at page 101 of the plaintiffs' bundle of documents. The plaintiffs however asserted that the 1<sup>st</sup> defendant did not implement the part development plan as re-planned by the physical planner but instead created and allotted a Plot No. 48 to one Omar Shariff Ibrahim which plot encroached onto the 1<sup>st</sup> plaintiffs' Plot No. 49 by as much as 2metres. The said Omar Shariff Ibrahim developed Plot No. 48 despite protestations from the plaintiffs to him and to the council and in the process directed the storm water from his said Plot to Plot No. 49 belonging to the plaintiffs. The plaintiffs aver that their Plot No. 49 has been rendered unusable and on that account seek damages from the defendants. The plaintiffs fault the 1<sup>st</sup> defendant for allocating Plot No. 48 to the 2<sup>nd</sup> defendant when they knew or ought to have known the same was encroaching onto Plot No. 49. The plaintiffs also fault the 1<sup>st</sup> defendant for approving the development plans for Plot No. 48 in the face of the encroachment.

13. The plaintiffs' state that the dispute remained unresolved and the expectation was that a solution would be arrived at but the conduct of the 1<sup>st</sup> defendant rendered that impractical. The 1<sup>st</sup> defendant notwithstanding the pendency of the suit in 2014 renewed its push to construct the access road through the plaintiffs' plots forcefully. The 1<sup>st</sup> defendant on 15<sup>th</sup> January 2014 served the 1<sup>st</sup> plaintiff an enforcement notice requiring him to demolish all the structures on Plot No. 49 within 14 days. The plaintiffs sought the intervention of the court to have the boundaries of Plot Nos. 48 and 49 delineated by the Physical Planner. The court on 17<sup>th</sup> December 2014 inter alia ordered thus:-

**1. That the District Physical Planning Officer, Migori County, together with the District Surveyor, Migori County do proceed to plots Nos. 48 and 49 within Migori Township to determine and indicate the position of the uncertain or disputed boundary thereof.**

**2. That the District Physical Planning Officer, Migori County and the District Surveyor, Migori County do file their decision on the dispute in the Honourable court, within 30 days of service of the order of this court upon them.**

14. Both the County Surveyor and the County Physical Planner implemented the court order and filed their respective reports on 17<sup>th</sup> February 2015. Both were agreed that there was encroachment on Plot No. 49 by Plot No. 48. The findings as recorded by the physical planner were explicit and are as follows:

**1. That Plot No. 49 is owned by Peter Mudida who has an allotment letter issued to him by the department of lands on 14<sup>th</sup> January 1998.**

**2. That the said plot by Mudida is currently under temporary structures where timbers are stored. The plot is measuring 15 x 30metres as indicated in the allotment letter but there is a small discrepancy on the ground. The section facing the 9M road is less by 2M on the ground due to the encroachment by the neighbouring Plot No. 48 i.e ground measurement 13 x 30metres.**

**3. That the neighbouring Plot No. 48 is fully developed with the building thereon accommodating residential and commercial uses. The building has encroached onto the neighbouring Plot No. 49.**

**4. That by the time the actual beaconing Plot 49 were being undertaken by the survey department, Mr. Madina Sharif Hussein had already developed a permanent structure on his Plot No. 48. This prompted the survey team to place a new beacon along the wall on Plot No. 48.**

**Conclusion:**

**The Plot No. 48 has encroached onto Plot No. 49 by margin of two metres on the lower side facing the service lane.**

15. These reports in my view settle the issue of ownership and the position of the plots on the ground. The survey report has not indicated there is a road of access passing through the plaintiffs Plot No. 49. The 1<sup>st</sup> defendant cannot therefore have any justification in instating that a road passes through the plaintiffs' land as the existing plans do not show that such a road exists. The 1<sup>st</sup> defendant however is entitled to approve any structures and/or developments that are put on in any plot within its jurisdiction pursuant to the provisions of the Physical Planning Act, Cap 286 Laws of Kenya. According to the surveyor's report

annexed at page 128 of the plaintiffs bundle of documents the approximate area of Plot No. 49 encroached by Plot No. 48 is a mere 0.0037Ha which in my view is insignificant as the remainder of Plot No. 49 can still be planned for development although perhaps owing to the encroachment by Plot No. 48 it may no longer be possible for the plaintiffs to carry out the exact type of development that they had planned for the plot. It is conceivable that the plaintiffs have suffered inconvenience and have been put to considerable expense for the period the dispute has ranged. The compensation that the plaintiffs would be entitled to can only relate to the portion that has been found to have been encroached upon by Plot No. 48. The owner of Plot No. 48 in my view is not responsible for the encroachment as he was allotted the plot by the 1<sup>st</sup> defendant who had the responsibility of ensuring the allotted plot did not encroach any other persons plot. I hold the 1<sup>st</sup> defendant responsible for the resultant encroachment.

#### 16. Plaintiffs claim for damages;

The plaintiffs contend that they have since being allocated the subject plots endured a lot of harassment by the 1<sup>st</sup> defendant and have for that reason not been able to fully develop and utilize their said plots to realize optimal economic benefits. The plaintiffs claim loss and damage from the 1<sup>st</sup> defendant. The plaintiffs state that they intended to build 12 boarding rooms on each of the plots and would have been renting them at kshs. 350/= per night meaning per day they would have been earning kshs. 8,400/= translating to a yearly income of kshs. 3,066,000/=. The plaintiffs further state the 1<sup>st</sup> defendant prevented them from completing the construction on the 2 plots with the result that the construction costs have now escalated and hence it would cost a lot more to construct the same structures approved for development on the said plots.

17. The plaintiffs in support of their claim for damages have annexed at page 61 of the bundle of documents a valuation report by Kobita & Company Registered Valuers dated 22<sup>nd</sup> December 1998 which showed the value of the plots as at that date and what the value would be if the plots were completed as per the approved plans.

#### Plot No. 50:

**Value as at 22<sup>nd</sup> December 1998    shs.3,300,000/=**

**Value after completion                      shs.13,000,000/=**

#### Plot No. 49:

**Value as at 22<sup>nd</sup> December 1998    shs.1,400,000/=**

**Value after completion                      shs.13,000,000/=**

18. From the evidence adduced, it is clear that Plot No. 50 was developed with two permanent structures and it is not clear why the plaintiffs did not go ahead to complete the development as per the approved plans. As regards Plot No. 49 the evidence adduced establishes there has been a long running dispute with the 1<sup>st</sup> defendant and there is clear evidence of encroachment onto the plot although the encroachment as I have observed is not significant since the plot can be replanned for development. The evidence suggests that the plaintiffs nonetheless have been carrying on business on both plots although they may not have been able to complete the approved developments on the plots owing to the running dispute with the 1<sup>st</sup> defendant. There was a shop and other building on Plot No. 50 and there were some semi permanent structures on Plot No. 49 including a timber yard from where no doubt the plaintiffs were carrying on business and generating income. The special damages claimed by the plaintiffs by way of lost business in my view are speculative and have not been proved and cannot therefore be awarded.

#### 19. Determination;

However the conduct of the 1<sup>st</sup> defendant has been rather high handed as relates to the plaintiffs and bordered on being punitive. Despite the plaintiffs' protestations that their plots are being encroached upon by reason of the 1<sup>st</sup> defendant's acts of allocating Plot No. 48 to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant did not show any willingness to resolve the matter. The 1<sup>st</sup> defendant apparently went on to sanction the planning of a ring road which would have passed through the plaintiffs plots yet they were aware that they had allocated the Plot Nos. 49 and 50 to the plaintiffs. The 1<sup>st</sup> defendant could only do that if arrangement were made to fully compensate the plaintiffs the full value of their affected plots. It took the intervention of the court vide **Wambilyangah, J's** order of 30<sup>th</sup> November 2000 to have the road replanned to avoid the plaintiffs plots. The acts of the 1<sup>st</sup> defendant, I am satisfied prevented the plaintiffs from fully developing their plots as envisaged and that no doubt impacted on the economic benefits they could derive from their said plots. An award of general damages would in the circumstances be merited to compensate the plaintiffs for the inconvenience, anxiety and loss of opportunity.

20. Although it is difficult to ascertain the damage suffered by the plaintiffs by reason of the 1<sup>st</sup> defendant's acts, it is necessary for the court to do justice to the parties. It cannot be disputed the plaintiffs have suffered loss and damage by reason of not being able to fully develop and utilize their plots owing to the 1<sup>st</sup> defendant's actions. I would in the circumstances of this case consider an award of Kenya Shillings Two Million (kshs. 2,000,000/=) fair and reasonable as general damages and award the same to the plaintiff as against the 1<sup>st</sup> defendant.

21. On the basis of the evidence presented before the court and the documents reviewed and considered by the court, I am satisfied that the plaintiffs' case is proved on a balance of probabilities. The defence filed on behalf of the 1<sup>st</sup> defendant admits

the plaintiffs were allocated the subject plots. The Surveyor and the Physical Planner from the 1<sup>st</sup> defendant confirmed the encroachment onto the plaintiff's Plot No. 49. The defendants did not file any documents and/or any submissions and thus the bundle of documents filed by the plaintiffs was not challenged with the consequence that the court placed reliance on the said documents in reaching the conclusion that the plaintiffs' case had been established on a balance of probabilities.

22. The net result is that I enter judgment in favour of the plaintiffs on the following terms:-

**i. That the County Physical Planner's and the County Surveyor's reports respecting Plot Nos. 48 and 49 within Migori Township dated 17<sup>th</sup> February 2015 and filed in court on 23<sup>rd</sup> February 2015 are adopted and approved by the court and should be implemented forthwith.**

**ii. An order of permanent injunction be and is hereby issued against the defendants restraining the defendants either by themselves, their agents and/or servants from interfering with the plaintiffs Plot Nos. 49 and 50 upon implementation of (i) above.**

**iii. Kshs. 2,000,000/= being general damages awarded to the plaintiffs as against the 1<sup>st</sup> defendant with interest at court rates from the date of this judgment until payment in full.**

**iv. Costs of the suit awarded to the plaintiffs as against the 1<sup>st</sup> defendant with interest at court rates.**

**Judgment dated, signed and delivered at Kisii this 25<sup>th</sup> day of November, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

M/s Nyawencha for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

N/A for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**