



**Tigerer (Suing on His Behalf and on Behalf of 850 others) v Attorney General & 5 others
(Environment & Land Case 255 of 2012) [2024] KEELC 1353 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 255 OF 2012
FM NJOROGE, J
MARCH 15, 2024**

BETWEEN

**STEPHEN KIPRUTO TIGERER (SUING ON HIS BEHALF AND ON BEHALF
OF 850 OTHERS) PLAINTIFF**

AND

**ATTORNEY GENERAL OF KENYA 1ST DEFENDANT
THE COMMISSIONER OF LANDS 2ND DEFENDANT
THE DISTRICT COMMISSIONER BURETI 3RD DEFENDANT
THE DISTRICT FOREST OFFICER BURETI DISTRICT 4TH DEFENDANT
THE FOREST OFFICER NDOINET FOREST 5TH DEFENDANT
THE OFFICER COMMANDING LETEIN POLICE STATION . 6TH DEFENDANT**

JUDGMENT

1. The plaintiff has brought this suit on his own behalf and on behalf of 850 others. All the defendants are government officers. The plaintiff avers that he and others were allocated land in Lower Ndoinet Settlement Scheme but to date they have never been issued with their title deeds. It is claimed that from time to time the defendants harassed the plaintiffs and threatened them with evictions but on 31st January 2006, the administration police under instructions from the 3rd, 4th, 5th and 6th defendants unlawfully destroyed the plaintiffs’ dwellings and schools and rendered the plaintiffs homeless and made them apprehensive of being evicted from their land. The plaintiffs seek the following prayers:
 - a. A declaration that land allocated to them in the western part of the Mau forest and gazetted in legal Notice No. 148 of 16th February 2001 lawfully belongs to the plaintiffs;



- b. A permanent injunction restraining the defendants from evicting the plaintiffs from their parcels of land as allocated to them in the Mau forest;
- c. An order directing the 2nd defendant to issue the plaintiffs with the parcel documents to the parcels each occupies;
- d. Damages/compensation for the loss of the plaintiffs' properties sustained owing to the actions of the defendants;
- e. Cost of this suit and interest on (c) and (d) above at the court rates.

Defence

2. The defendants filed their statement of defence on 16th of March 2006 denying the claim. In particular, they denied the plaintiffs are members of the Lower Ndoinet Settlement Scheme or they were allocated land in the Mau forest as alleged. They further state that the western part of the Mau forest that the plaintiffs claim was not part of the forest land excised by Legal Notice 148 of 16/12/2001. In the alternative, the defendants aver that the said legal notice was stayed by an order in legal notice Nairobi HC Misc Application No. 421 of 2003 and the said case was still pending in court. It is denied that the plaintiffs were issued with such letters of allotment or that such letters of allotment can legally confer title to the suit property until the title deed has been issued. The defendants further accused the plaintiffs of having illegally encroached into gazetted forest land and having caused massive environmental degradation therein and that despite several evictions, the plaintiffs have continued to return to the forest until the eviction of 31st January 2006 which was carried out after due notice had been issued to the plaintiffs. The defendants aver that there would be no legal basis for the issuance of title deeds to illegal occupants of gazetted forest land and that the court lacks jurisdiction to issue the order which they term as untenable. In addition, the defendants aver that Section 16 of the *Government Proceedings Act* bar the issuance of an injunction. They also state that no notice of intention to sue has been issued to or received by the Attorney General and that the suit is fatally defective for failure to comply with the provisions of Section 13 (A) of the *Government Proceedings Act*. Finally, the defendants state that the suit is also fatally defective in that orders issued on 30th September 2005 in Nakuru Misc. App 129 of 2005 were not complied with.
3. The suit was heard on 6th March 2023 and 24th April 2023. Both the plaintiffs and the defendants called one witness each. The parties were then ordered to file submissions. The plaintiffs elected not to file submissions. The defendants filed their submissions on 20th June 2023. I have considered the defendant's submissions as well as pleadings and evidence in this case.

Evidence of the Parties

Plaintiffs' Evidence

4. Joseph Sigilai Some testified as PW1. He testified that he is a Dorobo from Ndoinet Settlement that he has lived there since 1966; that Ndoinet is to the north of the Mau forest. He has come to court on his own behalf and on behalf of 850 people who live in Ndoinet Settlement; Ndoinet is a Government Settlement Scheme. The government gave the plaintiffs the suit land; each person got 5 acres He testified that they were chased away from the land by the Provincial Commissioner Rift Valley, a Mr. Raburu. He testified that PC Raburu came to the area in an aircraft and flew around, then landed and said that those who had "crossed the cut line" should vacate; they had not crossed the cut line but nevertheless they asked where the cut line was and the Provincial Commissioner Mr. Raburu engaged them for 15 days and then they vacated; it was his testimony that the PC did not have any court order



and he used policemen to compel the people to vacate. The policemen came and ordered them to leave. They removed them from their houses and then burnt the dwellings; they had been given a 21 days' notice which had expired; that they were taken to a portion of the same land and a boundary was established in the same year, 2001; the boundary is not a forest boundary but a boundary of Bomet, Kericho and Narok; his land is on the Bomet side and they were told whoever's land is in Bomet, Kericho, Narok, Nakuru should go and obtain titles in those towns. He testified that while they were waiting for titles they were evicted but the Nakuru people were issued with titles but they were told by the surveyor in Nakuru to wait for title. The Permanent Secretary then informed them that they should go seek titles in Bomet; he wanted to go to Bomet but his card read "Nakuru". He testified that by then the boundary had not been established and some land went to Bomet and some to Nakuru; they asked the persons living in the area where they had been taken for permission to build and they built temporary dwellings; some people had already planted tea in the area where they were evicted from. He averred that he should be allowed to go back to his land and that he be given a title deed for it.

5. On cross-examination PW1 averred that they were given land between 1996-1998 before the Legal Notice 148 of 2001 issued. He stated that it was surveyors who pointed them the land out to the people and that nobody was in the forest. He explained that the Ogiek and Ndorobo are the same tribe and he is aware that there is a judgment from Arusha that gives the government timelines to settle the Ogiek.

Defendant's Evidence

6. DW1, Evans Kegode testified that he is the Head of Survey and Mapping at Kenya Forest Service and he has worked there for over 20 years and he is conversant with the suit land. He testified that the Gazette Notice No 148 of 16/12/2001 was challenged in court; that the *Forest Act*, Cap 385 which stated the intention to alter a forest boundary was published and the public was given 28 days, and if there was no objection, the government would alter the boundary by publishing a legal notice and if there arose a challenge, the process was to stop. He testified that he has not seen any allotment letters of the Plaintiff and titles could only issue upon completion of the boundary alteration process.
7. On cross-examination he confirmed that he is aware of the Legal Notice 148/2001 dated 16/2/2001 and stated that it declared de-gazettement of forest land and that the affected part would then cease to be forest land. He confirmed that it was challenged. He explained that only the the intention to degazette the forest was challenged but the gazettement of the forest was not challenged; that before the legal notice, there was a notice to members of the public issued by the Minister for Environment and Natural Resources. He explained that the legal notice declaring the area as being a forest is still in existence and that the land still belongs to the Kenya Forest Service.

Submissions

8. On 20/6/2023 defendant filed submissions. The Plaintiffs elected not to file submissions.
9. In the defendant's submissions, the following issues arise for determination: (a) Whether the Plaintiffs have validly brought the instant suit on behalf of the 850 other alleged Plaintiffs; (b) Whether the Plaintiff/s was validly allocated land in the Western part of Mau Forest; (c) Of the implications of legal notice no 148 of 16/2/2001; (d) Whether the Plaintiffs should be granted the orders sought (e) Who should pay the costs of this suit. On issue (a), the Defendants' submitted that the suit is not a representative suit but a suit by one Stephen Kipruto Tigerer against the Defendants'. It is their submission that the Plaintiffs did not advertise the notice of intention to sue in the Daily Nation Newspaper or the Standard newspaper as directed by this court in a ruling delivered on 30/9/2005. On issue (b), the Defendants' rely on Section 107 (1) of the *Evidence Act* to submit that no letter of allotment has been produced by the Plaintiffs to show they were validly allocated land in the Western



part of Mau Forest. On issue no. (c) the Defendants submit that the Plaintiff has not produced Legal Notice No 148 of 2001. They submit that no letter of allocation was annexed to show the time of allocation and Legal Notice No 148 of 2001 could not apply retrospectively. On issue no. (d) The Defendants' submit that the Plaintiff cannot be granted the orders they seek as the court cannot allocate the Plaintiff gazetted forest land based on a non-existent gazette notice. They submit that the Plaintiffs invaded forest land knowing too well they had no right to do so.

Analysis and Determination

10. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
 - a. Whether the suit is null for failure to issue a notice under section 13 A of the *Government Proceedings Act*;
 - b. Whether the plaintiff has validly brought the instant suit on behalf of the 850 other alleged Plaintiffs;
 - c. Whether the Plaintiff/s was validly allocated land in the Western part of Mau Forest;
 - d. Whether the Plaintiff/s should be granted the orders sought; and
 - e. Who should pay the costs of this suit.
11. On the first issue, this court is of the view that the provisions of Article 50 of the *Constitution* grant any aggrieved person the right to approach the court and seek remedies such as those the plaintiffs now seek. There is no constitutional qualification that a notice must be issued prior to the lodging of the suit. Besides, the notice provided for in the act was intended in my view to enable the Attorney General to investigate the claims in consultation with the relevant departments to obtain information that could help in defending the matter. In the present case a comprehensive defence was filed by the Attorney General and it means that he was given instructions by the 2nd – 6th defendants who had the information regarding the dispute at their fingertips. I therefore do not see how the defendants have been prejudiced by that absence of notice as they know of the dispute and have risen to defend it timely.
12. Regarding the second issue and on a preliminary basis, it is imperative to note that the plaint herein is dated 2/2/2006 and it was received by the Court on 3/2/2006. It is the Defendants' contention that the suit is not a representative suit but a suit by one Stephen Kipruto Tigerer against the Defendants'. The Defendants' reason for such line of argument is that the Plaintiff did not advertise the notice of intention to sue in the Daily Nation Newspaper or the Standard newspaper as directed by this court in a ruling delivered on 30/9/2005. The Court notes that in the Plaint dated 2/2/2006, it is averred that it is brought "pursuant to leave granted to the Plaintiff to file a representative suit by the learned judge Justice D. K. Musinga on the 5/10/2005 in the Nakuru HC Misc Civil App. No 129 of 2005 (Attached is a copy of the Court Order.)" I have perused the Court file. Neither the plaintiff nor the Defendants produced the order said to have been issued by Hon D.K. Musinga J. (as he then was) or the ruling dated 30/9/2005. There is no advertisement of the kind that was also said to have been issued while leave was being granted. It cannot even be said that the 850 other persons alleged to be co-plaintiffs are aware of the existence of the present suit. There is therefore no evidence before this court to make a determination that the instant suit has been validly brought on behalf of the 850 persons as alleged by the Plaintiff. In this court's view the plaintiff is the lone litigant in his suit against the defendants.
13. On whether the Plaintiff was validly allocated land in the western part of Mau Forest, the Plaintiff's claim is that each allottee holds allotment letters for their respective portions of land but they have to



date never been issued with title deeds by the Commissioner of Lands under the Ministry of Lands despite having acquired land legally.

14. In the case of *Philma Farm Produce & Supplies & 4 others v The Attorney General & 6 others* (2012) eKLR, the court held as follows:

“The petitioners’ claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner claim must fail.....”

15. The court has gone through the court file and notes that no letter of allotment has been adduced by the Plaintiff.

16. Section 107, 108, 109 of the *Evidence Act* provides that: -

“107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. 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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

17. Besides, even if for arguments’ sake it was the case that allotments had been issued to the plaintiff and others, this court fails to see how such allotments of gazetted forest land could have been deemed to have been later regularized by Gazette Notice 148 of 2026 which was in any case challenged before the expiry of the period stated on its face, meaning that the degazettement intended to be done was not achieved and that the land remains forest land.

18. This court finds that the Plaintiff is not entitled to the orders sought as he has not adduced evidence to substantiate his claim. Further this court takes cognizance of the notorious fact that anthropogenic activities have laid to waste vast swathes of forest cover on the Mau Escarpment which constitutes one of Kenya’s major water towers. It is therefore imperative to conserve the Mau escarpment area under tree cover to ensure observation of the principles of inter-generational and intra-generational equity that are very clearly espoused by the *Environmental Management and Co-Ordination Act* 1999. Further, Article 69 of the *Constitution* provides as follows:

“69. Obligations in respect of the environment

(1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;



- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - (d) encourage public participation in the management, protection and conservation of the environment;
 - (e) protect genetic resources and biological diversity;
 - (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - (g) eliminate processes and activities that are likely to endanger the environment; and
 - (h) utilize the environment and natural resources for the benefit of the people of Kenya.
- (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

19. Though the present suit was lodged before the inauguration of the current Constitution, the eviction of the plaintiff and others from forest land took place shortly after the enactment of the *Environmental Management and Co-Ordination Act* 1999, a legislation establishing an appropriate legal and institutional framework for the management of the environment. It can be deciphered therefore that the eviction was as a result of a policy that was then rapidly gaining traction in Kenya: to protect and conserve the environment more meticulously than before.

20. It is therefore clear that in evicting persons out of what is forest land, the defendants were only carrying out their duty of protecting the environment from any further degradation by the affected persons and thus the defendants are free from blame.

21. I therefore find that the plaintiff has failed to establish his claim against the defendants to the required standard and this suit must fail. I therefore make the following final orders:

- a. The Plaintiff's suit dated 2/2/2006 is dismissed.
- b. The plaintiff shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 15TH DAY OF MARCH, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

