



**Dodhia & another v Kenya Railways Corporation (Environment & Land
Case E003 of 2022) [2024] KEELC 1260 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E003 OF 2022
FO NYAGAKA, J
MARCH 7, 2024**

BETWEEN

VIPUL RATILAL GOSAR DODHIA 1ST PLAINTIFF

BHIMJI DHANJI VEKARIA 2ND PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

1. The 1st and 2nd Plaintiffs, Vipul Ratilal Gosar Dodhia and Bhimji Dhanji Vekaria, (hereinafter referred to as ‘The Plaintiffs’) instituted the instant suit and then filed an Amended Plaint dated 16/11/2022, verified by Affidavit of the 1st Plaintiff. It was deposited to on a similar date.
2. The Plaintiffs pleaded that they were the registered owners of all that parcel of land known as Kitale Municipality Block 4/436 (hereinafter ‘The Suit Land or ‘Suit Property’) situate in Kitale, having bought it from one Samuel Mwaura Mukora in the year 2001 and accordingly issued with a Certificate of Lease.
3. It was their case that on or about 29/01/2021, the Kenya Railways Corporation (‘KRC’ or) the Defendant herein, entered their suit property and defaced it by putting marks thereon. They pleaded further that upon being informed by their tenants of the invasion, they went into the suit properties and on questioning the Defendant’s agents, they claimed that the land belonged to KRC.
4. They pleaded further that despite owning the suit property for a period of 20 years, the Defendant’s servants, without notice, demolished commercial units and the perimeter wall at night. They averred that the Defendant’s actions were illegal and amounted to trespass and that they had the duty not only to notify them of the intention to demolish since there were tenants in there carrying on business in order to salvage their assets but also to accord them an opportunity to be heard before taking an



- adverse action as that of demolition in line with Article 47 on Fair Administrative Actions Act and Fair Administrative Actions Act.
5. They averred that the action of KRC violated their constitutional right to property under Article 40 of *the Constitution* and had not only lost millions of shillings used to purchase the property but also the monies used to develop the suit property valued at Kshs. 42,000,000/-. That the Defendant had thereby deprived them of source of earnings since their tenants were forced to flee during the demolition resulting in violation of their socio-economic right Constitutionally guaranteed under Article 43.
 6. The Plaintiffs listed particulars of loss and damage as encompassing entering their land without authority, defacing the suit properties, depriving them use, possession, occupation and quiet enjoyment, evicting them, demolishing commercial units, depriving them their source of livelihood and causing them mental anguish and financial strain.
 7. They identified particulars of loss suffered as monthly rent of Kshs. 340,000/- lost from 20/01/2021 to date and developments thereon valued at Kshs. 42,000,000/-.
 8. On the foregoing factual and legal backdrop, the Plaintiffs prayed for the following reliefs;
 - a. A declaration that the Plaintiffs are the legal owners of land parcel number Kitale Municipality Block 4/436.
 - b. The defendant, its servants and or agents be restrained by way of permanent injunction from entering, damaging an or interfering in any way with land parcel No. Kitale Municipality Block 4/436.
 - c. Damages for trespass on the said land parcel number Kitale Municipality block 4/436.
 - d. An Order for payment of Kshs. 340,000/- per month being lost income from 29/01/2021 to date.
 - e. Exemplary and Punitive damages for illegal eviction and destruction of property.
 - f. Costs of this suit and interest.

The Evidence

9. The 1st Plaintiff testified as PW1. He adopted his statement filed on 25/01/2022 as his evidence. He produced the eight (8) documents dated 21/01/2022 as P.Exhibit 1-8 and the ones dated 16th November, 2022 and filed on 5th December 2022 as P.Exhibit 9-12 and the one filed on 14/01/2023 as P.Exhibit 13. I will refer to each in detail in the analysis hereinafter.
10. It was his evidence that they (Plaintiffs) conducted due diligence, then went to the suit land and entered into an agreement with Samuel Mwaura Mukora for Kshs. 2,000,000/-. About the demolition he stated that they did not receive any notice for it and he had tenants in the premises. The tenants used to pay rent of Kshs. 340,000/- every month.
11. On cross-examination he stated that despite conducting due diligence and visiting the site, they did not ask Samuel Mwaura Mukora how he acquired the land. He testified that they were not given part development plans (PDPs) of the suit.
12. He further stated that the railway line was 70 - 100 metres from the suit properties and that he did not inquire from Samuel Mwaura Mukora who was involved in the acquisition and in what manner. He stated he was not aware that Samuel Mukora was involved in a criminal case in Nakuru over the property.



13. The 1st Plaintiff testified further that when they started digging foundation, the Defendant sent police officers to stop it but upon writing a letter to the Defendant and attaching the title to the suit property, they were allowed to proceed with the construction and did so to completion and thereafter let them out. He did not have with him the Defendant's letter forwarding his title to Nairobi for verification neither did he have the letter and that he had not called Samuel Mwaura Mukora as a witness since he passed on.
14. With respect to the rental income, the 1st Plaintiff stated he referred to receipts between the year 2017 and 2020 for the hardware known as Black Mill Hardware and Electricals Limited. He did not have receipts for other tenants and neither did he avail the claimed agreement they had entered with them nor called any one of them as a witness.
15. The 1st Plaintiff stated further that he had not availed any Declarations to Kenya Revenue Authority about earnings but nonetheless produced the valuation report (P.Exhibit 5) which he conceded had no names of tenants or the number. It had only pictures before and after demolitions and development plans.
16. He testified that there was a caution registered on the suit property by the Defendant. It indicated the Defendant's claim that the land was vested or owned by it.
17. As regards the notices for demolitions, he admitted that did not look at the notices filed by the defendants. In the end, he stated that he did not look at the notices.
18. Henry Wanyama Mombe testified as PW2. He stated that he was the Plaintiffs' accountant. He adopted he statement dated 15/02/2023 as his evidence in chief. On cross-examination, he stated that he did not have proof of employment. It was his case that he only used to confirm that tenants had paid rent but had no statement of accounts.

The Defendant's Case

19. Kenya Railways Corporation challenged the Plaintiffs' claim through the Statement of Defence dated 04/03/2022. In inviting the Plaintiff to prove ownership, it was its case that the Plaintiffs were not the registered owners of the suit land.
20. The Defendant pleaded that the Plaintiffs obtained the title to the suit land illegally and fraudulently. In setting out the particulars, it was its case that Samuel Mwaura Mukora unlawfully and illegally obtained the title to the suit land through a forged letter purported to have emanated from the Defendant to the effect that it had no objection in having the Commissioner of Lands allocate him the Defendant's land.
21. It averred that since the land falls within the Railway reserve and it has never surrendered the title for reallocation by the Commissioner of Lands, Samuel Mwaura Mukora illegally and fraudulently acquired the title thereto. Further, that the land was not unalienated land under the Government Lands Act. Again, it pleaded that there were no Board Meeting Minutes of the Defendant, as is supposed to be the practice, to approve the surrender of title to the suit property as to enable the Commissioner for Lands to facilitate issuance of title to Samuel Mwaura Mukora.
22. In the premises, the Defendant asserted, that the illegal and fraudulent manner in which Samuel Mwaura Mukora procured his title deprived him of proprietary interest he would convey to anyone including, the Plaintiffs. Its averred further that upon realizing the fraud, it moved to Kitale Lands Registry to register a caution on the title sometime in the year 2007. However, it was never involved, invited for hearing or notified by Kitale Lands Registry when the caution was removed.



23. The Defendant pleaded that the Plaintiffs' lack any proprietary interest in the suit land for obtaining the title without requisite consents. They claimed that they failed to conduct due diligence to ascertain the status of the property prior to their transaction with Samuel Mwaura Mukora.
24. In response to the demolition, the Defendant averred that it was carried out by multi-agency operation by the Government to clear all encroaching developments on railway reserve which is mandated to provide rail transport to the public and for personal and commercial use. The Defendant claimed that prior to demolitions, it served several notices to the encroachers and lands vested in the defendants requiring them to vacate which were published on 20/03/2018, 27/09/2019 and 30/09/2019 at the Government Publication as well as the daily newspapers, the Standard and the People Daily.
25. In the end, the Defendant denied the particulars of loss and damage. It urged the Court to dismiss the suit with costs.

The Evidence

26. Duncan Mwangi, the Defendant's Principal Surveyor testified as DW1. He adopted his undated statement filed on 27/06/2022 as his evidence. He produced the letter dated 06/03/1996, and the Caution registered on the suit land as D.Exhibit 1 and 2 respectively.
27. He stated that there was short term Development Plan for Kitale town. The Development Plan and Part Development Plan were marked as DMFI 3 and 4 respectively. He also produced the Survey Plan as DMFI 5. It was his case that there was a Layout Plan for Kitale, he produced it as D.Exhibit 6.
28. He testified that the Defendant issued a Notice in the website www.mygov.go.ke and a public notice in the standard newspaper. He produced the two notices as D.Exhibit 7(a) and 7(b). Further, he stated that on 30/09/2019, the Defendant issued a further Notice in a newspaper called The People Daily, he produced it D.Exhibit 7(c). He also produced the Legal Notice No. 440 which referred to Kenya Vesting of Land of 1963 as D.Exhibit 8(a). Again, that the Order that vested land to East Africa Railways.
29. He further referred to Legal Notice No. 24 of 1986, another land vesting Order. He produced it as D.Exhibit. 8(b).
30. The witness further testified that there was Criminal Case No. 693 of 1997 against Samwel Mwaura Mukora and John Kabira. He relied on the Ruling as DMFI 9.
31. In reference to the letter dated 18/05/2002 from the Station Master to 1st Plaintiff, stating that he did not have any objection to the development being carried on, the witness stated that the Station Master did not have any authority to issue a letter of no objection to the existence of a title, only the Managing Director.
32. It was his testimony that the Plaintiff did not follow the procedure in acquiring the suit, a process that is only effected through sale or transfer to lease or surrender. He testified again that if that were to be legally correct there must be approval from the Cabinet Secretary for Transport: as for a Lease there must be approval from the Board of Directors, and as for a surrender, the same procedure applies and a deed of surrender for it made bearing the Corporation seal.
33. It was his case that the issuance of a letter of objection by the Station Master could not be substitute the (above-stated) procedure required.
34. In reference to Kitale Development Plan, (DMFI 3), he stated that it is a document that is used to reserve land for specific purposes, including reserve land, commercial places and the plan clearly marks



- it as East African Railways Station Reserve. He testified that in the Map, the suit land was not contained but based on subsequent documents, it showed that it was curved out of the land reserved for the Defendant.
35. In reference to the Part Development Plan, (DMFI 4) prepared on 1991, he stated that it was prepared for curving out 2 plots within the Railway station reserve. He stated that the plots are not indicated by their numbers on the Plan but are described by a bold boundary as ‘Commercial Plots’.
 36. He added that the curving out of the plots did not follow procedure for allocation described in the preceding paragraphs. He referred to the Survey Plan which showed all the beacons, coordinates, distances and bearings marking the extent of the Railway Station reserve in relation to the suit property. Further, that according to the layout plan, which shows railway lines, stations buildings, railway sidings to industrial plots and buildings such as the Railway housing, the suit land was curved out of what is called the ‘operational area’.
 37. The witness referred to the letter of No Objection, D.Exhibit 1, and stated that it was forgery since it purported to have emanated from the Defendant when in fact it did not. That if Samuel Mwaura Mukora had indeed acquired the property legally, it would have been through the process described in paragraph 43.
 38. On cross-examination, it was his evidence that he had not produced any title document issued on favour of the Defendant. In reference to DMFI 9, he admitted that the case did not make any mention of the suit property and does not mention the letter dated 06/03/1996. He stated that the accused persons were acquitted and that from the letter he could not tell whether the Defendant was involved or not in the case.
 39. His evidence was that as at the time they visited the suit land, there were no buildings and there was a fence round it. He admitted that there was no Court Order allowing the demolition in accordance to *Kenya Railways Corporation Act*.
 40. While referring to the Caution, D.Exhibit 2, he testified that that it did not bear the signature of the Land Registrar and did not have anything other than the stamp on top to show the date it was presented for registration. Further, in reference to D.Exhibit 7(a) and (b), the notice to the general public, his evidence was that it did not bear the suit property, only the railway reserve.
 41. He stated that the KRC had liaised with Ethics and Anti-Corruption Commission (EACC) for investigation of the cases.
 42. Wycliffe Agutu, a Senior Security Officer testified as DW2. He adopted his undated statement as his evidence. It was his case that the demolitions were undertaken by a multi-agency team formulated by the National Government.
 43. Geoffrey Krop Tingoria, the Deputy County Surveyor employed by the Ministry of Lands, Kitale Lands Office testified as DW3. He produced the Survey Plan for the Railway Land as D.Exhibit 5, the survey plan for Kitale Municipality Block 4/36 as D.Exhibit 12 and the Registry Index Map as D.Exhibit 13.
 44. He stated that according to the Part Development Plan, Parcel No. 436 has been amended (added) following the authenticated survey plan of F.R No. 290/38. It was his case that the railway line is shown on the Map by a broken symbol.
 45. He stated that he had never seen document in relation to the suit land that would have shown whether such land would be excised from the railway line and who allocated it. It was his position that survey



plan No. F.R24/2 displays the interest of Kenya Railway and for one to demarcate public land, it has to be gazetted first and subsequently be approved by Parliament.

46. In further describing the process of allocation, he stated that Surveyors come in at the third stage. He stated that allocation is first done, the 2nd stage is the preparation of the Part Development Plan which is approved by the Director of Physical Planning and the third stage is the survey where the Surveyor follows the duly signed and authorized documents. It was his case that the role of the Surveyor is to determine the position of the plot in respect to survey regulations.
47. During cross-examination it was his evidence that he could not tell when the land was allocated to the Defendant. He stated that the land was surveyed on 04/12/1995 as per the Survey Plan 290/38 (D.Exhibit 12) and was given No. 436. Being approximately 0.185 acres. He stated the land is part of railway reserve.
48. It was his evidence that the larger part was surveyed on 31/05/1925 as per the Survey Plan and was given Parcel No. LO (Land Ordinance) 2116. Further, that for land to be surveyed, a PDP and an allotment letter has to be brought to their office. In reference to the suit land, he stated that a survey was done and authenticated by the Survey Office meaning that its registration was done after all the processes were completed.
49. On the foregoing, it was his evidence that he was not privy to the letter of allotment over plot No. 436.

The Submissions

50. The Plaintiff and the Defendant urged their respective cases through lengthy written submissions dated 18/08/2023 and 29/09/2023 respectively. Their contents are appreciated and infused in the analysis section of this judgment.

Issues for Determination

51. Having comprehensively appreciated the parties' pleadings, the testimonial and documentary evidence as well as the submissions presented, the pertinent issues that emerge for determination are as follows;
 - i. Whether the root of ownership of title in Land Parcel No. Kitale Municipality Block 4/436 was proper.
 - ii. In view of (i) above, an assessment of the question whether Samuel Mwaura Mukora lawfully acquired title of Land Parcel No. Kitale Municipality Block 4/436.
 - iii. Depending on (ii) above, whether Samuel Mwaura Mukora validly passed title of Land Parcel No. Kitale Municipality Block 4/436 to the Plaintiffs herein.
 - iv. Reliefs.
52. I will hence deal with the issues seriatim.

Analysis and Determination

i. Whether the root of ownership of title in Land Parcel No. Kitale Municipality Block 4/436 was proper

53. The resolution of a huge chunk of the land dispute hinges on establishing proprietorship of a suit land right from the inception. In the instant case that duty rested on the Plaintiffs. Having instituted this suit, the onus of proof was on them to demonstrate not only how they came into ownership but more



- importantly, trace the roots of ownership in order to validate their title. Section 107 of the *Evidence Act* is clear on the above legal position: he who alleges the existence or otherwise of a fact must prove it.
54. Pursuant to the foregoing, it is evident that before the Plaintiffs came into possession, the Certificate of Lease was issued in favour of Samuel Mwaura Mukora on 27/03/2000 by the Lessor, the Government of Kenya.
 55. Subsequently, the Certificate of Lease was issued in the Plaintiffs name on 30/10/2001. The particulars of lease indicate that the Lessor, the Government of Kenya, had initially leased the suit land to Samuel Mwaura Mukora for a term of 100 years.
 56. In contrast, the Defendant produced Legal Notice No.440 of 1963. It vested land reserved for use by the defunct East African Railways and Harbours Administration in its General Manager department. Subsequently the land was conveyed to and vested in the Kenya Railways Corporation vide Legal Notice No. 24 of 1986. The two Legal Notices were produced by the Defendant through Nuncan Mwangi as D.Exhibit 8(a) and 8(b) respectively.
 57. In addition to the foregoing, the Defendant produced as D.Exhibit 5, The Survey Plan Folio Register No. 24/2 dated 31/05/1925. It was retraced in compilation by D. Kivindu on 30/03/2001. It shows the Railway Station Reserve in Kitale. It indicates that it measures 118.8 acres.
 58. DW1 further produced Survey Plan F/R 290/38. It is dated 04/12/1995. It provides a clean, clearer position of the suit premises in relation to the railway line and the road reserve. I say so because D.Exhibit 5, the Survey Plan Folio Register No. 24/2 of the year 1925 indicates by way of a broken line the proposed position of the railway track in the following words;
'approx. position of proposed railway track'
 59. When the railway line was eventually constructed, it can be seen, according to Survey Plan F/R 290/38, that Parcel No. 436, the suit property herein, is positioned exactly between the railway line and the road. Much is to be discerned from the Yard Layout produced as D.Exhibit 6. From Exhibit, it can be seen that within the general area in contention, different spaces have been allocated various functions by the Defendant. I believe the evidence of the Defendants that once land, of whichever land regime, has been reserved for the Kenya Railways Corporation the procedure for changing it to be owned privately or for private use has to be followed.
 60. Placing side by side the Evidence adduced by the Plaintiff and the Defendant it is irrefutable that the suit land, even in absence of title document by the Defendant, as early as year 1925, the suit land fell squarely within land vested in the Kenya Railways Corporation. Thus, the root of the suit land was and remains irredeemably shaky: it is was not legal.

ii. In view of (i) above, whether Samuel Mwaura Mukora lawfully acquired title of Land Parcel No. Kitale Municipality Block 4/436

61. Having found that the suit land was public land I now turn to the process Samuel Mwaura Mukora ended up as the proprietor. To that end, I will interrogate Government Lands Act.
62. Section 2 of the repealed Government Lands Act defines "unalienated Government land" as:

"Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment."



63. Section 3 of the said Act further provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may-

- a. subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land.”

64. The Act provides for the parameters for the exercise of the foregoing powers. It provides:

“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 [1948], Sub. Leg.)-

- (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President.”

65. Section 7 of the Act provides that:

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute or and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.”

66. In *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR the Court of Appeal spoke to the powers of the Commissioner of Lands to alienate public land in the following manner;

“The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v Shariff Mohammed Shatry*, [1940] 19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity.”

67. Coming back to the instant case, even if the suit land were to be said to be unalienated government land, the Plaintiff did not lead any evidence that the Commissioner of Lands was involved in any way whatsoever, let alone demonstrate that he (the Commissioner for Lands) was acting under the authority of the President in allocating the suit land to Samuel Mukora.

68. The foregoing notwithstanding, this Court is of the opinion that the suit land did not fall under un-alienated government land since the evidence indicated that it already was reserved for the Defendant herein.

69. That said, in now focus my attention to Section 13(2) of the [*Kenya Railways Corporation Act*](#). It is couched in the following terms;

13. Powers of the Corporation as a statutory body
- (2) Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for



the purposes of the Corporation and in particular, without prejudice to the generality of the foregoing, shall include power-

- (h) to sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board is not necessary for the purposes of the Corporation: Provided that the Corporation shall not sell, let or otherwise dispose of any building or land placed at its disposal by the Government otherwise than with the consent of, and on conditions agreed by, the Government”.

70. Whereas the foregoing provision donates power to the corporation to deal with its property, Section 14(2)(4) adds it in the following manner provides as follows;

- “(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without, consideration: (emphasis mine)

Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

- (5) The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal”.

71. Section 14(4) cited above is particular in its wording. The Kenya Railways Corporation may convey, transfer or surrender its surplus land for free or at a consideration. That being the case, in absence of evidence of surrender of title, transfer or conveyance to Samuel Mwaura Mukora, the inevitable conclusion is that how he came into possession of the suit land was unlawful and unprocedural. I do not agree with the Plaintiff’s submissions on the issue to the effect that Samwel Mukora lawfully acquired title to the suit land he would lawfully pass onto any person, let alone retaining it.

72. As rightly argued by the Defendants in their written submissions, the Plaintiffs were under an obligation to go to the root of the title and demonstrate the initial allocation was lawful and procedural. Had they done so they would be protected by the principle of bona fide innocent purchasers for value without notice.

73. To the contrary, the documents presented by the Plaintiffs herein were impeached by the Defendants as to their authenticity. It came out during cross examination that the Plaintiff did the bare minimum in, and did not in any way, ascertain(ing) the validity of the Samuel Mukora’s title.

74. The Plaintiffs’ witness admitted among other things that he did not ask Samuel Mukora how he acquired the land, was not given past development plans and conceded that the railway line was barely 70 -100 metres away. The proximity of the railway line ought to have signalled or warned the Plaintiffs of the validity of the seller’s title and hence the need to be more vigilant in their due diligence.



75. The purported letter of no objection from the Defendant dated 18/05/2002, authored by Philip Rono, 'The Station Master' is questionable. It was not authenticated by the Plaintiff and its maker was not called to give evidence. It did not demonstrate that it was written pursuant to the procedures of turning KRC land to private land. Therefore, it cannot be taken to be genuine. In any event, it cannot base the root of a title duly excised from KRC.
76. In a nut shell, the evidence tendered by the Plaintiffs in the entire transaction and the attendant Certificate of Lease cannot be protected by this Court. There is no title to protect. The suit land rightfully belongs to Kenya Railways Corporation.
77. Having found so, and in view of the notices issued to the general public by the Defendant on 20/03/2018 through www.mygov.go.ke, and the one of 27/09/2019 and 30/09/2019 done through the Standard and the People Daily Newspapers respectively, the rest of the issues identified for determination fall by the wayside save. They are now moot.
78. In the end, this Court finds and hereby holds that the Plaintiffs have not, on a balance of probability, proved their case. The entire suit fails. The following final orders hereby issue:
 - i. The suit as filed and amended through the Amended Plaint dated 16/11/2022 is hereby dismissed in its entirety.
 - ii. Costs of the suit to be borne by the Plaintiffs jointly.
79. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 7TH DAY OF MARCH, 2024.

HON. DR. IUR FRED NYAGAKA
JUDGE

