



REPUBLIC OF KENYA



Kariuki v Ng'ang'a & 2 others; Wachari (Interested Party) (Environment & Land Case 696 of 2017) [2024] KEELC 4314 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 696 OF 2017**

OA ANGOTE, J

MAY 23, 2024

BETWEEN

JOSEPH NJOGU KARIUKI PLAINTIFF

AND

JOHN KAMAU NG'ANG'A 1ST DEFENDANT

LUCY NYOKABI NJOROGE 2ND DEFENDANT

NAIROBI CITY COUNCIL 3RD DEFENDANT

AND

ERNEST CHERERE WACHARI INTERESTED PARTY

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 9th September, 2013. The suit, initially instituted in the Magistrates Court was transferred to this Court on 27th September, 2017. The Plaintiff seeks the following reliefs;
 - i. That a permanent injunction be issued to the Defendants restraining their servants, agents, or anybody claiming under them from demolishing, evicting, trespassing or alienating plot No 4/320.
 - ii. Costs of this suit.
2. It is the Plaintiff's case that he was at all material times the registered owner of plot number 4/320 situate in Soweto, Kayole Estate Nairobi; that he erected a permanent house thereon and rented the same; that sometime in September, 2013, the 1st and 2nd Defendants wrote a letter addressed to the occupants of plot 3/403 asking them to vacate; that the letter was however given to the tenants of his



property plot 4/320 and that the aforesaid letter threatened his tenants causing them to refuse to pay him rent.

3. According to the Plaintiff, on 6th September, 2013, the 1st and 2nd Defendants caused the Chief of Soweto to summon him to appear at his office to answer to allegations of carrying out illegal constructions on the 1st and 2nd Defendants' land and that the Defendants colluded to demolish his plot so as to settle the 1st and 2nd Defendants.
4. The 1st Defendant did not file a Defence. The case against the 2nd Defendant was withdrawn on 18th June, 2014.
5. The 3rd Defendant filed a Defence on 10th July, 2014. It denied the assertions as set out in the Plaintiff stating that the Plaintiff has not established that he is the owner of parcel of land known as Plot 4/320; that the plot card does not in any way confer ownership of the suit property; that the 3rd Defendant did not in any way lease or otherwise sell the suit property to the Plaintiff and that no nexus has been shown between the 3rd Defendant's alleged actions and the Plaintiff's claim.
6. The Interested Party was admitted into the proceedings in 2014 on account of his claim to ownership of the suit property.

Hearing & Evidence

7. The matter proceeded for hearing on 3rd November, 2022. The Plaintiff, PW1, adopted his witness statement [undated] and filed in court on 10th September, 2013 as his evidence in chief. He produced the documents dated 30th January, 2015 as PEXHB1.
8. It was his evidence that the plot in issue is plot 4/320; that he has been living on the plot since 1991 when he was issued with a letter of allotment; that there were clashes at the time; that they were temporarily allowed to live on the suit property by the Nairobi City Council and he had built timber structures thereon and that no one came to evict him from the suit property.
9. PW1 stated that in 2009, the Nairobi City Council asked him, among other people, to present his documents and national identity cards to facilitate issuance of an allotment letter which he was given; that he was allowed to construct permanent houses; that he paid Kshs 400 and was given receipts and that the documents he has adduced were given to him by the Council.
10. It was his testimony that he constructed a house with a foundation and had 14 other timber houses on the property; that in 2013, the Chief summoned him on the basis that he was constructing on someone else's land; that the person claiming the land never gave the Chief any documents evincing the same and that he was later forcefully evicted from the suit property, and his houses demolished prompting him to file the present suit.
11. It was his evidence on cross-examination that he has a notice of eviction issued to him on 7th September, 2013 by John Kamau Ng'ang'a; that the notice was never signed by the Nairobi City Council; that he never wrote a demand letter; that the Letter of Allotment was signed by the District Officer; that the Letter of Allotment does not have a County Government stamp; that the allocation was temporary and the timber houses he constructed were never approved; that he is no longer on the land having been evicted in 2013 and that no one is on the suit property.

Submissions

12. The Plaintiff's Counsel submitted that the Plaintiff is the owner of the suit property having been allotted the same by the 3rd Defendant for value upon payment of due consideration and that despite



the foregoing, and as demonstrated, the Defendants jointly destroyed the 14 room structure on the property which was the Plaintiff's sole source of income.

13. Counsel submitted that the Plaintiff claims Kshs 28,000 for each of the 14 structures as well as Kshs 10,000,000 for the entire structure and that whereas he did not amend his claim to seek the aforesaid sums, the Court should take cognizance of the damages and award them to the Plaintiff. Counsel placed reliance on the case of John Mwangi Kanyi vs John Mutunga Mwangi [2019] eKLR.
14. The 3rd Defendant filed submissions on 4th April, 2024. Counsel submitted that the pleadings before the Court make it clear that there are two properties herein being 4/320 and 3/403; that the notice to vacate was issued to the proprietor of plot 3/403 while the Plaintiff alleges the same was served on his tenants on plot 4/320; that this being so, it is apparent that the two properties may refer to the same property and that it behooved the Plaintiff to prove the existence of plot 4/320 and its position on the ground which he has failed to do.
15. Counsel submitted that the Plaintiff relied on a letter issuing temporary allotment, subject to other conditions and by laws of the issuing office and that he has not proved that he met the conditions established therein or made any follow up to be issued with the title.
16. It was submitted that as expressed by the Court in Philma Farm Produce & Supplies & 4 Others vs The Attorney General & 6 Others[2012]eKLR, letters of allotment do not confer proprietary rights but a right to receive the property upon compliance with the terms. Reliance in this respect was also placed on the case of Lilian Waithera Gachuhi vs David Shikuku Mzee[2005]eKLR.
17. It was submitted that the letter of allotment produced by the Plaintiff shows that he was allotted the land by the office of the District Officer; that the District officer aforesaid had no mandate to allocate land, this power being vested in only two entities, to wit, the President and the Commissioner of Lands and that further, the letter of allotment was not registered as required by part X of the Governments *Land Act*. Reliance in this respect was placed on the case of James Njuguna & 3 Others vs Municipal Council of Nakuru & Another [2010] eKLR.
18. Counsel posited that the Plaintiff, while alleging to have been issued with a notice to vacate by the 3rd Defendant, has no evidence thereof; that further, the letter adduced makes reference to another parcel and that the Plaintiff has failed to establish its case and the same should be dismissed with costs. The other parties did not file submissions.

Analysis and Determination

19. Having considered the pleadings, testimonies and submissions, the following issues arise for determination;
 - i. Whether permanent injunctive orders should issue against the Defendants?
 - ii. Who should bear the costs of the suit?
20. The Plaintiff instituted this suit against the Defendants seeking inter alia for a permanent injunction restraining the Defendants from interfering with the suit plot.
21. Despite service, the 1st Defendant did not file a Defence and did not participate in the trial. The 3rd Defendant filed a Defence but equally did not participate at trial. Neither did the 1st Interested Party. Consequently, all the Defendants and the Interested Party failed to counter the Plaintiff's testimony and evidence which stand uncontroverted and unchallenged. The 3rd Defendant's Defence on record remain mere allegations.



22. However, it is settled that uncontroverted evidence is not automatic evidence. Failure by the Defence to adduce evidence does not lessen the Plaintiff's burden of proving his case. This was succinctly expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR where the Court stated;

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct..”

While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.

The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

23. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is captured in Section 107 (1)(2) of the *Evidence Act*, thus;

“(1) 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.”

24. And Sections 109 and 112 of the same Act provides as follows;

“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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

25. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

26. The Court will be guided by the aforesaid principles noting that there is no contest regarding the validity of the adduced evidence.

27. It is the Plaintiff's case that he is the lawful proprietor of the suit property having been allocated the same sometime in the year 1991 by the Nairobi City Council, now the Nairobi County Government; that having been allotted the suit property, he took possession and began developing the same by



constructing two and later on 14 timber rooms which he rented out and received income therefrom and that in 2013, he was illegally evicted from the suit property and his structures demolished.

28. The Plaintiff adduced into evidence an allotment letter dated 24th October, 1991; plot card serial numbers; receipts of payments issued by the 1st Defendant; invoices and receipts from Nairobi Water and Sewerage Company, and Photographs.

29. To begin with, it is noted that the Plaintiff's claim to the suit property is founded on a letter dated 24th October, 1991 which he refers to as an allotment letter. The letter provides as follows;

“Re: Temporary allocation of plots; Ex-Muroto Resettlement Scheme

This is to notify you that you have been allocated a temporary plot no 4/320 which will be shown to you by the surveyor in charge from the city commission at the site.

Please ensure you retain this slip for production during inspection by the Nairobi City Commission and Administration Officials.

However, the temporary allocation is still subject to all city commission by-laws.”

30. So, is this an Allotment Letter? The Courts have had occasion to discuss the elements of an Allotment Letter and whether any proprietorship rights accrue therefrom. The Supreme Court in *Torino Enterprises Limited vs Hon. Attorney General*, Petition Number 5 (E006) of 2022 expressly stated thus;

“It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr. Joseph N.K. Arap Ng'ok v. Justice Moiyo Ole Keiyua & 4 Others C.A.60/1997* [unreported]; and in *Gladys Wanjiru Ngacha v. Teresa Chepsaat & 4 Others HC Civil Case No. 182 of 1992; [2008] eKLR*, the superior courts restated this principle as follows: “It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all. ...” [Emphasis added]. [59] The pronouncement in *Gladys Wanjiru and Dr. Joseph N. K. Arap Ng'ok (Supra)* has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v. Sabina Wanjiru Kuguru & Another*, Environment and Land Case No. 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 Others*, Environment and Land Suit No. 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v. Ahmed Muhammed Osman & 11 Others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few. [60] Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines....”

31. The procedure for issuance of a Certificate of Lease arising from a letter of allotment was espoused in the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane), Suing on Behalf of The Estate of Mohamed Haji Dagane) Vs Hakar Abshir & 3 Others [2021] eKLR* thus;

“The question of acquisition behooves the court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiff's acquisition from the light of the law. This court in the case of *Mako Abdi Dolal v Ali Duane & 2 others [2019] eKLR*



noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows: “All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.” Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively.

The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situated had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 Others* [2019] eKLR “... The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue.”

32. The Court need not say more. The letter adduced by the Plaintiff is simply permission granted to him to stay on the suit property temporarily. It has not been demonstrated that a formal letter of allotment, accompanied by an approved part development plan, was granted after this, setting out terms and conditions for compliance, which the Plaintiff complied with.
33. Indeed, it would only be upon compliance of the terms and conditions in the Allotment Letter that rights over the suit property would crystallize in favour of the Plaintiff.
34. The Plaintiff not having had any rights over the suit property, could be removed therefrom. However, this ought to have been done legally and procedurally and the Plaintiff, notwithstanding his lack of proprietary rights over the property could maintain a claim for unlawful eviction.
35. Unfortunately, no evidence has been adduced in this respect. There is no evidence of any unlawful eviction. The Plaintiff has only made reference to an eviction notice which was issued in respect to a separate plot by the 1st Defendant. Ultimately, the Plaintiff has failed to establish his case in this regard.
36. It is noted that Counsel for the Plaintiff in his submissions also sought for damages, in the nature of mesne profits/special damages for destruction of the Plaintiff's property. While this claim is not merited in view of the finding above, the Court reiterates that submissions are not pleadings and new issues cannot be raised by way of submissions as in this case.
37. Although the Plaintiff has failed to establish his case, the suit was not defended. Consequently, I decline to condemn the Plaintiff to pay costs. For those reasons, the Court makes the following determination;
 - i. The Plaintiff's claim dated 9th September, 2013 be and is hereby dismissed.
 - ii. Each party will bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE



In the presence of;

Mr. Ogeto for Plaintiff

Ms Ng'ang'a for Kinyanjui for 3rd Defendant

Court Assistant: Tracy

