



Mwai & 4 others v County Government of Kirinyaga (Environment & Land Case 154 of 2016) [2024] KEELC 4160 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 154 OF 2016**

JM MUTUNGI, J

MAY 23, 2024

BETWEEN

**MUTHIKE MWAI 1ST PLAINTIFF
MOSES MURIUKI MWAI 2ND PLAINTIFF
KIACURU MWAI MATHANGU 3RD PLAINTIFF
JAMES NGABU MWAI 4TH PLAINTIFF
STEPHEN MATHANGU MWAI 5TH PLAINTIFF**

AND

THE COUNTY GOVERNMENT OF KIRINYAGA DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit by way of Plaint dated 5th October 2016, seeking for the following orders;
 1. Removal of the restriction placed on LR Mwerua/Kagio/2647
 2. A permanent injunction to issue against the Defendant, its agents or anybody claiming through it from entering, remaining, developing or in any way interfering with the Plaintiffs peaceful right of user of Land Parcel No. Mwerua/Kagio/2647.
 3. Punitive and/or general damages.
 4. Any other relief the court may deem fit to grant.
 5. Costs.
2. The plaint was predicated upon the grounds that the Plaintiffs are the registered proprietors of all that piece of land known as LR Merua/Kagio/2647 (suit land) measuring approximately 4.05 hectares.



That the Defendant placed a restriction on the suit land on 20th March 2013, thereby restricting the Plaintiffs from dealing with the land. The Plaintiffs aver that the action has impeded their use of the land and prays that the same may be lifted.

3. Despite service upon the Defendant, the Defendant did not enter appearance and/or file defence and, the Plaintiffs' suit proceeded *ex parte* and the Judgment was delivered on 6th July 2018 against the Defendant.
4. The Defendant filed an application dated 7th November 2019 seeking to have the *ex-parte* judgment entered on the 6th July 2018 set aside pending the hearing and determination of this suit and for leave to file its defence out of time. The application was allowed and the Defendant filed its statement of defence on 15th June 2020. In the statement of defence the Defendant averred that the suit land was public land and had been acquired through compulsory acquisition and that compensation for the same was made. The Defendant further averred that the registration of the suit land in the names of the Plaintiffs, if any, as the proprietors of the suit land had been done fraudulently and illegally. The Defendant pleaded that it rightfully placed a restriction on the suit land as it formed part of the public land under the management of the Defendant. It was the Defendant's contention that the restriction placed on the suit land was valid and should not be interfered with as its removal would be detrimental to public interest.
5. The Defendant amended its statement of defence on 1st July 2021. In the amended statement of defence, the Defendant raised a Counterclaim where it averred that the suit land was a resultant portion of LR Mwerua/Kagio/127 after subdivision originally owned by Mathangu Ruirie (deceased). The Defendant averred that in a bid to extend Kagio Township it acquired land Parcel Mwerua/Kagio/2647 from the deceased and in compensation gave the deceased land Parcel Marurumo/Adj. Sec/156 measuring 22.5 acres in addition to a sum of KShs 65,818/- for developments in 1989. The Defendant therefore averred that consequent to the compensation paid to the deceased it became the rightful and lawful owner of LR Mwerua/Kagio/2647. The Defendant thus contended that the Plaintiffs acted fraudulently in staking claim to land parcel Mwerua/Kagio/2647 and particularized fraud as follows:-
 1. Illegally being in possession of public land compulsorily acquired by the Defendant for public purposes.
 2. Illegally being in possession of public land when they were duly compensated by the Defendant with land of bigger acreage and also given monetary compensation.
 3. Colluding with officials at the Land Registry and having the title to the suit property herein which was earmarked for public use, allocated to the Plaintiffs.
 4. Illegally subdividing public land and transferring the subdivisions to third parties.
 5. Failing to inform the Defendant of the existence of Kerugoya Succession Cause No. 164 of 2005 regarding the suit property and failing to enjoin the Defendant in the said suit.
 6. Misleading the Court into issuing a Certificate of Grant in favour of 2nd and 3rd Plaintiffs listing the suit property as part of the assets of the estate of Mathangu Ruirie (deceased) while the same had already been compulsorily acquired by the Defendant and converted to public land.
6. The Defendant in its counterclaim prays for the following orders:



1. A declaration that the Defendant is the legal owner of LR No. Mwerua/Kagio/127, LR Mwerua/Kagio/2647 and all other subdivisions emanating from LR Mwerua/Kagio/127 and subsequent orders for registration of the same in its name.
 2. An order of Revocation and cancellation of title documents to Land Parcel No. Mwerua/Kagio/2647 in the name of the Plaintiffs herein and all other title documents to all subdivisions arising from LR Mwerua/Kagio/127.
 3. An order of eviction against the Plaintiffs their agents, servants and/or anybody acting on their behalf from LR Mwerua/Kagio/2647.
 4. An order directing the Land Registrar to rectify the green card and issue the Defendant with a title to land parcel LR Mwerua/Kagio/2647 and titles to all subdivisions arising from LR Mwerua/Kagio/127.
 5. A permanent injunction restraining the Plaintiffs jointly and severally by themselves, their servants, employers and/or agents from trespassing into, registering any dealings on, dealing in, disposing off, transferring LR Mwerua/Kagio/127, LR Mwerua/Kagio/2647 and all other subdivision emanating from LR Mwerua/Kagio/127 or any part of, in any manner detrimental to the Defendant.
 6. Costs of this suit.
7. The Plaintiffs filed their response to the amended defence and counterclaim dated 1st October 2021 and pleaded that the Defendant had offered LR Mwerua/Marurumo/156 as compensation which was not available as it had been occupied by a third party. They further pleaded that they were not in possession of the suit land and none of the members of their family had been compensated. They claimed that LR Mwerua/Kagio/127 was subdivided by their deceased father following the conclusion of Embu Succession Cause No. 181 of 1993 which ordered the Defendant's predecessor to remove all caution/restrictions over the original title. They also averred that the suit land was issued pursuant to the conclusion of Kerugoya Succession Cause No. 164 of 2005. They claimed that the Defendant had subdivided the suit land and sold some of it to private individuals who have fully developed the land.
8. The Plaintiffs filed an Amended Plaintiff on 1st October 2021 where they prayed for orders that;
1. A declaration that the Plaintiffs rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya 2010 have been violated and infringed by the Defendant.
 2. A declaration that in the absence of compliance with the provisions of the Land Adjudication Act and Compensation to the Plaintiffs in accordance with the said Act as read together with among others Articles 40(3) of the Constitution 2010, the purported compulsory acquisition is itself null and void ab initio.
 3. In the alternative to (b) hereinabove an order do issue directing the Defendant to immediately comply with relevant provisions of the Constitution 2010 and the Land Acquisition Act in the acquisition of the suit property and in particular ensure that the compensation due to the Plaintiffs is assessed at the current market value and payment thereof made promptly.
 4. A declaration that the Defendant's action was oppressive, arbitrary and unconstitutional and was calculated to procure its financial benefit at the expense of the Plaintiffs.



5. An injunction directed at the Defendant, either by itself, its servants, agents or persons acting under its direction from carrying on any activity, however, on the suit property until the Plaintiffs herein are fully compensated as by the law.

Evidence of the Parties

9. The suit was heard on 6.6.2023 when both parties testified and closed their respective cases. The Plaintiff, PW1 testified and as part of his evidence he adopted his statement dated 1st November 2021. He stated that his father was the registered owner of land parcel LR Mwerua/Kagio/2647, which the Plaintiffs inherited. He testified that the Defendant took possession of the suit land, subdivided it and allocated portions thereof to private individuals, without compensating the Plaintiffs. It was his position that they should be compensated by the Defendant. Under cross examination, PW1 testified that he was not aware that the suit land was acquired in 1973 by the County Council of Kirinyaga. He confirmed that LR Mwerua/Kagio 127 originally belonged to his grandfather. He testified that he had no knowledge of land parcel Mwea Marurumo/156 and further affirmed that his father never surrendered the original title in respect of land parcel Mwerua/Kagio/2647.
10. Stephen Wambugu, DW1, a surveyor with the County Government of Kirinyaga testified on behalf of the Defendant. He adopted his written statement dated 15th February 2022 as part of his evidence and placed reliance on the bundle of documents exhibited dated 17th November 2020 and the further bundle of documents as per the list dated 7th March 2022 in support of the Defendant's case. He testified that land parcel Mwerua/Kagio/127 was acquired in 1973 for purposes of expanding Kagio town and that the owner was compensated by the then County Council of Kirinyaga with Land parcel Mwea/Marurumo/Adj/156 and with Kshs. 65,818/- for the developments thereon. He stated that the Defendant allocated plots within LR Mwerua/Kagio/127, to private individuals who had already developed the plots with permanent buildings.
11. Under cross-examination, DW1 testified that the acquisition was not compulsory in the strict sense, but rather the intention of the County Council was to take the land and compensate the owner with some other land. He confirmed that the Plaintiffs never took possession of land parcel Mwea/Marurumo/156 that was the land they were supposed to be compensated with. The witness further stated he was not aware how the compensation was effected as no evidence was available to demonstrate that the Plaintiffs grandfather actually got the land he was compensated and/or acknowledgment for the sum and for developments.

Submission, Analysis and Determination.

12. The parties filed written submissions following the closure of the trial. The Plaintiffs in their submissions asserted that they are the registered owners of the suit land and that the County Council of Kirinyaga acquired Land Parcel No. Mwerua/Kagio/127 in a process that was illegal, null and void. The Counsel for the Plaintiffs submitted that the action by the Defendant's predecessor was meant to dispossess the Plaintiffs and their forefathers, their property. The Plaintiffs submitted that there was no compensation and as such the acquisition was illegal, null and void abinitio.
13. The Defendant submitted that the suit was time barred; that the compulsory acquisition was lawful; and that the Plaintiffs were not entitled to the reliefs they sought.
14. The Defendant's Counsel argued that by the time the Plaintiffs instituted the suit, their claim if any, had become statute barred as the acquisition had taken place more than 40 years before the suit was filed. Further, Counsel submitted that the acquisition was lawful and in this respect pointed to the minutes and resolutions of the defunct Kirinyaga County Council which showed the Council had



resolved to have Kagio Township expanded by way of acquiring various parcels of land within the precincts of the Township and having the owners compensated with alternative land. The Defendant submitted that the Plaintiffs late Grandfather, Mathangu Ruirie was compensated and was given land parcel Mwea/Marurumo/156 and was paid Kshs 65,818/- for the developments he had effected on land parcel Mwerua/Kagio/127 but that the deceased notwithstanding that he had been compensated, did not surrender the original title to land parcel Mwerua/Kagio/127 and that enabled the beneficiaries to subdivide the land.

15. The Defendant contended that the land had already been acquired by the Defendant and was therefore not available to the deceased beneficiaries to inherit and/or subdivide. In support of the Defendant's submission Counsel relied on the Case of Wangai Gacheru –vs- Kenya National Highways Authority & 2 Others (2020) eKLR where the Court dismissed the Petition on the ground that there had been inordinate delay in filing the Petition and that the action constituted abuse of the Court process.
16. I have considered the parties' pleadings, the evidence adduced and the rival submissions of the parties, the main issues for determination in this suit are:
 1. Whether or not the Plaintiffs are the lawful owners of the suit land.
 2. Whether there was compulsory acquisition of the suit land and if so, whether the same was procedurally done.
 3. Whether an order of permanent injunction should issue against the Plaintiffs.
17. I have considered the material placed before the Court and evidence adduced by the parties and clearly what is in issue is the ownership of LR Mwerua/Kagio/2647 being a resultant subdivision of LR Mwerua/Kagio/127. On the one hand, the Plaintiffs contend that they are the registered owners of the suit land having inherited it from their father, who inherited it through transmission after the death of his own father. It was their position that indeed LR Mwerua/Kagio/127 had been earmarked by the defunct County Council of Kirinyaga as one of the parcels of land that would be compulsorily acquired for purposes of the expansion of Kagio Town. The Plaintiffs however contend the compulsory acquisition was not lawfully effected as the Defendant's predecessor did not follow the laid procedure. They termed the acquisition as illegal, null and void. The Plaintiffs further averred that their grandfather retained the certificate of the original suit land which passed to their father upon their grandfather's death. The abstract of title of LR Mwerua/Kagio/2647 indicates that the Plaintiffs are the registered owners of the suit land but the Defendants on their part contend that they compulsorily acquired the suit land in 1973 from the original proprietor Mathangu Ruirie, the Plaintiffs grandfather and as such the suit property constituted public land. The Defendant argues that the original registered owner of the LR Mwerua/Kagio/127 was duly compensated with LR Mwea/Marurumo/156 and with monetary compensation of Kshs. 65, 818/- for the developments thereon. The Defendant averred that upon the acquisition, it took possession of the suit land- and has subdivided it and allotted plots to individuals to develop. The Defendant produced the minutes of the Agriculture, Land and Forest Committee which passed the said resolution for the compulsory acquisition.
18. There is no dispute that the Plaintiffs Grandfather (deceased) was the original owner of land parcel Mwerua/Kagio/127. Equally it is not disputed that the defunct Kirinyaga County Council intended to have Kagio Township expanded and to achieve that objective they resolved to acquire from persons within the Kagio Township their parcels of land and as compensation they were to give them alternative land. In the case of land parcel Mwerua/Kagio/127 that was owned by the Plaintiffs Grandfather, he was to be compensated with land parcel Mwea/Marurumo/156 and was to be paid Kshs 65,808/- for developments. The Plaintiffs contended land parcel Mwea/Marurumo/156 was not available since a third party was already in occupation and therefore according to them the acquisition was not



actualized. It was against that background that the Plaintiffs father filed succession proceedings in Embu Succession Cause No. 181 of 1993 where he was awarded the suit land which he subsequently subdivided to give rise to land parcel Mwerua/Kagio/2647 which the Plaintiffs now lay claim to as beneficiaries having inherited the same from their father.

19. The suit by the Plaintiffs essentially is one for recovery of land and/or alternatively for compensation by the Defendant for having constructively compulsorily acquired the Plaintiffs land parcel without paying prompt and reasonable compensation. The Defendants in their submission have raised the issue of the suit being time barred though they never pleaded limitation in their pleadings. I acknowledge that limitation of actions goes to the jurisdiction of the Court to entertain the suit and can be raised by a party at any stage in the proceedings.
20. The Plaintiff in his Supplementary list of documents dated 1st October 2020 exhibited 3 letters dated 11th August 2006, 20th September 2007 and 18th November 2008 from the defunct County Council of Kirinyaga which all confirm, the Plaintiffs and/or their deceased father/grandfather never got land parcel Mwea/Marurumo/156 which was offered as compensation for land parcel Mwea/Kagio/127. The contents of the 3 letters are reproduced hereunder:-

To: Mathangu Ruirie Family 11th August 2006

C/o Muthike Mwai

Box 13

Wanguru

Re: Farms Acquired For Kagio Township Expansion

The Council would like to confirm to you that according to our records your land L/R No. Mwerua/Kagio/127 was acquired for the above mentioned purpose and compensation done on L/R Mwea/Marurumo/156.

Follow up is being done to ensure proper transition.

G. Karimi

Clerk To Council

To: Muthike Mwai 20th September, 2007

Box 13

Wang'uru

Re: Compensation Of Land Parcel Mwerua/kagio/127

The Council confirms that it acquired parcel No. Mwerua/Kagio/127 which was supposed to be compensated with Kirinyaga/Marurumo/156.

It also confirms that the said land for compensation was occupied by another person.

Therefore you are being requested to give the office more time to look for an alternative.

G. Karimi

Clerk To Council

To: Stephen Mwai Mathangu 18th November, 2008

Box 13



Wang'uru

RE: Land Compensation Mwerua/kagio/127

We acknowledge that the above plot which belongs to you was acquired by the Council by way of exchange with parcel No. Mwea/Marurumo/156.

However the land records in the Land Registry are not available to verify who occupies the land. It's of knowledge to this office that you never took possession of the land.

Kindly bear with us while arrangements are being made to ensure that you are compensated.

R. W. Miano (Mrs)

Clerk To Council

21. The effect of the above letters was to revive the Plaintiffs cause of action in the event it had lapsed. The action being for recovery of land the period of limitation would run from 18th November 2008 when the last letter admitting liability and assuring the Plaintiffs that they would be compensated was written by the Defendant. The period of limitation would therefore have lapsed on 17th November 2020 when 12 years would have expired from the date when the cause of action accrued following the admission from the defunct Council.
22. The evidence that the Plaintiffs never took occupation and/or possession of land parcel Mwea/Marurumo/156 was not controverted as it is evident that even the defunct County Council of Kirinyaga admitted that they did not. It is evident that although the Defendant had the intention to acquire the land parcel then belonging to the Plaintiffs grandfather the process of acquisition was never completed. The procedure of land acquisition under *the constitution* and the Land Acquisition Act, Cap 295 (now repealed) was not complied with.
23. The purported acquisition having been done in the 70s, the Court notes that it would have been governed by the former Constitution of Kenya and the Land Acquisition Act Cap 295 (now repealed). Section 75 (1) of the former Constitution of which the relevant provisions read as follows:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:

 1. the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefits; and
 2. the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest or right over the property; and
 3. provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation...”
24. The protection of private property as guaranteed under Section 75(2) of the Retired Constitution is sustained under the provisions of Article 40 of the 2010 Constitution. In the relevant excerpts, Article 40 (2), (3), (4) and (6) provide as follows:

“ 40 (2) Parliament shall not enact a law that permits the State or any person:-



- a. To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description
3. The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation:
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-
- (i). requires prompt payment in full of just compensation to the person, and
- (ii). allows any person who has an interest in, or right over, that property a right of access to a court of law.
25. The provisions in the Land Acquisition Act (Repealed) set out an elaborate process for acquisition of land. Sections 17, 18, 19 and 20 of the Act provide for survey of the compulsorily acquired land and vesting in the Government. The procedures require that appropriate notice be given to the Registrar of Lands and the fact of acquisition noted on the land register to serve as a notice to all persons dealing with the land. This procedure, the Court of Appeal held in the Case of Commissioner of Lands v Coastal Aquaculture Ltd (1997) eKLR must be adhered to strictly. The Court stated thus:-
- “In this case, the only evidence of the acquisition was a letter by the Commissioner expressing an intention to acquire the suit property. The Commissioner, as the custodian of land documents had not provided any gazette notice or any notice showing that the Government took possession of the land and that the property had vested in it in accordance with the Land Acquisition Act (Repealed). Court held that as the custodian of these documents, nothing would have been easier than to furnish them to the Court.”
26. In the Case of Eunice Grace Njambi Kamau and Another v Attorney General & 5 others (2013) eKLR this Court sitting at Nairobi stated thus:-
- “In my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The Commissioner of Land and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected...”
27. In the Case of Virenda Ramji Gudka and 3 Other v Attorney General [2014]eKLR, this Court further stated that “Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of *the Constitution* and sections 107 and 133 of the *Land Act*, Act No. 6 of 2013 which replaced the provisions previously contained in the Land Acquisition Act ... These provisions have to be complied with for the rights of acquisition to crystallise.”
28. In instant case, the Defendant has not proved that the acquisition was completed. In such circumstances, the Defendant cannot be said to have compulsorily acquired the suit land as the process for compulsorily acquiring land was not adhered to.
29. It is however admitted and it is not disputed that the defunct County Council of Kirinyaga took possession of and subdivided land parcel Mwerua/Kagio/2746 and allocated plots to third parties



though it is not evident what ownership documents were given to the allottees by the Defendant since the title of the land is still in the name of the Plaintiffs. It is also clear from the evidence that some of the allottees have effected permanent developments on the plots they were allocated and as such it would be practically impossible to revert land parcel Mwerua/Kagio/4726 to the Plaintiffs. Although the Plaintiffs have purported to carry out succession of the suit land and apportioned the same in the manner set out in the certificate of confirmation of grant and the consequent title issued to them as a result of transmission, this in the circumstances cannot be effected on the ground.

30. There was a clear intention that indeed the County Council of Kirinyaga wanted to expand the Kagio Township and their agreed manner of compensating those land owners who were affected was by offering them alternative land. The alternative land identified to compensate the Plaintiffs grandfather turned out to be unavailable and this fact was admitted by the Council as is evident from the letters written by the Council to the Plaintiffs in 2006, 2007 and 2008. Essentially therefore the Plaintiffs were not compensated for their land parcel Mwerua/Kagio/2647. It was not made clear by way of evidence what happened to the other two subdivisions of the original land parcel Mwerua/Kagio/127 and the Court will deem that the Plaintiffs have no claim in regard to these other subdivisions.
31. On the basis of the evidence adduced by the parties, the Court is satisfied that the that the Plaintiffs were not compensated by the Defendants for land parcel Mwerua/Kagio/2647 as the Alternative land parcel Mwea/Marurumo/156 that they were to be compensated with was unavailable. The Defendant no doubt required the Plaintiffs land for a public purpose and in that regard under the provisions of Article 40 (3) of *the Constitution* the Plaintiffs and/or their predecessors should have been promptly and fairly compensated. Article 40(3) of *the Constitution* provides as follows:-
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
32. Having come to the conclusion that the Plaintiffs were not compensated for the land the Defendant appropriated from their father, it is my finding and holding that the Plaintiffs have proved their case of a balance of probabilities.
33. The Defendant's Counterclaim to the extent that they have failed to prove that the Plaintiffs grandfather was compensated and/or that the alternative land offered was available to the Plaintiffs, is unsustainable and I dismiss the same.
34. The upshot is that Judgment is entered in favour of the Plaintiffs in the following terms:-
 - i. That the Plaintiffs are entitled to be compensated for land parcel Mwerua/Kagio/2647 appropriated by the Defendant for expansion of Kagio Township.
 - ii. The Defendant is ordered to compensate the Plaintiffs the current market value of land parcel Mwerua/Kagio/2647 without any developments.



- iii. The value of the land in (ii) above to be established and certified by a Government Valuer within the next 90 days from the date of this Judgment and the Defendant to effect payment of the certified value to the Plaintiffs within 90 days of such certification of the value by the Government Valuer.
- iv. The Plaintiffs to surrender the title they hold to land parcel Mwerua/Kagio/2647 to the Land Registrar for cancellation.
- v. The Plaintiffs are awarded the costs of the suit and of the Counterclaim.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23RD DAY OF MAY 2024.

J. M. MUTUNGI

ELC - JUDGE

