



**Umayya v County Government of Mombasa (Environment & Land Petition
E005 of 2023) [2024] KEELC 4692 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E005 OF 2023**

NA MATHEKA, J

JUNE 12, 2024

BETWEEN

BENEDICT ODHIAMBO UMaya PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

JUDGMENT

1. The claim is that the Petitioner is the owner of the parcel of land known as Plot Number 10918/11/MN. Upon purchasing the said property in 2016, the Petitioner took possession of the same, cleared the land and developed the property by building a 2 storey residential building on the said property. Before undertaking the construction of the house, the Petitioner made an application to the Respondent for approval of his intended development plan and paid the requisite charges and the said plan was duly approved. Consequently, the Petitioner built the aforementioned house. On 12th March, 2021, at night, the Respondent through its employees and/or authorized agents and servants using their bulldozers and low loader and excavators whose number plates were wrapped with papers, started demolishing the buildings around Bamburi - Kidarajani Naivas area so as to set up the place ready for the redevelopment exercise. However, while doing so, descended on the Petitioner's property, chased away the Petitioner's family members and tenants thereof and carried out the demolition. The Respondent, its employees and/or authorized agents and servants were so reckless and negligent and did not listen to anybody during the demolition exercise. The Petitioner and his family were forced to watch helplessly as their house was illegally put down by the Respondent. The Respondent did not give the Petitioner a chance to be heard before demolishing the Petitioner's house on the suit property and/or give the Petitioner a notice of the intended demolition exercise. The manner in which the Respondent has fenced off the suit property denies the Petitioner a chance to access his property and/or to undertake any new developments thereon. The Respondent was negligent in the manner in which it demolished the Petitioner's house on the suit properties . The Respondent did not give the Petitioner any notice before demolishing the Petitioner's house on the suit property. The Respondent decided to



destroy the Petitioner's house on the suit property yet the Respondent was aware and/or ought to be aware that it was a private property belonging to the Petitioner. The Respondent decided to destroy the Petitioner's house at night on the suit property yet the Respondent was aware and/or ought to be aware of the security concerns which could be caused by such an act. Further, the Respondent's aforesaid actions are illegal and in contravention of the Constitution of Kenya, 2010.

2. The Petitioner has a right to be treated in a credible and accountable manner by the Respondents as state organs under Article 10 of the Constitution of Kenya, 2010 which right as aforesaid, been violated by the Respondent. Similarly, the Petitioner's fundamental right to enjoy a fair administrative action by the Respondent as provided in Article 47 of the Constitution of Kenya, 2010 has been violated by the Respondent. The Petitioner's inherent right to natural justice as codified in Article 50 of the Constitution of Kenya, 2010 has been violated by the Respondent. The Petitioner's right to the suit property as provided under Article 40 of the Constitution of Kenya, 2010 has been violated by the Respondent in the manner in which the Petitioner's house was destroyed without prior notice having been given to the Petitioner by the Respondent. All in all, the Respondent failed to act in an accountable manner so as to ensure that it does not interfere with the Petitioner's property rights guaranteed under Article 10, 40 and 47 of the Constitution of Kenya, 2010.
3. As a result of the aforesaid actions, the Petitioner has suffered loss of income as he is no longer receiving the monthly rent of 12,000.00 from the one unit bedroom flat. Further the Petitioner is now being viewed as a land grabber in the public eye yet he followed due process in the acquisition of the suit property and obtained all necessary approvals before developing the same. Vide a valuation report conducted in April, 2023, M/S Nyange Integrated Consultants Ltd qualified the loss suffered by the Petitioner as a result of the demolition of the house at Kshs.9,606,274.65. The Petitioner therefore seeks compensation for the destruction of his house at Kshs.9,606,274.65. In addition, as a result of the Respondent's aforesaid actions, the Petitioner has been forced to rent a one-bedroom house at Kshs.12, 000 per month where he stays with his wife and 2 children. The Petitioner therefore prays for compensation of the sum of Kshs.12, 000/= per month from March, 2021 when the Petitioner's house was demolished. The Petitioner also seeks loss of income at the rate of Kshs.12,000/= per month from the date when the Petitioner's one unit 1 (one) bedroom flats were demolished to date when the Respondent will compensate the Petitioner for the value of the said structures.
4. The Petitioner prays that the following orders be granted:
 - a. A declaration that the Respondent acted illegally and unconstitutionally in facilitating the demolition of the house to property known as Plot Number 10918/11/MN.
 - b. A declaration that the Respondent is in violation of Articles 2, 3,10,19,20, 21, 28, 40, 47 and 50(1) of the Constitution of Kenya, 2010 and the provision of the Fair Administrative Actions Act in the manner in which the Respondent demolished the house standing on the suit property.
 - c. Compensation with respect to the house demolished by the Respondent on the property known as Plot Number 10918/11/MN.
 - d. An order that the Petitioner is entitled to full compensation of his demolished house by the Respondent on Plot Number 10918/11/MN.
 - e. Special damages of Kshs.50,000 for the valuation report.
 - f. Compensation for the loss of use of the property as pleaded herein above.
 - g. General damages for violation of the Petitioner's fundamental rights,



- h. Costs of the Petition be awarded to the Petitioner herein.
4. The Respondent filed a replying affidavit dated 5th March 2024. John Wambua Francis a planner with the Respondent stated that one Mustafa Gedi Noor complained that there was encroachment upon his property namely, as Plot Number 10918/11/MN which is also the suit property herein. The Respondent's officers visited the site on the 10th February 2016 and confirmed they was illegal construction work going on at the frontage of the suit property. It was agreed that the illegal structures be demolished. He produced the certificate of search, the survey report and various correspondences to confirm these facts. Section 26 of the [Land Registration Act](#) No. 3 of 2012 states as follows:
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
5. There is a fact that Mustafa Gedi Noor is the registered owner of the suit land. Section 108 of the [Evidence Act](#) Cap 80 states that;
- “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.”
- Section 109 of the [Evidence Act](#) states that;
- “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.”
6. In *Mbuthia Macharia vs Annah Mutua & Another* (2017) eKLR the court of appeal discussed the burden of proof and stated as follows;
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”
7. The Petitioner produced a sale agreement dated 18th January 2016 between Abdulmalik Abubakar Khamis as the vendor and himself of Plot Number 10918/11/MN for Kshs 400.000/= . He has not produced any evidence to show that the vendor was or is the said registered proprietor of the suit land. He did not produce the certificate of title nor the search certificate and the court cannot establish what connection Abdulmalik Abubakar Khamis had with the suit land if at all. It is also surprising that the



suit land was not transferred to the Petitioner if it was indeed a sale of part of Plot Number 10918/11/MN measuring 30 by 30 feet.

8. Section 116 of the *Evidence Act* which states;

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

9. The Respondent found that the Petitioner had encroachment upon the suit property namely, as Plot Number 10918/11/MN which belonged to one Mustafa Gedi Noor and it is also the suit property herein. The Respondent's officers visited the site on the 10th February 2016 and confirmed they was illegal construction work going on at the frontage of the suit property. It was agreed that the illegal structures be demolished. They produced the certificate of search, the survey report and various correspondences to confirm these facts. I find that the Petitioner has failed to establish any proprietary, interest on the suit land and hence cannot claim any compensation for the same. Indeed, the said vendor never swore any affidavits to corroborate the Petitioner's evidence that he was the seller and had the capacity to enter into the said sale agreement. Secondly, even if the structures were legally constructed on the suit land, the Petitioner has not shown that it was the Respondent who was responsible for the demolition. I find that the Petitioner has failed to establish his case on a balance of probabilities and I dismiss it with costs.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

