



Njuguna & 2 others v County Government of Kajiado & 2 others (Environment & Land Case 1 of 2019) [2024] KEELC 5754 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 1 OF 2019**

**LC KOMINGOI, J
JULY 25, 2024**

BETWEEN

**STEPHEN NJUGUNA 1ST PLAINTIFF
JOHN MUTURIA M'MWENDA 2ND PLAINTIFF
SAMUEL MWANGI KIRUKI 3RD PLAINTIFF**

AND

**COUNTY GOVERNMENT OF KAJIADO 1ST DEFENDANT
THE NATIONAL LAND COMMISSION 2ND DEFENDANT
KENYA RURAL ROADS AUTHORITY (KERRA) 3RD DEFENDANT**

JUDGMENT

1. By the Complaint dated 8th January 2019, the Plaintiffs together with others represented in this suit aver that they are the registered owners of properties Title No. Ngong/Ngong/13359, 9708, 13355, 9702, 69683, 33939, 9700, 29965, 13350, 14212, 14211, 60338, 29964, 42529, 9716, 32786, 32785, 29966, 16687 and 19664 (herein after referred to as suit properties). On 4th December 2018, the 1st Defendant through its agents trespassed on the suit properties which are along Kanisani, Ole Kisio and Sinai Road. They surveyed them and put markings/ beacons with the intention of expanding the road. On 5th December 2018, the 1st Defendant issued them with notices asking owners of the suit properties to realign their fences and/or developments within 30 days, failure to which the suit properties would be demolished.
2. The Plaintiffs aver that the 1st Defendant did not follow laid down procedures in an attempt to acquire the suit properties such as publishing the intended acquisition in the Kenya Gazette, having public participation on the intention to acquire or determining their value; the 1st Defendant did not seek authority from the property owners before entering to carry out the survey; the 1st Defendant intends



to hive off two (2) metres from the suit properties without compensating them for the compulsory acquisition; some of the marked items for demolition include electricity distribution poles and street lights which will cause a power supply interruption to the residents; the 2nd Defendant did not inspect the suitable properties to determine whether they were suit for the intended purpose.

3. They thus sought orders that;
 - a. The court do make a declaration that the 1st Defendant breached the mandatory provisions of the law with regard to protection of the right to property enjoyed by the Plaintiffs and that the Defendants have breached or disregarded the laid down procedure for acquiring private land through the process of compulsory acquisition.
 - b. The court do grant a permanent injunction restraining the 1st, 2nd and 3rd Defendants from interfering, trespassing, damaging or acquiring properties known as Title No. Ngong/ Ngong/13359, 9708, 13355, 9702, 69683, 33939, 9700, 29965, 13350, 14212, 14211, 60338, 29964, 42529, 9716, 32786, 32785, 29966, 16687 and 19664.
 - c. The plaintiffs be awarded costs and any further relief this Hon. Court may deem fit to grant.
4. The 1st Defendant in its statement of Defence dated 27th February 2019 denied the allegation of trespass and breach of statutory obligations stating that if any markings were made (which it denied), then they were made because the suit properties had encroached on a road reserve. It added that if any notices were issued, the same were procedurally done with an aim of protecting a public utility which had been encroached on by the Plaintiffs and there was no need of any public participation because this was not an act of compulsory acquisition. It sought that the suit be dismissed with costs.
5. The 2nd Defendant in its Statement of Defence denied the allegation of compulsory acquisition stating that they had not received such a request and that the 1st and 3rd Defendants were carrying out maintenance of the road which was within their mandate.
6. The 3rd Defendant in its statement of defence sought that the suit be dismissed with costs because no cause of action had been disclosed against it indicating that its mandate was to carry out routine maintenance road works.

Evidence of the Plaintiffs

7. PW1, John Muturia M’Mwenda the owner of Ngong/ Ngong/9716 adopted his witness statements as his part of evidence in chief. He stated that one evening they came from work and found notices from the County Government of Kajiado notifying them to vacate the properties. However, according to the Registry Index Map (RIM) their properties were within the accurate boundaries. They thus approached the County Government to discuss the issue but their grievance was not considered hence the filing of this suit.
8. PW2 Stephen Njuguna adopted his witness statement and buttressed the need for the orders sought.

Evidence of the Defendants

9. The Defendants and their advocates were absent on the day of hearing despite evidence of service. The court then directed that the matter proceed *ex parte*.
10. At the close of the oral testimony the plaintiffs tendered written submissions.



The Plaintiff's Submissions

11. Counsel for the Plaintiffs submitted that their ownership to the suit properties had neither been challenged nor was there a request to compulsorily acquire them as articulated under Section 107(1) of the *Land Act*. Demolishing the properties would cause them irreparable damage. The 1st Defendant's action of entering the properties and putting markings on them without authority was therefore an act of trespass. Additionally, the County Surveyor had no mandate to determine disputes noting that they had not received a notification from the Land Registrar of any alienations as required under Section 16 of the *Land Registration Act*. There was also no evidence that there was an increase in acreage as provided by Section 54(1) of the Physical Planning Act. Reference was made to the cases of Pamela Waithera Mburu v County Government of Kajiado [2018] eKLR, Gujral Sandeep Ragbir v County Government of Kajiado [2018] eKLR and Isaiah Otiato & 6 others against the County Government of Vihiga [2018] eKLR.
12. Therefore, the Defendants' actions were unconstitutional and the Plaintiffs were entitled to Kshs. 1,000.

Analysis and Determination

13. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiffs are entitled to the prayers sought;
 - ii. Who should bear costs of the suit?
14. The present dispute is on an alleged act of trespass whereby the 1st Defendant, acting through its surveyor, entered the Plaintiffs' properties and placed beacons and markings. The Plaintiffs aver that this constitutes an attempted act of compulsory acquisition without adherence to the requisite legal procedures.
15. In their statements of defense, the Defendants denied these allegations. The 1st Defendant specifically contended that the Plaintiffs' properties had encroached on the road reserve, and that any survey conducted was solely for the purpose of re-establishing the boundaries of the road reserve. The 2nd Defendant further disputed the allegation of compulsory acquisition, asserting that no notice had been received regarding any such acquisition.
16. To resolve this matter, it is imperative to ascertain whether the Defendants' actions constitute compulsory acquisition or trespass.
17. It is indeed a Constitutional authority under Article 40(3) that no person should be deprived of their land without due process being followed:
 - “(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.”

18. Part VIII of the *Land Act* provides guidelines on the process of compulsory acquisition. Section 107 of that Act provides:

“ 107.

- (1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.
- (2) The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.
- (3) The Commission may reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under subsection (2) and Article 40(3) of *the Constitution*.”

19. Regarding the procedure for compulsory acquisition, the Supreme Court in *Attorney General v Zinj Limited* [2021] KESC 23 (KLR) held that:

“It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired.”

20. The Defendants having contested the allegation of compulsory acquisition and the suit properties still being in possession of the Plaintiffs, I find that the claim for compulsory acquisition has not been sufficiently proved. This notwithstanding, any attempt to acquire property compulsorily should follow laid down procedures.

21. This brings us to the next issue of trespass. The Plaintiffs indicated that the Defendants entered their suit properties, put marking on them as well as beacons then issued them with a notice to vacate. Section 3(1) of the *Trespass Act* defines trespass as: “Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.” The Defendants actions, if proven, could constitute an unlawful intrusion onto the Plaintiffs’ properties, thereby amounting to trespass.

22. Save for the public notice dated 30th November 2018 from the Chief Executive Committee Member of Physical Planning and Urban Development of the County Government of Kajiado to land owners along Kanisani road, the Plaintiffs did not produce evidence of the said markings and beacons



put up. The said public notice reads: “... Surveying and marking of existing Kanisani Road ... the County Government of Kajiado wishes to notify all land owners along Kanisani road that the County Government Surveyors will commence marking and surveying of the above mentioned road... The surveyors will also indicate the width of the road reserve after which all land owners must realign their fences and / or developments accordingly within 30 days from the date of this notice to allow for road construction...”

23. This notice was to inform the Plaintiffs of the intended survey to determine measurements of the road reserve for purposing of constructing a road.
24. On 5th December 2019, this court ordered the District Surveyor to file a survey report of the suit properties. The said report dated 17th March 2020 filed on 6th March 2020 reads: “Survey team from this office visited the suit premises on 5th February 2020 in the company of the area chief and that of interested parties. The order was to undertake measurements of the road in parcel number Ngong/Ngong/13359 and others. The findings of the survey were: after computing the acreage of the parcels Ngong/Ngong/860, 1650, 1993 and 1983 using the coordinates they were found to be slightly bigger than the registered acreage; the average width of the roads on the ground are less than the registered width; there us apparent encroachment onto the road hence increasing the parcels acreage at the expense of the road; this encroachment was as a result of the increase in the acreage of some parcels. The affected parcels whose registered owners were not present during the site visit since most of them are not parties before the Hon. Court; several subdivisions followed further transferring the encroachment; the issue of encroachment can only be solved after the issue of the boundaries had been addressed by the Land Registrar.” The surveyor thus recommended the office of the Land Registrar to preside over the dispute by interrogating the owners of the encroaching parcels.
25. The Surveyor’s report unequivocally concluded that there was a boundary discrepancy and encroachment by the Plaintiffs’ properties onto the road reserve. This finding necessitates further action by the office legally mandated to address and resolve the boundary disputes. Section 18(2) of the [Land Registration Act](#) estops Courts from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. Consequently, the appropriate course of action is to refer the matter to the Land Registrar, who possesses the jurisdiction and statutory authority to adjudicate boundary disputes. In the event that any party is dissatisfied with the Land Registrar’s decision, they retain the right to seek recourse through the appropriate legal channels, including the right to appeal.
26. There being evidence that the 1st Defendant had issued a public notice of their intention to survey the properties, I find that the issue of trespass has also not been sufficiently proved.
27. The issue of compulsory acquisition has also not been proved.
28. In conclusion I find that the Plaintiff’s succeed partly and I do grant orders of permanent injunction restraining the Defendants from interfering and/or trespassing on the properties known as Title No. Ngong/Ngong/13359, 9708, 13355, 9702, 69683, 33939, 9700, 29965, 13350, 14212, 14211, 60338, 29964, 42529, 9716, 32786, 32785, 29966, 16687 and 19664.
29. The other Prayers are dismissed with no orders as to costs.

Dated, Signed and Delivered virtually at Kajiado this 25th day of July 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:



N/A for the Plaintiffs.

N/A for the Defendants.

Court Assistant – Mutisya.

