



**Kabau v Mwangi (Environment & Land Case 114 of 2016)
[2024] KEELC 6365 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 114 OF 2016
LN MBUGUA, J
SEPTEMBER 26, 2024**

BETWEEN

CHRISTOPHER KIAI KABAU PLAINTIFF

AND

NELSON NJUGUNA MWANGI DEFENDANT

RULING

1. The Plaintiff instituted this suit vide a plaint dated 9.2.2016. He contends that he is the proprietor of Plot No. A3 184 and Plot No. A3 185 (Kayole Infil) whereupon the Defendant has put up a commercial building without his consent. That the Defendant filed a case Milimani CMCC No. 3805 of 2012 claiming ownership of the suit parcels but the case was dismissed for failure to disclose a reasonable cause of action.
2. That pursuant to the dismissal, the Plaintiff agreed to allow the Defendant to continue with occupation of the suit parcels subject to signing a sale agreement and paying him a purchase price of ksh.4.5 million, but the defendant only paid ksh. 2, 599,000/= and has refused to sign an agreement for sale thus frustrating the sale.
3. He prays for judgment against the Defendant for;
 - a. Order declaring the Defendant, his agents/servants/and any persons claiming through them as trespassers and ordering the Defendant to demolish the structures built on the Plaintiff's plot.
 - b. An injunction restraining the Defendant, his tenants, agents, any persons claiming through him from trespassing onto Plot No. A3-184 and Plot No. A3-185 (Kayole Infil) situated at Kayole Estate in Nairobi City County or in any other manner dealing with the same.
 - c. General damages for trespass for nuisance.
 - d. Costs.



- e. Interest.
4. The suit is opposed by the Defendant vide his defence dated 5.8.2016 which was amended with a Counterclaim on 11.5. 2017. He admits that the Plaintiff is the proprietor of the suit parcels but contends that he is the lawful holder of allotments to Plot No. A3-184A and Plot No. 13-185A (Kayole Infil) and that on admission by City Council of Nairobi Housing Development Department, parallel plans had been prepared for the same plots thereby leading to double allocation.
 5. He admits that he filed Milimani CMCC No.3805 of 2012 and that it was struck out. He also admits that he purchased the Plaintiff's Plot No. A3 184 and Plot No. A3 185 (Kayole Infil) at ksh.4.5 million and has so far paid him ksh.2.6 million. He avers that the Plaintiff was required to refund him the ksh.2.6 million when it became clear that the plaintiff had refused to accept the balance of the purchase price but he has not done so.
 6. He counterclaims for the following orders;
 - a. A refund of a sum of ksh.2.6 million together with interest from 16.6.2015 to the date of payment in full
 - b. Costs of the suit.
 7. When the suit came up for hearing on 18.7.2022, parties recorded a consent to the effect that;
 - a) Plaintiff is owner of the suit property.
 - b) That the Plaintiff has so far received ksh.2,599,000/= from the Defendant.
 - c. That the Defendant has been in occupation of the suit property for the last 10 years without paying rent.”
 8. The court also gave directions for parties to explore ADR on the disputed issue of mesne profits and or refund. To this end, parties were to avail a joint valuation report capturing; the current market value of the suit plots, the value of the developments and the probable rent that could have been paid on the suit land.
 9. On 30.10.2023, counsel for the Plaintiff told the court that the Defendant had refused to participate in valuation, thus the Plaintiff allegedly filed his own valuation report and they also sought a date for delivery of judgment on the pending issue, but the court gave a mention date instead. On 5.12.2023, the plaintiff sought orders to file submissions in the matter, of which the court obliged with a rider that “The court to determine the issue of the valuation in the body of the judgment”.
 10. I have considered the rival submissions, those of the plaintiff dated 9.12.2024, as well as those of the defendant dated 14.3.2024. The plaintiff claims that as per the valuation report, he is entitled to a total sum of sh. 4 800 000, being the value of the two suit properties less what has been paid by the defendant (2 599 000) giving a sum of sh. 2, 201, 000. He also claims rental income of ksh.40, 000/= per month for 10 years, thus giving a sum of sh. 40,000x12x10=4.8 million.
 11. The Defendant submits that trespass is not an issue herein since he was ready and willing to complete payment of the purchase price were it not for the Plaintiff who refused the payments. Adding that occupation was with the full knowledge of the Plaintiff who had agreed to relinquish his pursuit of the plots, agreeing to sell them to the Defendant.
 12. I find that it is not tenable for the court to pronounce a final finding on the dispute at this stage for the following reasons;



13. Firstly, the submissions proffered by the parties contain matters of facts where each protagonist is blaming the other for the non-performance of an alleged sale agreement. However, submissions cannot take the place of evidence, See - *Sea Star Malindi Limited v County Government of Kilifi* (Environment & Land Case 47 of 2006) [2023] KEELC 20329 (KLR) (4 October 2023) (Judgment). Thus the court cannot embark on interrogating the controverted issues such as when the sale agreement was made and when it was rescinded, seeing that the plaintiff admits to having received more than half of the alleged purchase price of the suit property over a certain period of time. It follows that the court is being invited to make a determination based on disputed facts which have not been proved in evidence.
14. Secondly, I find that the consent dated 18.7.2022 didn't capture with clarity the issues which were left for the court's determination. The parties simply sought to explore Alternative Dispute Resolution Mechanisms and the court directed the parties to avail a valuation report. There is nothing which can be construed from the proceedings of 18.7.2022 as mandating the court to give a judgment based only on the report. Even the wording in the court's directions of 5.12.2023 that "the court to determine the issue relating to valuation in the body of the judgment" is a pointer to the fact that the report was not to be the only consideration.
15. Thirdly, still on valuation, I find that this court's direction for the parties to file a joint valuation report was not complied with. The Plaintiff's counsel however told this court on 30.10.2023 that he had filed a report and has delved into it in his submissions. However, the alleged report is neither in the physical court file nor in the Electronic file (CTS Portal).
16. It follows that this court has no material at all in which it can grant the prayers sought by the protagonists including the assessment of any damages. In that regard, the court proceeds to give the following directions;
 1. The directions given herein for the parties to file submission and the delivery of judgment are hereby set aside.
 2. The matter is to be heard through viva voce evidence.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Munyuga holding brief for Kimamo for plaintiff

Mambo for defendant

Court assistant: Joan

