



Kenya Power & Lighting Co. Ltd v Gachagua & 2 others (being sued as officials of Jada “B” Jua Kali Association) & 4 others (Environment & Land Case 1453 of 2007) [2024] KEELC 6377 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1453 OF 2007
LN MBUGUA, J
SEPTEMBER 26, 2024**

BETWEEN

KENYA POWER & LIGHTING CO. LTD PLAINTIFF

AND

**ISAAC GACHAGUA, HUSSEIN GODANA AND PETER B.N NJIRU BEING
SUED AS OFFICIALS OF JADA “B” JUA KALI ASSOCIATION 1ST DEFENDANT**

**GAMAU WAINAINA, DAVID GATHI AND RACHAEL NJERI BEING SUED AS
THE OFFICIALS OF JADA “A” JUA KALI ASSOCIATION 2ND DEFENDANT**

PANEL GRACE CENTRE 3RD DEFENDANT

CHRISCO CHURCH 4TH DEFENDANT

NAIROBI CITY COUNCIL 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by a plaint dated 14.9.2004 which was initially filed in the High Court as HCCC NO. 1256 OF 2004. It contends that it is the beneficial owner of parcel LR No. 113044/R Nairobi wherein it has constructed a power sub-station for purposes of distributing electric power to the neighboring areas. It further avers that the 1st-4th Defendants and their members have encroached upon and invaded the suit land and put up unauthorized structures, thereby endangering the Plaintiff’s investments and their own lives. Adding that the invasion was occasioned by the allocation of the land by the 5th defendant to the other defendants.
2. The Plaintiff prays for judgment against the Defendants jointly and severally for;
 - a. Eviction from the Plaintiff’s LR No. 113044/R Nairobi forthwith.



- b. Mandatory injunction compelling the Defendants to demolish and remove the structures they have constructed upon the Plaintiff's land being LR No. 113044/R Nairobi forthwith.
 - c. Damages for unlawful occupation.
 - d. Costs and interests.
3. The suit is opposed by the 1st and 3rd Defendants vide their amended statement of defense and counterclaim filed on 2.8. 2019. They deny allegations contained in the plaint and contend that they have occupied their own parcels of land legally allocated to them by the 5th Defendant who is legally registered as the proprietor of parcel LR No. 113044/R (the suit property).
 4. They counterclaim for a declaration that that they are owners of the suit property, a permanent injunction against the Plaintiff/any other person barring interference with the suit property, costs of the suit as well as orders that the Plaintiff's case be dismissed.
 5. The 2nd Defendants filed a statement of defence dated 5.5.2005 in which they contend that they are on the suit parcel legally.
 6. The 4th Defendant is opposed to the suit vide its statement of defence dated 14.7.2005 wherein, it pleads that it is the legal owner of the suit property by virtue of a letter of allotment issued by the 5th Defendant.
 7. The 5th Defendant opposed the suit vide its statement of defence dated 5.1.2005 denying plaintiff's claim, and contends that the Plaintiff's suit does not disclose a cause of action against it.

Case for the Plaintiff

8. The Plaintiff called 1 witness, PW1 Jediel Muriuki Marango, a senior property officer of the Plaintiff, currently managing the real estate portfolio across the country. He adopted his witness statement dated 28.11.2018 as his evidence in chief. He produced 11 items contained in their list of documents dated 14.7.2011 as P. Exhibit 1-11 and a further supplementary list dated 19.11.2019 as P. Exhibit 12.
9. In his witness statement, PW1 contends that that the Plaintiff is the registered proprietor of the suit property and that the parcel hosts a depot, a sub-station, office block and a fabricated building for operations. He avers that the 1st - 4th Defendants have encroached on the parcel and put up illegal structures and that the said action has caused serious security threat to the suit property, its equipment, employees and machinery.
10. That the Defendants action has also restricted the Plaintiff greatly in upgrading the sub-station and generally managing the supply of power to the neighborhood.
11. In cross-examination by counsel for the 4th Defendant, PW1 stated that vide a letter dated 16.5.1975 from the City Council of Nairobi, the Plaintiff was allocated 9.48 hectares of land in Dandora, then known as Dandora farmers and is near Komarock estate. He stated that the current substation is on the right of Kang'undo road while coming from Nairobi to Ruai using the said road, and that the same is fenced for purposes of securing installation and safety of occupants thereon.
12. He stated that the 4th Defendant's church can be seen within the vicinity of the substation and it is about 50 meters from the switch station. That there is also a road in between though it is not an official road. That the Plaintiff is in court because of the said encroachment by the 4th Defendant which is described as a registered company in the plaint.



13. PW1 was referred to an allotment letter dated 27.10.1992 addressed to Christ Co-workers fellowship by Nairobi City Commission as well as receipts issued by Nairobi City Commission of which Ksh. 15,180/=, Kshs.780/=, and ksh.801/= was paid separately by Chrisco Workers Fellowship for various services from Nairobi City County. He was also referred to several correspondences from Nairobi City County including a letter dated 29.4.2014 which reads, "Grabbing of Church Plot.... The official position is that the property has always been property of chrisco....".
14. Referred to P. Exhibit 12, PW1 stated that what is marked in bold red is the Plaintiff's land, whereby Chrisco Church is right at the corner, about a quarter of the church is inside the red bold line while the bulk of the church is outside the said line, but it is within the power lines. The space is meant for a power way leave for the switch yard which way leave is important because the power lines are high voltage and need tracing lines.
15. He pointed out that inside the bigger dotted bold red line of Plaintiffs Exhibit 12, there is another lighter bold line which indicates the substation yard and above it, there is Paniel Grace Center and a mosque and they are outside the station but within the red dotted bold line.
16. He stated that he did not have a beacon certificate of what belonged to the Plaintiff and that other Jua kali people (1st and 2nd Defendants) are not captured in P. Exhibit 12 which is a sketch map of the area drawn by Kenya Power Surveyors.
17. In re-examination, PW1 stated that the letter of allotment to the Plaintiff is specific for LR 11344 Nairobi and that the Plaintiff paid for a beacon certificate then Nairobi City County wrote to them stating that they were waiting for survey.
18. He stated that the letter of allotment, receipts, correspondences and the beacon certificate issued to the 4th Defendant have no land reference number.

Case for the 4th Defendant

19. The 4th Defendant called 1 witness, DW1 Pastor Cyrus Wanyaga Karuru, a pastor at the 4th Defendant's church at Komarock East branch. He adopted his witness statement dated 23.1.2018 as his evidence in chief. He produced 8 documents ranging from page 10-18 of the 4th Defendant's bundle dated 23.1.2018 as Defence Exhibits 1-8.
20. His testimony is that in the year 1992, the 4th Defendant applied to the 5th Defendant's predecessor for a vacant plot in East lands area of Nairobi in order to establish a church for its growing congregation and on 27.10.1992, it was allocated a parcel known as Title No. LR 113044/R Nairobi measuring 0.2 hectares of which it paid all the requisite charges demanded by the 5th Defendant and was duly issued with receipts.
21. That on 29.5.1997, the 5th Defendant's surveyor issued the 4th Defendant with a beacon certificate and the deed plan/survey map showing the plot. Subsequently, with the approval of the 5th Defendant, the 4th Defendant erected a church and built a stone wall to secure the property and has been in quiet possession for a period of over 20 years.
22. He stated that their church is located between Komarock Estate and Jada area and the other side is called Tasina or Komarock East. He avers that the 4th Defendant is not near the Plaintiff, of which there are many houses between them and the Plaintiff, they don't even share a boundary, thus plaintiff Exhibit 12 does not represent the actual position on the ground.



23. In cross-examination by counsel for the Plaintiff, DW1 stated that in the 4th Defendant's letter of allotment dated 27.10.1992, LR No. 113044/R is not mentioned and neither is it mentioned in their receipts, but in the Plaintiffs letter of allocation which is P. Exhibit 1, the L.R. No. is mentioned.
24. In re-examination, DW1 stated that for P. Exhibit 1, the LR No. mentioned is 11344 Nairobi while the LR No. which he quoted in his evidence in chief is LR 113044/R Nairobi, thus it is different from the Plaintiff's parcel. He reiterated that they were shown where the land and the beacons were and that they were issued with an allotment letter and receipts by the 5th Defendant who was duty bound to input the LR No. to those receipts.
25. The 1st, 2nd and 5th Defendants did not participate in the proceedings despite having been served, thus their cases were marked as closed. As for the 3rd Defendants, interlocutory judgment was apparently entered against them on 5.10.2005.

Submissions

26. The submissions of the Plaintiff are dated 14.2.2024 where it is argued that the Plaintiff presented unchallenged evidential proof that it is the lawful owner of the suit property while on the other hand, the 1st - 4th Defendants failed to dislodge the Plaintiffs claim. It was pointed out that the letter of allotment produced by the 4th Defendant is not in respect of the suit property herein being LR 113044/R which property had already been allocated to the Plaintiff more than 17 years earlier.
27. The Plaintiff submits that compensation of ksh.100 million for 20 years of trespass would suffice. It relies on the case of Rhoda Kiilu v Jiangxi Water & Hydro Power Construction Ltd [2019] eKLR where the court awarded the Plaintiff general damages of ksh.10 million for trespass which had occurred over a period of 1 year.
28. The Plaintiff also relies on the case of Joseph K Koech v Philip C. Sang [2018] eKLR to urge the court to evict the Defendants and to order them to remove structures erected on the suit parcel, failure to which the Plaintiff should be at liberty to remove them.
29. The 4th Defendant filed submissions dated 19.2.2024 arguing that it was not properly sued as it is a church organization, that it should have been sued through its board of trustees. It contends that being a church, it falls within the ambit of the Society's Act, thus it is not a legal person and can only be sued through its officials.
30. It is also submitted that the Plaintiff failed to prove its case against the 4th Defendant as its evidence did not support its pleadings. It is pointed out that the Plaintiff sought ownership of LR No. 113044/R while it produced documents relating to LR 11344 for a substation in Dandora, several kilometers away from the 4th Defendant's parcel which is in Komarock.
31. That on the other hand, the 4th Defendant's witness confirmed in his evidence that the 4th Defendant's plot was LR No. 113044/R situated at Komarock and he produced a letter of allotment, beacon certificate as well as a letter dated 29.4.2014 confirming that the suit parcel belongs to the 4th Defendant.
32. In supports of its case, the 4th Defendant relies on the cases of Muchonjo Marugu v Nguthiru PCEA Church [2002] eKLR, Veronica Wanjira Maringa & 26 others v ACK Buxton Diocese of Taita Taveta & another [2022] eKLR as well as the case of Makete & 6 others (Suing for and on behalf of Elgon East Friends Church (Quacker Yearly meeting) v Lusweti & 5 others (Environment & Land Case 10 of 2023) [2023] KEELC 17005 (KLR) (25 April 2023).



Determination

33. Having regard to the pleadings, the evidence and the submissions proffered herein, I frame the issues falling for determination as follows;
1. What is the status of the interlocutory judgment entered against the 3rd defendant on 5.10.2005.
 2. Whether the 4th Defendant has capacity to be sued.
 3. Who owns the suit land?
 4. What are the appropriate orders to give

Interlocutory Judgment

34. The records of the court indicate that interlocutory judgment was entered against the 3rd defendant on 5.10.2005. The legal regime governing the entry of interlocutory judgment is to be found under order 10 rules 4-7 of the Civil Procedure Rules. In the case of Peter Karanja Kamani v Isaac Mwangi Kimani [2018] eKLR, the court had this to say on the matter;

“In the case of Order 10 Rules 4, 6, 9 and 10 of the Civil Procedure Rules, interlocutory judgment cannot issue in land matters unless the claim is accompanied by a prayer for pecuniary damages or for detention of goods in which case interlocutory judgment shall be entered in respect of the prayer for liquidated damages or for detention of goods only and the other claim ordered to proceed in the normal way.”

35. A similar position was taken in the case of Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR, where the court stated that;

“It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory judgment...”

36. There is no prayer for a liquidated claim in the plaint at hand. It follows that the plaintiff has a statutory duty as set out at Section 107-112 of the *evidence Act* to prove its case against the 3rd defendant. In the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR, the court stated that;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest”.

37. Be that as it may, the court has taken into account that a statement of defence for the 1st and 3rd defendants was filed herein on 2.8.2019 by the firm of Khaminwa and Khaminwa advocates.

Locus standi in respect of the 4th defendant

38. The 4th defendant contends that they do not have capacity to be sued as they are but a church. Nowhere in their pleadings or in the witness statement of DW1, has the 4th defendant raised the issue of locus. The issue was only raised in the platform of submissions. In *Galaxy Paints Company Ltd v Falcon Guards Ltd* [2000] eKLR the court held that;

“It is trite law, that issues for determination in a suit generally flow from the pleadings....”.



39. While in *Gandy v. Caspair* [1956] EACA 139 it was held that;

“Unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record...”

40. At paragraph 9 of their defence, the 4th defendant pleads as follows;

“That the suit against it is bad in law, discloses no reasonable cause of action and is fatally and incurably defective and shall raise a preliminary objection in limine that the same be struck off for being an abuse of the process of court.”

41. In “limine” is a latin word which means; at the threshold, at pretrial or in the beginning. Nineteen years down the line, the 4th defendant never indicated the nature and scope of the Preliminary Objection, and the same was not prosecuted!. I find that it is rather late in the day for the 4th defendant to unleash a defence based on locus standi in the platform of submissions.

Ownership

42. The plaintiff’s grievance is that its substation sits on the suit land LR No.113044/R Nairobi which land has been encroached upon by the 1-4 Defendants, thereby restricting its mandate of supplying power to the neighborhood. On the other hand, the 4th defendant contends that it was lawfully allotted the suit land by the 5th defendant.

43. Plaintiff’s exhibit 1 is the letter of allocation dated 16.5.1975 for parcel L.R.11344 measuring 9.48 by the 5th defendant to the plaintiffs predecessors. The purpose of allocation was for setting up a substation site which was subsequently set up. On the other hand, the allotment to the 4th defendant dated 27.10.1992 is for “a church plot”.

44. What I discern from the documents availed by the plaintiff and the 4th defendant is that none of the two parties has a title to the suit land. It also appears that the allottee of the land is the 5th defendant. In the case of *Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another* [2022] eKLR, the court stated that;

“The court is alive to the fact that there are circumstances where a property in dispute has no title. This does not however mean that no rights can accrue therefrom. In such circumstances the court will set out to establish whether the documentary evidence establishes an unbroken chain leading to the root of the title as persuasively stated by Onguto J in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR”.

45. Thus in the case at hand, even if the parties do not have title documents, it does not mean that no rights in the said land can accrue. The ascertainment of such rights and interests will primarily be dependent on the documentary evidence availed by the parties. For the case of the plaintiff, the land which was allocated to them as per the allotment documents captured in exhibit 1 & 2 is L.R. 11344, and the land was allocated for a public purpose, hence it cannot be alienated to private use.

46. On the other hand, whatever was allocated to the 4th defendant is unknown, as it is simply indicated “it was a church plot”.



47. Another issue for consideration is that plaintiff's allocation occurred in 1975, which is 17 years before the allocation to the 4th defendant. From the outset, the plaintiffs did pursue the issue of registration of the title in their favour. In the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR, the court stated that;

“When the appellant's documents are compared with those of the 1st respondent, what is apparent is that the appellant's attempts to secure proprietorship of the suit property were earlier in time than that of the 1st respondent.”

Also see *Gitwany Investment Limited V Tajmal Limited & 3 Others* [2006] eKLR.

48. The document at page 5 of plaintiffs document indicates that the site ground work had kicked off way back in 1981, and by 1998, the high voltage power lines were already there. In the SCOK case of *Torino Enterprises Limited v Attorney General (Petition 5 (E006) OF 2022 [2023] KESC 79 (KLR) (22nd September) (Judgment)* the court stated that;

“An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises”.

49. The 4th defendant must have been aware of the plaintiff's presence in the vicinity and this ought to have sounded a warning as to what they were acquiring from the 5th defendant.

50. Another observation relates to the plaintiff's claim that Defendant's actions pose a security threat to themselves and to others. The plaintiff constantly decried the issue of safety as squatters had encroached on the suit land as seen in various correspondence (see exhibits 7 and 8 of the plaintiff). The nature of the activities undertaken by the plaintiff entails the installation of high voltage power lines. That should sound a warning to any reasonable person who is cognizant of their own safety and the safety of others. It follows that any encroachment upon the plaintiff's substation should not be condoned.

51. This far, I come to the conclusion that the plaintiff's rights and interests in the suit property are superior to those of the 4th defendant, hence the plaintiff is entitled to protection from this court. I say so while taking cognizance of the fact that no title document was proffered before this court by any of the parties, that the court doesn't know the registration status of the suit property and that the party who could have shed light on this issue, “the Nairobi City County” opted to be missing in action! I also take judicial notice that parcel L.R. 11344 has been mentioned in various cases, including, *Torino Enterprises Limited v Attorney General (Petition 5 (E006) OF 2022 [2023] KESC 79 (KLR) (22nd September) (Judgment) supra*.

52. The Reliefs Should damages be awarded in this case?. The plaintiff is claiming damages to the tune of Ksh.100 million for the trespass which has taken place for the last 20 years and has cited my own decision in *Rhoda Kiilu v Jiangxi Water & Hydro Power Construction Ltd* [2019] eKLR. However, an award of damages entails exercise of judicial discretion, which should be exercised judicially depending on the circumstances of each case.

53. In the case at hand, the author of the mess is the 5th defendant which did not even find it expedient to appear in court to unravel the quagmire it creates in haphazard allocations of land. If any such damages are awarded against the culprit, the 5th defendant, it is the tax payers who will end up footing the said costs, a situation that is not tenable under these circumstances. In that regard, I will not give any award of damages. On the same reasoning, I will not award costs in this matter.

54. In the end, plaintiffs claim is allowed in terms of prayer 1 and 2 in the plaint.



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

LUCY N. MBUGUA

JUDGE

In the presence of:-

Okeyo for plaintiff

Okello for 4th Defendant

Court assistant: Joan

