



**Bajoh (Suing as Legal Representative of Estate of Abdalla Mohamed Bajoh - Deceased) v Haban (Suing as Legal Representative of Estate of Said M Haban - Deceased) & another (Environment & Land Case 103 of 2017) [2024] KEELC 13503 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13503 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 103 OF 2017  
FM NJOROGE, J  
NOVEMBER 27, 2024**

**BETWEEN**

**MOHAMED ABDALLAH BAJOH (SUING AS LEGAL REPRESENTATIVE OF ESTATE OF ABDALLA MOHAMED BAJOH - DECEASED) ..... PLAINTIFF**

**AND**

**OMAR SAID HABAN (SUING AS LEGAL REPRESENTATIVE OF ESTATE OF SAID M HABAN - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF TANA RIVER ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Both original plaintiff and 1<sup>st</sup> defendant died and were substituted by their respective legal representatives who prosecuted their respective claims to the end.

**Pleadings**

**The Plaintiff.**

2. The undated amended plaint filed on 19<sup>th</sup> October 2021 substituted the original plaintiff but left the following prayers intact:
  - a. A permanent injunction restraining the defendants either by themselves, legal representatives or any person claiming interest through them from interfering in any way with the plaintiff's use and enjoyment of plot size 0.36 ha within Tana River County as shown on the Part Development Plan Number TRD /312/2009/27 dated 23<sup>rd</sup> July 2009;



- b. Damages for wrongful entry by the defendants onto the plaintiff's parcel of land and obstruction of profitable developments thereon;
  - c. An order for the removal of the fence, any other structure and beacons placed by the respondents, to be removed at their own cost and the originally placed beacons be restored;
  - d. Costs and interests of this suit;
  - e. Any other relief this honourable court may deem fit to grant.
3. The Plaintiff's case is that he purchased a plot of land measuring 0.200 ha from the 1<sup>st</sup> defendant in 2008. Later on the plaintiff was allocated land by the County Government of Tana River, making his land size to be 0.366 ha. He was issued with a letter of allotment. He paid for a beacon certificate. He was then issued with a part development plan dated 23/7/2009. However, the 1<sup>st</sup> defendant in the company of a surveyor invaded the plaintiff's land and placed beacons, fencing off the suit property. The 1<sup>st</sup> defendant then forcibly occupied the land and threatened the plaintiff with eviction, and those actions stalled the plaintiff's business on the suit property hence the claim.

**The 1<sup>st</sup> Defendant's Amended Defence.**

4. The amended defence dated 5/12/2023 is relied on by the defendant. The defendant's case is that in 1998 the County Council resolved and recommended allocation of a petrol station site plot to him and he applied for allocation pursuant to which 0.294 ha of land were allocated to him. A part development plan was gazetted in respect of the said plot among others and was forwarded to the Minister for approval in the year 2000. He admits that the plaintiff engaged him for purchase of a portion of land from him but he never paid for it in full as per the written agreement. Later on he agreed, upon persuasion by the plaintiff and his son and also out of his own pressing financial needs, to sell the plaintiff a portion of land measuring 0.200 ha. The plaintiff then had an agreement written down by his advocates. The plaintiff however paid the consideration partly in cash of KShs 304,900/= and also by way of supply of commodities machinery and machinery parts. A cash balance of KShs 195,100/- has never been paid to date.
5. Later the parties entered into another agreement dated 27/10/2008 for the sharing of the plot and in 2010 the plaintiff procured beacon certificates for his portion of 0.094 ha from the County Surveyor.
6. The 1<sup>st</sup> defendant challenges the authenticity of the plaintiff's PDP dated 27/7/2007 over lack of material particulars including signature and further avers that that PDP showing that the plaintiff's plot is 0.294 ha is a nullity as it overrides the allotted area in the prior PDP dated 24/8/1999 yet the planning authorities concerned never sought his written consent in changing the PDP so as to include the portion given to him in 1999. He avers that he legally placed beacons on his portion of land since he had not been paid the purchase price and thus remained the beneficial owner thereof thus the plaintiff lacks a cause of action. He accused the plaintiff of numerous counts of forgery of documents with ridiculous effects, for example, of a beacon certificate in order to extend the portion he purchased from him, and also of a sharing agreement in order to purport to have acquired the entire of the 1<sup>st</sup> defendant's plot. He challenged the authenticity of these documents. He claims that all the irregular documents held by the plaintiff were cancelled by the County Executive for Lands and Agriculture - Tana River vide a letter dated 28/6/2017.

**The Counterclaim.**

7. In the counterclaim the 1<sup>st</sup> defendants seek the following orders:



- a. A declaration that he is the owner of the portion of land measuring approximately area 0.094 ha vide reference and/or PDP Number TRD 312/2010/05 and that the subsequent beacon certificate and the letter of allotment indicating that the plaintiff purchased 0.366 ha from the 1<sup>st</sup> defendant be declared null and void;
- b. A refund of the outstanding balance of the purchase price amounting to Kshs 195,100/=;
- c. Any further or other relief that this honourable court shall deem fit and just to grant.

### **Reply to The 1<sup>st</sup> Defendant's Amended Statement of Defence and A Defence to The Counterclaim**

8. The plaintiff also filed a reply to the 1<sup>st</sup> defendant's amended statement of defence and a defence to the counterclaim in a pleading dated 25/2/2022. That pleading admits that the 1<sup>st</sup> defendant sold the plaintiff 0.200 ha and he was left with 0.094 ha but insists that he paid the consideration in full. He further adds that he was allocated more land by the County Council of Tana River to make his land 0.366ha as per the PDP dated 23/7/2009 and a letter of allotment No 01655 was issued. He castigates the alleged cancellation of his documents as sub judice this case and contrary to an existing court order.

### **Evidence**

#### **Plaintiffs' evidence**

9. PW1 was the original plaintiff. He testified on 13/10/2020 prior to his demise. He stated that pursuant to a change of location of a road, he requested the clerk of the council for an extension which request was accepted and a new PDP was created. He denied invading the 1<sup>st</sup> defendant's land. he testified that he approached this court because the defendants allegedly tried to alter the boundaries and take away his portion of land; that the cancellation of his documents was contrary to an order of this court. However, he denied ever having been notified of the alleged cancellation by way of a letter.
10. PW2, Duncan Odhiambo, a surveyor, testified on 5/3/2024. He stated that he went to the site and inspected and verified that the beacons were as per the measurement agreed by the parties. Then he factored in the extension granted to the plaintiff by the County Council after the road in front of the plaintiff's plot was relocated thus leaving a large open space. At the time of the survey exercise the plaintiff had already occupied that space. According to him his sketch shows three plots, A, B and C. Plots A and C were bought from the 1<sup>st</sup> defendant by the plaintiff while plot no B was officially granted to the plaintiff by the County Council. There was an encroachment at plot no C leaving Plot A to be of a much lesser area than was bought.
11. Upon cross examination PW2 stated that he obtained the PDP which he used in his exercise from the County Council; that he found that there was encroachment from the 1<sup>st</sup> defendant yet he never indicated the extent of such encroachment on the sketch he prepared; that no subdivision has been effected to date. With the close of PW2's evidence the plaintiff's case was marked closed.

#### **1<sup>st</sup> defendant's evidence**

12. DW1 Adnan Barisa Dae a surveyor working with the Ministry of Lands gave evidence for the defendant. His evidence is that he made a survey report dated 2/11/2022 regarding the suit property; that the suit land was an unsurveyed plot measuring 0.294 ha first allocated to the defendant. He demarcated the parcel into two portions; one of 0.094 ha for the 1<sup>st</sup> defendant and another one of 0.200 ha for a petrol station. Later a road diversion created an open space and that open space measured 0.024 ha and it was allocated to the 1<sup>st</sup> defendant. He made a drawing representing the same and attached



it to his report dated 22/2/2021. He averred that there are existing structures on the land. According to him parcel no A on his sketch is the petrol station. The remainder of the land increased to 0.1180 when the extra space created by the diversion was added. His evidence is that the extra area should go to no other person but the 1<sup>st</sup> defendant. He conceded that no subdivision had been conducted on the parcel originally allocated to the 1<sup>st</sup> defendant. He stated that a private surveyor like PW2 relies on data from the Survey office. He testified that PW2 never visited the Survey office. That the only point of disagreement between PW2 and DW1 is the manner of handling the area brought about by the road diversion. The additional land was next to the road leading to Hola town. An extension of a plot is normally applied for. He has not seen any application by the plaintiff for the allocation of the extra space to him. He stated that when the plaintiff applied to the County Government he was told that the said space had been allocated and cannot be subject to a second allocation and the PDP in support of the new allocation was cancelled.

13. Upon cross examination however he stated that the 1<sup>st</sup> defendant had not made any application for allocation of the extra area created by the road diversion, but the plaintiff had done so. He stated that he was not aware of any order barring him from any dealing with the suit land pending this case; that the extra land was added to the remainder. He admitted that a shift in the road would only affect Part A in the sketch of PW2 which represented the plaintiff's plot. He found some old beacons while on site but he never indicated the new beacons in his report. Without any explanation he stated that the new beacons had been improperly placed.
14. DW2, Omar Said Haban son to the original plaintiff testified orally and adopted his written witness statement dated 5/12/2023 and adopted documents filed as exhibits in the case. he stated that the plaintiff had uttered a forged beacon certificate enlarging the plot to 0.366 ha and that the PDP for the same acreage was cancelled.
15. Upon cross-examination DW2 stated that he has no evidence in the form of a letter from his now deceased father in which balance of consideration had been demanded. He also stated that his father never applied for and was never granted any additional land by the County Government. His father's plot can not be any more than 0.094 ha. He admitted that the plaintiff has a petrol station on the land. He was not aware of any road diversion. He had no knowledge as to who prepared the 1<sup>st</sup> defendant's beacon certificate (1DExh 3). He had no knowledge whether the plaintiff had ever applied for extension of his plot. He was not aware of the fixing of any beacons on the land or when the 0.200 ha for the plaintiff was excised from his father's allocation.
16. At that juncture the 1<sup>st</sup> defendant's case and the 2<sup>nd</sup> defendant's case were marked as closed, the 2<sup>nd</sup> defendant's without the calling of any evidence and directions were taken for the filing of submissions.

## **SUBMISSIONS**

17. Only the plaintiff and the 1<sup>st</sup> defendant filed their submissions in the case. I have considered those submissions in the preparation of this judgment.

### **Plaintiff's Written Submissions**

18. The plaintiff's submission is that after the purchase of 0.200 ha the County Council of Tana River allocated him more land, making his entitlement to be 0.366 ha and he was issued with a part development plan, a beacon certificate and a letter of allotment for this. He took possession of the property and has been running his petrol station thereon. However, the 1<sup>st</sup> defendant and a surveyor from the 2<sup>nd</sup> defendant descended on the property on 1/4/2017, forcefully occupied a portion thereof and fixed some beacons thereon hence the suit. The plaintiff identified the following issues



- for determination: a) whom between the plaintiff and the 1<sup>st</sup> defendant has encroached on another's land; b) was the purported cancellation of the plaintiff's part-development plan and letter of allotment warranted? c) does the plaintiff owe the 1<sup>st</sup> defendant Kshs 195,100 as balance of the purchase price? d) what orders should issue in the counterclaim.
19. Regarding the first issue the plaintiff submitted that after purchasing 0.200 from the 1<sup>st</sup> defendant he successfully applied in writing to the 2<sup>nd</sup> defendant for more land. on 2/5/2009 and a part development plan was created to accommodate the changes; later a letter of allotment dated 10/8/2011 was issued for the old and the new acreage combined. Bases on these documents the plaintiff established developments on the suit property and even obtained approvals from the County Council and NEMA therefor. It was submitted that the situation changed only in 2017 when the defendants took away part of the plot. Citing *Opiyo & Another Vs Olunje* 2023 KECA 1539 KLR, he averred that allegations of forgery were not proved. He testified that DW1 tried to justify the extra acreage by claiming that the 1<sup>st</sup> defendant deserved to get more land as the first allottee. He however submitted that DW1 in fact corroborated the plaintiff's witnesses' evidence. He pointed out that it was the case that the 1<sup>st</sup> defendant had not applied for more land yet DW1 had indicted an increase in the acreage of his plot by 0.024 ha. and that this must be because he had encroached on the plaintiff's land. He urged that the defendants had not proved the statement in their pleading that the plaintiff was claiming even the 0.094 that remained of the 1<sup>st</sup> defendant's land.
  20. It was further submitted for the plaintiff that he deserves Kshs 6,000,000/= as compensation for illegal trespass that affected his petrol business.
  21. Regarding the cancellation of the PDP and letter of allotment he submitted that it was illegal as there was no evidence of forgery, for being done arbitrarily and without giving the plaintiff notice and a chance to be heard contrary to Article 47 of *the constitution*. The case of *South East Development Co Ltd V Registrar of Titles & Another* 2021 eKLR was cited in support of that proposition.
  22. Concerning the third issue it was submitted that the balance of Kshs 195,100/= was not proved, and that in any event that claim is statutorily time barred since the contract was made in 2008 and the counterclaim was filed in 2022.

### **The 1<sup>st</sup> Defendants' submission**

23. The 1<sup>st</sup> defendant submitted that the issues for determination were the following: whether the 1<sup>st</sup> defendant had acquired a plot measuring 0.294 ha; whether the 1<sup>st</sup> defendant and the plaintiff entered into a valid sale agreement; whether the portion the plaintiff sold to the 1<sup>st</sup> defendant was 0.200 ha; whether the plaintiff is legally claiming an extra portion of land including the remaining 0.094 ha belonging to the defendant and finally whether the plaintiff has proved his case on a balance of probabilities as requires by law and whether he is entitled to the relief sought in his amended plead. He submitted that the 1<sup>st</sup> defendant applied for and was allocated a parcel measuring 0.294 ha in 1999; that the PDP was procedurally made and approved by the 2<sup>nd</sup> defendant; that the PDP was later gazetted; that the PDP was forwarded to the Minister for lands for approval; that he sold to the plaintiff 0.200 ha and remained with 0.94 ha; that Kshs 304,900/= was paid in kind and Kshs 195,100 remained as balance of consideration which has not been paid to date; that a plot sharing agreement was made on 27/10/2008; that in April 2010 the 1<sup>st</sup> defendant procured his beacon certificate for the remaining 0.94 ha; that the plaintiff's PDP No TRD /312/009/2010/05 overlaps the area allotted vide PDP TRD/312/99/14 of 1999; in May 2010 the plaintiff fraudulently obtained a beacon certificate from the same surveyor but altered it to read 0.366 ha instead of 0.200 ha. Thus increasing the area, he purchased from the 1<sup>st</sup> defendant by some 0.372 ha.; that the plaintiff subsequently forged the plot



sharing agreement by indicating a number different from that on the beacon certificate and also altered the acreage to 0.360 ha which is also different from that on beacon certificate; that the allocation of 0.366ha to the plaintiff was cancelled in 2017.

### **Analysis And Determination**

24. It is common ground among all parties herein that the 1<sup>st</sup> defendant was allocated 0.294 ha; that he sold the plaintiff 0.200 ha and remained with 0.094 ha; that a road diversion left an open area near the two portions. The issues for determination now outstanding are as follows:
- a. Whether any of the parties applied for allocation of the said open space;
  - b. Whether there was any forgery of documents on the part of the plaintiff;
  - c. Whether it is the plaintiff or the defendant who encroached on and attempted to take away the other's parcel of land;
  - d. Whether, if any allocation was made to the plaintiff, the cancellation thereof was proper;
  - e. Who ought to bear the costs of the suit.
25. On issue no (a) above, 1<sup>st</sup> defendant applied for extra land. I do not find any statement in the amended defence and counterclaim even remotely insinuating that the DW2's evidence was that the 1<sup>st</sup> defendant never applied for allocation of the extra land the road diversion created. DW2 never claimed to have applied for allocation of extra land. On the strength of the 1<sup>st</sup> defendant's pleadings and evidence the conclusion this court arrives at is that he never made any application for allocation of extra land after he sold the portion of 0.200 ha to the plaintiff. His land remained 0.094 ha in size.
26. Regarding issue no (b) the 1<sup>st</sup> defendant claimed that there was forgery of documents by the plaintiff. The 1<sup>st</sup> defendant does not state that he or his witnesses witnessed the alleged acts of forgery on the plaintiff's part, expert evidence was required to support the claim. I do not consider the visual analysis on the part of DW1 and DW2 to amount to expert evidence in that regard. That left the court with no evidence to go by. This court is thus unable to rule conclusively that there was forgery by the plaintiff and that claim must fail.
27. Issue no (c) is as to whether it is the plaintiff or the defendant who encroached on and attempted to take away the other's parcel of land, the answer lies party in the answer to issue no (a) herein above. The land held by the 1<sup>st</sup> defendant remained a constant 0.94 in the computations emerging from the sale. However, PW2 found that it had increased by 0.024 ha in his report. This increment could not be accounted for. Even DW1 could not account for it. On the other hand, the plaintiff's case is that he respected the sharing of the original plot allocated to the 1<sup>st</sup> defendant but also sought allocation of extra land to himself. It was the plaintiff's case that the extra land abutted his plot and that he applied for it. I do not find any evidence from the defendants to support the claim that the plaintiff at any time sought to dispossess the 1<sup>st</sup> defendant of the 0.094 ha which he had remained with after the sale. This claim too must fail. The court observes that the defendants acted in concert in trespassing on the plaintiffs' land and affixing new beacons thereon in their illegal mission and that they are both liable.
28. Issue no (d) is as to whether, if any allocation was made to the plaintiff, the cancellation thereof was proper. First it is the plaintiff's case that he applied for extra land. This is not denied by the defendants. Pursuant to that application a PDP, Ref No TRD/312/2009/27 was prepared and the allocation to the plaintiff was confirmed in a letter dated 3/3/2014. That letter confirmed the existence of a parcel of land measuring 0.366 ha. On the basis of that evidence, this court finds that an allocation of additional land to the plaintiff by the 2<sup>nd</sup> defendant. A single PDP was issued for the entire parcel that comprised of



the original acreage purchased from the 1<sup>st</sup> defendant and the extra land allocated to the plaintiff having issued, and forgery not having been conclusively established against the plaintiff by way of evidence, the 2<sup>nd</sup> defendant cannot deny that it allocated the plaintiff extra land.

29. It is the 1<sup>st</sup> defendant's case that the 2<sup>nd</sup> defendant later on vide a letter dated 28/6/2017 cancelled the allocation of the extra land made to the plaintiff. The plaintiff's plea is that the cancellation was improper since he was not accorded prior hearing. He submitted that this was contrary to the tenets of natural justice and in violation of Article 47 of *the constitution*. That article provides as follows:

47. Fair administrative action

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.”

30. The coming into force of the provision of Article 47 of *the constitution* heralded a new era in which no public officer could by sitting behind a desk in an office make drastic decisions or undertake actions that peremptorily deprived a citizen of his rights to a fair hearing and which had the worse consequence of which arbitrarily violating his right to property.

31. This court's perception is that based on the 1<sup>st</sup> defendant's pain that he was the one who would have benefited from allocation of the extra land had he not sold the part abutting the road to the plaintiff. Consequently, upon discovery that the plaintiff had been allocated that extra land and had it amalgamated with the portion sold, he began a push with an intention of benefiting from the extra land. However, the plaintiff's parcel on which a petrol station had already been developed proved a barrier as it was a buffer between the 1<sup>st</sup> defendant's 0.094 ha and the extra land. All that DW1 could state is that it was the 1<sup>st</sup> defendant who ought to have benefited from the allocation that went to the plaintiff. But how could an allocation make a manna-like descent upon an inert 1<sup>st</sup> defendant who it is not even clear whether he was aware of the road diversion that created the extra land or even the existence of the extra land until it was allocated to the plaintiff? That was not possible.

32. The foregoing is evidence of some malice aforethought in the cancellation of the allocation to the plaintiff. This court agrees with him that he ought to have been granted an opportunity to be heard in order for the decision made in those proceedings to stand scrutiny under Article 47 of *the constitution*. The process of cancellation not having observed the tenets of natural justice, this court finds that it was inherently unfair, unreasonable and unlawful and it is to be reversed by this court on those grounds.

33. Regarding issue no (e) as to who should bear the costs of the present suit I find that the actions of the two defendants herein galvanized the plaintiff into filing the present suit and since they have been found to be illegal, the defendants must bear the costs of the present suit.



## **Conclusion**

34. In the upshot this court finds that the plaintiff's claim in the amended plaint filed on 19/10/2021 has merit while the defendant's amended defence and counterclaim dated 5/12/2023 is devoid of merit. I therefore dismiss the defendant's counterclaim dated 5/12/2023 and enter judgment for the plaintiff in respect of his claim in the amended plaint dated 19/10/2021 in the following terms:
- a. The arbitrary cancellation of the land allocation to the plaintiff by the 2<sup>nd</sup> defendant vide a letter dated 28/6/2017 is null and of no effect and is hereby reversed;
  - b. The defendants shall allow the plaintiff unhindered utilization of the land allocated to him vide PDP no TRD/312/2009/27 dated 23/7/2009, the letter of allotment and the beacon certificate issued therefor;
  - c. Since no evidence of special loss and damage was adduced by the plaintiff the plaintiff is hereby awarded a token of Kshs 1,000,000/ as nominal damages for trespass to be borne by the defendants jointly and severally;
  - d. All undesirable fences and structures affixed by the defendants onto the land allocated to the plaintiff vide PDP no TRD/312/2009/27 dated 23/7/2009 shall be removed at the defendants' expense forthwith in default of which the plaintiff shall be at liberty to remove them and have the beacons restored by a qualified surveyor and charge the same against the defendants jointly and severally;
  - e. The costs of the suit and counterclaim shall be borne by the two defendants herein jointly and severally.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

