



Onyancha & 9 others v Commissioner for Lands & 7 others (Environment & Land Case 349 of 2017) [2024] KEELC 13427 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 349 OF 2017
A OMBWAYO, J
NOVEMBER 21, 2024**

BETWEEN

ELIKANAH ONYANCHA & 9 OTHERS & 9 OTHERS & 9 OTHERS PLAINTIFF

AND

THE COMMISSIONER FOR LANDS & 7 OTHERS & 7 OTHERS & 7 OTHERS DEFENDANT

JUDGMENT

1. The plaintiffs have come to court claiming that at all material times they were and are still the registered owners of commercial plots known as Nakuru/Municipality Block 27/743, 744, 745, 746, 747, 872, 873, 875, 876, 877 respectively. The Plaintiffs bought the suit commercial plots from members of Mwariki Farm and Company Limited. During subdivision of the said commercial plots a public road was reserved to serve the Plaintiffs' commercial plots.
2. The commercial plots need to be serviced by a wide frontage road and a service land at the back as per the Physical Planners Act. The Plaintiffs built rental houses on the said commercial plots which now are fully occupied by the tenants.
3. According to the 6th, 7th and 8th Defendants have grabbed the said public road which served the Plaintiffs' tenants. Moreover, the 6th Defendant has used some unscrupulous methods to insert two new plots being Nakuru/Municipality Block 27/1888 and Nakuru/Municipality Block 27/889 on the registered Index Map. The 1st, 2nd and 3rd Defendants have transferred plot number Nakuru/Municipality Block 27/889 into the names of the 7th and 8th Defendants and issue them with the Certificate of Lease. The two fake plots are not registered on the ground but corruptly done on the map.



4. The survey of Mwariki Farm and Company Limited was done under cadastral survey (fix survey) whereby there was a survey plan F/R 225/96 dated 12th November, 1979 which shows that there is a block of 25 commercial plots done under the required standard of survey thus showing the coordinates of every corner beacon. The new inserted plots have no records in the survey of Kenya cadastral section hence showing that some unorthodox method was used to insert the said plots on the registered index map.
5. The 4th and 5th Defendants have used some unscrupulous methods to insert two new plots which on a public road The Plaintiffs stand to suffer irreparable loss and damage if an order of injunction is not granted. The plaintiffs contend that the action by the Defendants is illegal and unconstitutional and the court is obliged to intervene.
6. The plaintiffs pray for an order of permanent injunction/mandatory injunction do issue restraining the 6th, 7th and 8th Defendants by themselves, their agents, servants from entering, erecting any project/structures, selling, transferring, leasing and/or in any way interfering with the parcels of land known as Nakuru/Municipality Block 27/888 and Nakuru/Municipality Block 27/889, a declaration that the suit commercial plots served as a public road to the Plaintiffs' tenants plus costs and interest of the suit.
7. The 1st and the 5th defendants entered appearance and filed defence through the Attorney General denying the statements in the plaint and added that if the 6th, 7th and 8th defendants acquired public land illegally, then the scene was due to misrepresentation of facts. The 6th defendants entered appearance and denied the allegations by the plaintiff.
8. When the matter came up for hearing PW1, Elkanah Onyancha Gori eloquently stated how the 7th and 8th defendants were issued with title deeds in respect of public land being a road of access. He produced the map of the area showing the public road that had been allocated to the 7th and 8th defendants. He produced beautiful colored photos showing the public rough road adjoining a tarmac road with residential structures on both sides of the road. The cross examination by Mr. Hari Gakinya learned counsel for the 6th Respondent did not yield any contradiction by the said PW1. PW2's evidence was similar to PW1's evidence and the cross examination did not yield any contradiction.
9. DW1, Jim Kariuki Kairu a former University lecturer admitted that the suit properties were superimposed on public land and not available for allocation. He appeared to agree with the plaintiffs that the land was meant for public use and not available for allocation to the 7th and 8th defendant. He also stated that the 6th defendant had already transferred land to its members and surrendered public land to the Government of Kenya. He produced the report by the Regional Surveyor Rift Valley as evidence that the parcel of land No Block 27/888 and 889 were superimposed on 10M open space earmarked for tree planting.
10. The 7th and 8th Defendants neither entered appearance even after service of summons to enter appearance nor filed defence and did not attend hearing.
11. I have considered the evidence on record and do begin by stating that the era of Kenyans illegally acquiring all public spaces and roads is gone. This court has jealously guarded public land from greedy Kenyans who salivate at any open space and will go at all length to get titles for the same. This court has held time and again that Land reserved for public utility is not available for further alienation. Further that such land reserved for public utility is held in trust for people as was held in the case of Dorcas



Atieno Rajoru & 145 others v Mjahid Sub-chairman Harambee Maweni Committee SHG & 2 others (2016) eKLR. The court stated that:-

“indeed it is trite law that plots for public utilities and open spaces are usually surrendered to either the council, the county government or the national government that is required to hold plots meant for public utilities on behalf of the residents of the place where such plots are situated.”

12. The Court of Appeal in the case of Kipsirgoi Investments Ltd v Kenya Anti- Corruption Commission while interpreting section 2 of the GLA and section 3 of the Physical Planning Act held that allocation of the suit premises in that case which had been planned as an open space, was irregular as the land had already been alienated. The land was not available for further alienation. In Republic v Commissioner of Lands & 4 others ex parte Associated Steel Mill (2014) eKLR, the court affirmed the position that public land must only be used for the purpose for which it was acquired and should not be allocated to private individuals for commercial purposes.
13. The same position was upheld in Kenya National Highway Authority v Shalien Masood Mughal & 5 others (2017) eKLR. This court agrees with the position expressed in the 3 cases cited above amongst many others. This court adds its voice and declares that public land is held in trust for the people of Kenya. Land reserved for public utility is not available for further alienation.
14. In the case of James Joram Nyaga & another v Hon AG (2007) eKLR, the court held that: -

“The above section (section 3 of the GLA) clearly limits the power of the commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the president.”
15. The Court of Appeal in Chemey Investment Ltd –vs- Attorney General & 2 others (2018) eKLR categorically stated that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. Having found that the suit premises was irregularly and unlawfully allocated to the respondent, it follows that the same should and must be revoked and or cancelled. This court will not hesitate to cancel the respondent’s title and revoke the grant issued thereof. The law, section 26 of the [Land Registration Act](#) is clear that a title obtained by illegal/irregular means may be cancelled.
16. I do find that prayers sought by the plaintiff merited and I do grant an order of permanent injunction do issue restraining the 6th, 7th and 8th Defendants by themselves, their agents, servants from entering, erecting any project/structures, selling, transferring, leasing and/or in any way interfering with the parcels of land known as Nakuru/Municipality Block 27/888 and Nakuru/Municipality Block 27/889, a declaration that the suit commercial plots served as a public road to the Plaintiffs’ tenants plus costs and interest of the suit. Moreover, I do issue an order that title no Nakuru/Municipality Block 27/888 and Nakuru/Municipality Block 27/889, be and are hereby cancelled. No orders as to costs as the defendants did not oppose the grant of the same.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF NOVEMBER 2024

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-11-21 17:23:27

