



County Government of Kakamega v Mundia & another (Being Administrators of the Estate of James Israel Mundia) (Environment & Land Case E024 of 2022) [2024] KEELC 13877 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E024 OF 2022
DO OHUNGO, J
DECEMBER 16, 2024**

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA PLAINTIFF

AND

WILBERFORCE OMUSALA MUNDIA 1ST DEFENDANT

BEATRICE SALANO KISAINA 2ND DEFENDANT

BEING ADMINISTRATORS OF THE ESTATE OF JAMES ISRAEL MUNDIA

JUDGMENT

1. The Plaintiff, a County Government established under Articles 6 (1) and 176 of *the Constitution* of Kenya 2010, moved the Court through Plaint dated 9th May 2022. It averred that pursuant to a lease registered on 7th June 1979, it leased to the Defendants the parcel of land known as Kakamega Municipality/Block III/152 (the suit property) for a period of 99 years with effect from 1st July 1975. That the Defendants breached special condition number 2 of the lease by failing to develop the suit property.
2. Consequently, the Plaintiff prayed for judgment against the Defendants for:
 - a. A declaration that the Defendants had breached the special condition number 2 on development to the registered lease of plot title number Kakamega Municipality/Block III/152 within Kakamega Municipality;
 - b. An order that the lease registered on 7th June 1979 in favour of James Israel Mundia (deceased) be forfeited on account of breach of the special conditions; and
 - c. Such other order as the Honourable Court may deem fit and just.



3. The Defendants filed statement of Defence and Counterclaim dated 13th October 2022 wherein they averred that the lease was registered in favour of James Israel Mundia (deceased) on 19th February 1997 and not on 7th June 1979. They denied that the deceased had failed to develop the suit property and further averred that building plans were submitted prior to the deceased's death, which plans were approved and resulted in construction of a two bedroom cottage in the suit property in the year 2002.
4. The Defendants also averred that they submitted building plans to the Plaintiff which were rejected and that a lease in respect of the suit property was issued in their joint names on 16th May 2022. They further averred that the Plaintiff's refusal to approve their building plans was actuated by malice.
5. The Defendants therefore prayed for judgment against the Plaintiff for:
 - a. An order of permanent injunction against the plaintiff from repossessing the defendants' Plot Number Kakamega Town/Block 111/152.
 - b. An order of injunction compelling the plaintiff through all its departments to approve all the plans submitted by the defendants upon payment of the requisite fees and upon meeting all the necessary requirements.
 - c. Costs of the suit.
 - d. Such other order that this honorable court may deem fit and just.
6. Ronald Matende Omwoma testified as the sole Plaintiff's witness. He stated that he was a retired Civil Servant and a land administration expert. He adopted his Witness Statement dated 17th November 2023 as his testimony. He also produced copies of the documents listed as item numbers 1 to 6 in the Plaintiff's List of Documents dated 9th May 2022 as well as a copy of the document in the Plaintiff's Supplementary List of Documents dated 17th November 2023, as the Plaintiff's exhibits.
7. Mr Matende stated in the Witness Statement that he was a member of the Appeals Panel of the Kakamega County Land Application, Extension of Leases and Land Administration Committee that was gazetted through Gazette Notice Number 103 dated 30th December 2020 and published in Gazette Volume CXXIII - No. 12 dated 15th January 2021 with a mandate to hear appeals from persons whose plots had been identified as undeveloped in breach of the special conditions of their allotment letters and leases. That the Committee was to thereafter make recommendations on repossession to the Plaintiff. He also stated that on 16th February 2021 the Plaintiff as the lessor of the suit property published a report of undeveloped plots within Kakamega Municipality and in response, the Defendants prepared and served upon the Plaintiff a "Decision Review Request." He added that the Committee considered the Defendants' appeal and thereafter made a recommendation advising the Plaintiff to repossess the suit property on account of nondevelopment. That the Plaintiff then issued to the Defendants a "Notice for Repossession" through letter dated 11th January 2022 which was served upon the Defendants on 31st January 2022.
8. Mr Matende went on to testify that the Committee inspected the suit property in his presence and found a two room house on it. He however insisted that the house was not a private dwelling house and that there was non-compliance with conditions 1, 2, 5, 6, 7, and 8 of the lease. He added that he was aware that James Israel Mundia was deceased and that the notice which the Plaintiff issued was addressed to James Israel Mundia.
9. The Plaintiff's case was then closed.



10. Beatrice Salano Kisaina testified next as the sole Defence witness. She adopted her Witness Statement dated 13th October 2022 as her testimony and produced copies of the documents listed as item numbers 1 to 8 in the Defendants' List of Documents dated 13th October 2022 as her exhibits.
11. Ms Salano stated in her Witness Statement that James Israel Mundia (deceased) who was her father-in-law passed away on 19th February 1997 and that prior to his demise he had begun the process of obtaining plans for the development of the suit property. That immediately after the deceased's demise, Aggrey Mundia who was her husband who was the deceased's son took over the management of the suit property and obtained approval of development plans from the Plaintiff for a two-bedroom cottage. That her husband passed away in the year 2009 before he could get the suit property fully developed as per the submitted plans.
12. Ms Salano went on to state that her husband could not get the necessary approvals for development was because the lease was not registered in his name since succession in respect of the deceased had not been concluded. That there were protracted issues within the family following her husband's demise which delayed filing of succession proceedings. That ultimately, Succession Cause No. 316 of 2020 was filed by herself and the First Defendant who is her brother-in-law leading to issuance of letters of administration on 5th February 2021 and confirmation of grant on 18th June 2021. She added that immediately before the conclusion of the succession cause, she submitted to the Plaintiff development plans in respect of the suit property, but they were rejected on the ground that the suit property was registered in the name of a different person. That the Plaintiff's department advised her to conclude the succession process and to obtain title in her name before resubmitting the plans for approval.
13. Ms Salano also stated that upon the conclusion of the succession cause, the Plaintiff approved issuance of a lease in the joint names of the Defendants herein. That when the Plaintiff issued a notice of repossession, she appeared before the Appeals Committee, submitted her documents and made her case whereupon Ms Elvira Wilunda Advocate who was the Chair of the Committee advised her to obtain all the approvals since her case was understandable. She added that she was shocked when she received notice of intention to repossess the suit property and that the Plaintiff's action amount to abuse of office.
14. Ms Salano further testified that she was residing on and occupying the house in the suit property as of the date of her testimony and that she intended to develop it further once she had funds. That the said house is a two bedroomed servants' quarter and that she was the one who constructed it.
15. The Defence case was then closed. Thereafter, parties filed and exchanged written submissions.
16. The Plaintiff filed written submissions dated 19th February 2024 in which it argued that the Defendant failed to develop the suit property, contrary to special condition numbers 2 and 5 as well as the terms of the lease. The Plaintiff relied on Article 60 (1) of Constitution which provides that land shall be held, used and managed equitably, efficiently and productively and Sections 12 (9) and 31 of the *Land Act* and argued that it is entitled to the reliefs sought. It further contended that the building on the suit property did not fit the definition of a dwelling house. Regarding the counterclaim, it argued that the same is untenable since forfeiture is a remedy that is allowed by law and that it cannot also be compelled to issue approvals as sought.
17. On their part, the Defendants filed written submissions dated 4th May 2024 in which they argued that the Plaintiff did not claim breach of any of the other conditions besides special condition number 2. They argued that there is no breach of special condition numbers 2 and 5 since the Plaintiff's witness confirmed that there is a house on the suit property which is used by the survivors of the initial lessee as a dwelling house. That there is no definition or description of what kind of house qualifies to be



a dwelling house. They added that after the initial lessee died, a new lease was issued to them as the survivors.

18. The Defendants went on to argue that the Plaintiff opted to maliciously exploit Beatrice Salano and that the Court should not allow that to happen. That Beatrice Salano explained her position, but the Committee ignored her. They urged the Court to dismiss the Plaintiff's case and to allow their counterclaim.
19. I have considered the parties' pleadings, evidence, submissions and authorities cited. The issues that arise for determination are whether there was breach and whether the parties are entitled to the reliefs sought.
20. From the material on record, it is not contested that a lease dated 26th July 1978 in respect of the suit property was issued to James Israel Mundia and duly signed by him on 7th June 1979. The lease was registered on 7th June 1979 and a Certificate of Lease dated 7th June 1979 issued in his name. It is also not in dispute that James Israel Mundia passed away on 19th February 1997 and that the Defendants obtained letters of administration in respect of his estate. Further, there is no dispute that a Certificate of Lease dated 16th May 2022, in respect of the suit property, was issued to the Defendants.
21. Although the Plaintiff has in its submissions referred to additional conditions, its case as pleaded exclusively alleges breach of special condition number 2 in the lease issued to James Israel Mundia (deceased). The said condition provides:

The Lessee shall within six calendar months of the actual registration of the lease submit in triplicate to the Local Authority plans (including block plans showing the positions of the buildings and system of drainage for the disposal of sewage, surface and sullage water) drawings, elevations and specifications of the buildings the Lessee proposes to erect on the land and shall within 24 months of the actual registration of the lease complete the erection of such buildings and the construction of the drainage in conformity with such plans, drawings, elevations and specifications as amended (if such be the case) by the Local Authority: PROVIDED that notwithstanding anything to the contrary contained or implied by the Trust *Land Act* if default shall be made in the performance or observance of any of the requirements of this condition it shall be lawful for the County Council or any person authorized by the County Council to re-enter into and upon the land or any part thereof in the name of the whole and thereupon the term hereby created shall cease but without prejudice to any right of action or remedy of the County Council in respect of any antecedent breach of any condition herein contained.

22. The Plaintiff's case is that the deceased breached Special Condition number 2 by failing to submit plans within six calendar months of the registration of the lease and further by failing to develop the suit property within twenty four months of the registration of the lease. There is however no dispute that there was standing on the suit property a two room house as of the date the Plaintiff commenced its internal proceedings seeking forfeiture and repossession. Pursuant to Special Condition number 5, the suit property was to be used for only "one private dwelling house." The lease did not however define what constitutes a dwelling house.
23. The lease having been registered on 7th June 1979, Special Condition number 2 required the deceased to submit plans by 7th December 1979 and to develop the suit property by 7th June 1981. Despite acknowledging existence of the two room house and notwithstanding that it was alleging breach of Special Condition number 2, the Plaintiff did not offer any evidence as to when the building was constructed. In view of the Second Defendant's testimony that she constructed the house, it is safe



to conclude that the construction was attained after the deceased's death. The deceased was clearly in breach of Special Condition number 2.

24. The question that I have grappled with is whether it is just, in the circumstances, to grant forfeiture to the Plaintiff. The Plaintiff commenced its endeavours to repossess the suit property through Gazette Notice Number 103 dated 30th December 2020 and published in Kenya Gazette Volume CXXIII - No. 12 dated 15th January 2021. By that date, the two room house was standing on the suit property. Subsequently, a Certificate of Lease dated 16th May 2022, in respect of the suit property, was issued to the Defendants, obviously with the Plaintiff's active participation and consent. The said lease is for a term of 99 years with effect from 1st July 1975. The Defendants contend that they are keen to further develop the suit property and have submitted to the Plaintiff building plans. In those circumstances, the justice of the situation does not commend itself to granting the relief of forfeiture.
25. On their part, the Defendants claim Plaintiff has refused to approve their building plans. They therefore seek an injunction to compel the Plaintiff to approve all the plans. There is a separate regime for consideration of such applications and redress of any ensuing grievances, under the *Physical and Land Use Planning Act*. The Defendants should pursue any relief under the said statute.
26. Regarding the Defendants' prayer for a permanent injunction restraining the Plaintiff from repossessing the suit property, I agree with the Plaintiff that forfeiture and repossession are statutory remedies. The Plaintiff may very well establish future grounds for forfeiture and repossession. The Court cannot permanently bar future forfeiture and repossession.
27. In view of the foregoing discourse, I find no merit in both the Plaintiff's case and the Defendants' counterclaim. I dismiss both, with no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF DECEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Wabuko for the Plaintiff

Ms Mburu holding brief for Mr Magina for the Defendants

Court Assistant: M Nguyayi

