



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amolo & 6 others v Chege & another (Environment & Land Case  
241 of 2014) [2023] KEELC 189 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 241 OF 2014  
OA ANGOTE, J  
JANUARY 19, 2023**

**BETWEEN**

**JORAM AMOLO ..... 1<sup>ST</sup> PLAINTIFF  
ANTHONY CHEGE MWANGI ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH NGIGI MBUGUA ..... 3<sup>RD</sup> PLAINTIFF  
JANE NJOKI MWANGI ..... 4<sup>TH</sup> PLAINTIFF  
JANE MUTHINDA KIMEU ..... 5<sup>TH</sup> PLAINTIFF  
SIMON WAITITU NDUNG’U ..... 6<sup>TH</sup> PLAINTIFF  
BERNARD KIMUNYA ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**NGARUIYA CHEGE ..... 1<sup>ST</sup> DEFENDANT  
ATHI WATER SERVICES BOARD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through the amended plaint dated March 26, 2014, the plaintiffs herein sought the following reliefs:
  - i. A permanent injunction restraining the defendants by themselves, their agents and/or servants from further trespassing onto and constructing on the plaintiffs’ plots/pitch No C24, pitch No C61, pitch No C49, pitch No C63, pitch No C64, pitch No C59 and pitch No 58 Kahawa West Market Nairobi and forthwith remove any structures erected thereon.
  - ii. Damages for trespass to land
  - iii. Costs and interests to (2) above



- iv. Any other or further relief this court may deem fit to grant.
2. The plaintiffs' case is that they have at all material times been the owners and entitled to possession of their properties known as plots pitch Nos C24, C61, C49, C63, C64, C59 and 58 Kahawa West Market. They assert that on or about March 3, 2014, the defendants, without the consent of the plaintiffs entered upon the said plots and started digging trenches thereon with a view to erecting structures thereon and stockpiled building materials. The plaintiffs aver that these actions by the defendants amount to trespass to land, by reason of which they have suffered loss and damage.
  3. The 1<sup>st</sup> defendant opposed the suit by way of a statement of defence dated August 21, 2017. The 1<sup>st</sup> defendant averred that the developments complained of by the plaintiffs relate to the construction of ablution blocks, a project undertaken by the 2<sup>nd</sup> defendant and duly approved by the Nairobi County Government which owns the project.
  4. It was averred by the 1<sup>st</sup> defendant that the project is meant to serve the Kahawa West Open Air Market traders and the public in general. He argued that as a Member of County Assembly, Kahawa West, he has no proprietary interest in the project other than ensuring that the lives of the electorate are improved by way of better services.
  5. The 2<sup>nd</sup> defendant filed a defence dated May 28, 2014, in which it denied the allegation that on March 3, 2014, the defendants entered the plaintiffs' plots without their consent, dug trenches and stockpiled building materials as alleged by the plaintiff. The 2<sup>nd</sup> defendant denied that such entry amounted to trespass.
  6. It was averred by the 2<sup>nd</sup> defendant that if the defendants did enter the suit land as alleged, then the same was lawful and legal, having obtained the necessary consent from the rightful owners and/or their agents, the Nairobi City County, who are also the subsequent owners of the facility upon completion of the ablution block for the interest of the general public.
  7. The 2<sup>nd</sup> defendant averred that they would seek to enjoin the Nairobi City County Government in the suit and stated that no demand or notice of intention to sue preceded the institution of the suit. Consequently, it was averred, the plaintiffs are not entitled to any costs in any event.

### **The Plaintiff's Evidence**

8. PW1, the 7<sup>th</sup> plaintiff, testified on behalf of all plaintiffs, that own the suit plots. PW1 informed the court that the plaintiffs were issued with allotment letters; that they have been paying rates in respect of the plots and that there were council minutes in which it was resolved that they get plots.
9. PW1 testified that the position of their plots was planned as per the sketch on page 17 of their bundle; that when they started developing their plots, the 1<sup>st</sup> defendant encroached on the same; that as a result, the process of acquisition of titles stopped and that there was an acre of land which had been earmarked for an ablution block.
10. PW1 asserted that he took photographs of the area which was encroached on; that there were existing ablution blocks before the encroachment and that the City Council gave conditions, including that there was to be consultation with private owners before any facility was put up.
11. He testified that the plaintiffs have been on their properties since 2014 and should be compensated to the tune of Kshs 22.9 million. It was the evidence of PW1 that he makes a daily income of Kshs 2000 and that total sum was arrived at by multiplying the daily earnings times the years the plaintiffs have occupied their land.



12. During cross examination, PW1 testified that the letters of allotment were dated November 1, 2004 and that they were subject to conditions, the first being that they deposit a non-refundable Kshs 2600; that he did not have proof to show that they paid the non-refundable sum or that they made monthly payments of Kshs 400 and that the plaintiffs did not construct stalls on the plots, which was one of the conditions in the allotment letters. It was his evidence that business permits could not be issued to them because they had not put up businesses on the premises.
13. PW1 stated that he did not have evidence to show that the ablution block is owned by the 1<sup>st</sup> defendant; that the sketch map was made by Nairobi City Council; that the company which was undertaking the project is Athi Water Services Board; that the Kshs 22.9 million he is claiming was not mentioned in the plaint and that there is no mention of loss of business in the plaint as well. It was the evidence of PW1 that they have had possession of the suit properties since the day they were allocated the suit properties and that they have never carried out business on the allocated plots.

### **The Defendants' Evidence**

14. DW1, the 1<sup>st</sup> defendant, adopted his written statement dated April 5, 2018 in which he averred that the developments complained of by the plaintiffs relate to construction of ablution blocks, which project was undertaken by the 2<sup>nd</sup> defendant and was duly approved by Nairobi City County which owns the project. DW1 stated that the project is meant to serve Kahawa West Open Air Market Traders and the public in general and that he had no proprietary interest in the project.

### **Submissions**

15. The plaintiffs' counsel submitted that the plaintiffs have established on a balance of probabilities that they are the legal and actual owners of the suit properties; that the plaintiff's adduced the allotment letters, payment of receipts for the individual plots, minutes and resolutions of the City Council of Nairobi and that they also produced part development plans which indicate where new ablution blocks were to be constructed.
16. It was submitted that rather than utilizing the identified site, the defendants decided to encroach on the plaintiffs plots on which they constructed the ablution blocks.
17. It was the plaintiffs' advocate's submission that the 1<sup>st</sup> defendant did not challenge the existence of a Part Development Plan for Kahawa West Open-Air Market nor did he explain why he did not utilize the site reserved for ablution clocks, choosing instead to construct the same on the plaintiffs' plots without their consent.
18. They argued that the documents the 1<sup>st</sup> defendant produced showed that approval for the construction of ablution blocks, but do not specify the site where they were to be constructed. It was submitted by counsel that the construction was stopped by this court *vide* a temporary injunction.
19. Through submissions dated December 7, 2021 and supplementary submissions dated December 10, 2021, the 1<sup>st</sup> defendant's counsel submitted that following the 2013 general elections, the 1<sup>st</sup> defendant became a member of the County Assembly of Nairobi, Kahawa West Ward, and that in the said capacity, he approved the construction of ablution blocks in the ward's market area.
20. It was submitted that the approval came about after development frameworks were formulated by the Nairobi County Assembly and the recommendations of the National Environment Management Authority (NEMA) in its pursuit to clean the Nairobi River.



21. It was the 1<sup>st</sup> defendant's argument that being a member of county government, he was shielded from civil liability by section 133 of the *County Government Act* and should not be held personally liable because he was acting as an institution and not as a person. He relied on *John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co Ltd and 4 others* ELC No 163 of 2014.
22. The 1<sup>st</sup> defendant submitted that the plaintiff's failure to enjoin the Nairobi County Government or the National Environment Management Authority (NEMA) is fatal to the suit; that the construction of blocks was to take place in Kahawa West Market site, to which the Nairobi City Council had proprietary interests in and that the plaintiffs failed to prove their proprietary rights over the market stalls.
23. It was submitted that the plaintiffs' claim over the plots cannot be substantiated as they failed to prove compliance with the conditions set out in the allotment letters including executed copies of acceptance forms, receipts showing periodic payments of land rates, receipts on payment of monthly administrative charges of Kshs 400 which were to be paid from December 1, 2004, and construction of the market stalls in accordance with the requirements in the allotment letter.
24. The 1<sup>st</sup> defendant further submitted that a letter of allotment is not a title but only an intention by the Government to allocate land, and that upon the lapse of the offer in the allotment letter and failure to comply with the conditions therein, such a letter became null and void and the plaintiffs do not have any legal rights to the suit property, which remains the property of the Nairobi County Government.
25. Lastly, it was submitted that there was no proof that the plaintiffs' market stalls were demolished or interfered with by the construction. While the plaintiffs annexed pictures of business stalls; that the plaintiffs failed to accompany their electronic evidence with a certificate as required under section 106(B) of the *Evidence Act* and they are thus inadmissible and that the plaintiff has failed to prove the involvement of the 1<sup>st</sup> defendant in the alleged trespass.

### **Analysis and Determination**

26. Upon consideration of the pleadings, oral testimony, evidence and submissions of the parties to the suit, the following issues arise for this court's determination:
  - a. Whether the plaintiffs have proved trespass by the defendants.
  - b. Whether this court should allow the prayers sought by the plaintiff.
27. This is a claim of trespass by the plaintiffs, who assert that they own plots pitch Nos C24, C61, C49, C63.C64. C59 and 58 in Kahawa West Market, (the suit properties) against the defendants, who they claim entered into their properties without consent, dug trenches and piled building materials on their land with a view to construct ablutions thereon. According to the plaintiffs, the defendants' trespass on the suit properties caused them loss and damage.
28. The defendants, on their part, have asserted that the construction of ablution blocks was duly approved by the Nairobi County Government which owns the project and is meant to serve the Kahawa West Open Air Market traders and the public in general.
29. According to the 1<sup>st</sup> defendant, he does not have proprietary interest in the project and that he acted in his institutional capacity and not his personal capacity. The 1<sup>st</sup> defendant argued that the plaintiffs failed to prove compliance with the conditions in their letters of allotment and thus have no right to the suit land, which remains the property of the Nairobi County Government.



30. Section 3 (1) of the *Trespass Act* provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
31. Trespass has been defined by *Clerk and Lindsel on Torts*, 18th edition at Pg.23 as;
- “ any unjustifiable intrusion by one person upon the land in possession.”
32. The plaintiffs have asserted that they are the legal owners of the suit property herein through allotment letters issued to them in 2004. The Court of Appeal in *Joseph N.K Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR, in considering how title is obtained where there is allocation or allotment of land stated that:
- “ It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”
33. The nature of a letter of allotment was considered by the court in *Philma Farm Produce & Supplies & 4 others v Attorney General & 6 others* [2012]eKLR, which held that letters of allotment are not proof of ownership of land:
- “ These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner claim must fail.”
34. The court in *Gladys Wanjiru Ngacha v Teresia Chepsaat & 4 others* [2008] eKLR aptly stated that a letter of allotment is an invitation to treat and does not operate as a contract between the offeror and offeree.
35. From the letters of allotment produced as evidence by the plaintiffs, it is evident that the said letters were issued to the plaintiffs on November 1, 2004. While the allotment letters to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> plaintiffs are not dated, the terms indicate that they are to take effect from November 1, 2004. The plots allotted to the plaintiffs were for purposes of developing market stalls.
36. The conditions stipulated in the allotment letters include payment of a non-refundable deposit fee of Kshs 2600; payment of monthly administrative fee of Kshs 400 from December 1, 2004; construction of individual stalls in accordance with the approved plans within three months, with effect from November 1, 2004; payment of land rates annually; acquisition of business permits while carrying business in the stalls; that the site remains the property of the city council and that in the event of default in payment of administrative charges, the site will be repossessed, and that the stall will be used for a general grocery business.
37. The effect of these conditions is that the plaintiffs were required to construct stalls by February 2005 and to pay a non- refundable deposit and monthly administrative fees, failure to which the site/stall would be repossessed by the council.
38. From the evidence of the plaintiffs, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs paid the non-refundable deposit fee of Kshs 2600 as evidenced by receipts in the plaintiffs’ bundle, issued by the Nairobi City Council,



as it then was. During cross-examination, PW1 admitted that the plaintiffs did not produce evidence of the payment of the monthly administrative fee of Kshs 400, nor did they attach receipts of payment of rates. PW1 also admitted that the plaintiffs did not construct stalls on the allocated plots nor did they obtain business permits.

39. The cardinal rule of evidence is that he who alleges must prove. Based on the evidence by the plaintiffs, the conditions and terms set out in the allotment letters have never been complied with. Indeed, there is no evidence to show that the plaintiffs constructed stalls or conducted grocery business on the subject premises as required by the allotment letters.
40. Indeed, the lack of evidence of payment of the monthly administrative fee leads this court to conclude that there was default in remittance of the monthly charges. As per the letters of allotment, the consequence of this default is that the sites were liable for repossession by the Nairobi County Government.
41. It is trite that the effect of failure to satisfy the conditions in the letters of allotment is that no proprietary interest is acquired by such allottee. This was aptly stated by the court in *Bubaki Investment Co Ltd v National Land Commission & 2 others* [2015] eKLR where the court held that;
- “Having held that the petitioner did not comply with the terms and conditions of the letter of allotment, it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made.”
42. The upshot is that the plaintiffs in this matter did not acquire any proprietary interest in the suit property. They are thus precluded from making a claim to assert or protect such rights. That being the case, and considering that one cannot allege trespass against a defendant before proving that he has a legal or beneficial interest in the land, it is the finding of this court that the plaintiffs did not prove their case on a balance of probabilities.
43. For the reasons given above, the plaintiffs’ suit is dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**Ms. Mokaya for Kabue for 1<sup>st</sup> Defendant**

**Ms Wanjiri for Plaintiffs**

**Court Assistant - June**

