



**Macua (Suing as the Attorney of Francis Ngoma Macua) v Archdiocese  
of Nairobi, Kenya Registered Trustees (Environment & Land Case  
E039A of 2021) [2023] KEELC 16743 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16743 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E039A OF 2021  
BM EBOSO, J  
FEBRUARY 28, 2023**

**BETWEEN**

**PATRIC NGOMA MACUA ..... PLAINTIFF  
SUING AS THE ATTORNEY OF FRANCIS NGOMA MACUA**

**AND**

**ARCHDIOCESE OF NAIROBI, KENYA REGISTERED  
TRUSTEES ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The dispute in this suit revolves around the question of use of a road that was planned and surveyed in 2015 as a means of access to parcels of land that were planned and surveyed as subdivisions out of land parcel number Ndumberi/Ndumberi/3727. The proprietor of the land and the proponent of the subdivision scheme was Francis Ngoma Macua [hereinafter referred to as “Mr Macua”]. Provision for the road was made as a pre-condition for approval of the subdivision plan by the Physical Planning Authority under Section 41 of the *Physical Planning Act, 1996* [now repealed] as read together with Special Condition 2 of the Second Schedule to the *Physical Planning (Subdivision) Regulations, 1998* and Section B(8) of the Fourth Schedule to the *Act*.
2. After obtaining approval and after implementing the approved subdivision plan, Mr Macua sold two out of the five subdivision parcels to the defendant. The two subdivision parcels that were sold to the defendant are Ndumberi/Ndumberi/4322 and Ndumberi/Ndumberi/4323 [hereinafter referred to as parcel numbers “4322” and “4323” respectively]. Mr Macua subsequently decided to appropriate the road that had been planned and surveyed as the means of access to the five subdivisions. He relied on a clause that was contained in the sale agreements relating to the two parcels sold to the defendant. He erected a barrier and blocked the defendant from using the road to access the two



subdivisions that he had sold to the defendant. This triggered a suit by the defendant in the Chief Magistrate Court at Kiambu, in which the defendant obtained orders that enabled them to remove the barrier. Subsequent to that, the Chief Magistrate Court downed its tools on account of the limit of its pecuniary jurisdiction.

3. Subsequently, Mr Macua, through his son and attorney, Patric Ngoma Macua, brought this suit through a plaint dated 29/3/2021, seeking the following reliefs: (i) a declaration that the defendant is not entitled to an access way to their two properties through the other three subdivisions; (ii) a permanent injunction restraining the defendant against accessing their properties through the other three subdivisions; (iii) an order directing the defendant to cease interfering with the erection of a gate or barrier to limit and deny access to the defendant's two properties through the other three subdivisions; (iv) general damages for demolition of the gate; and (v) costs of the suit.

### **Plaintiff's Case**

4. The plaintiff's case was contained in the plaint dated 29/3/2021; the witness statement by Patric Ngoma Macua dated 29/3/2021 and the oral evidence that Patric Ngoma Macua tendered during trial; the exhibits produced during trial; and the written submissions dated 24/10/2022, filed by M/s Kingara & co Advocates.
5. In summary, the plaintiff's case was that he sold to the defendant the two subdivisions through two sale agreements dated 16/8/2016 and 28/9/2018 respectively. Clause 16 (ii) of the two sale agreements expressly provided that the access road which had been reserved in the subdivision plan were merely for the purpose of obtaining approval for the subdivision and would not confer any easement or right of access to the two properties that the defendant purchased. The plaintiff contended that the defendant was bound by the said clause. It was the plaintiff's case that the above agreement was reached because the defendant owned an abutting parcel of land that was served by a different access road and did not therefore require an access road for the two subdivisions that they purchased from the plaintiff. The plaintiff urged the court to grant him the above reliefs.

### **Defendant's Case**

6. The defendant's case was contained in the statement of defence dated 15/9/2022; the written witness statement by Josephat Nganga Wariara dated 15/9/2022; Mr Wariara's oral evidence tendered during trial; the bundle of exhibits produced during trial; and the written submissions dated 18/11/2022, filed by M/s Njorge Baiya & Company Advocates.
7. The defendant's case was that the subdivision plan in the mutation form was a legally necessary pre-condition for subdivision and was duly and voluntarily proposed, presented and assented to by the plaintiff. The defendant denied the contention that any part of the subdivision plan was limited to and solely intended for obtaining the planning permission. The defendant added that the plaintiff's claim was bad in law, contending that the plaintiff was estopped from pleading illegality and unlawful intentions to defeat the law and the planning regulations.
8. The defendant added that the clause which the plaintiff relied on was illegal and unenforceable in law. They contended that the approved subdivision plan and the registered mutation gave rise to five separate parcels of land none of which was principal to the other and each subdivision had an access road measuring 0.1228 hectares, which upon registration of the subdivisions was surrendered by the plaintiff and incorporated in the official map as access roads leading to the five parcels.
9. The defendant further contended that the gate that was removed had been illegally erected across the public access road, adding that the road did not form part of the plaintiff's property, hence the plaintiff



was not entitled to damages for the removal of the illegal gate. The defendant urged the court to reject the plaintiff's claim.

## Evidence

10. The parties' respective evidence mirrored the above summary of their respective cases. There was common ground on the facts relating to sale of the two subdivisions; ownership of the five subdivisions; and the subdivisions plan and mutation forms that gave rise to the titles held over the five subdivisions. The only contested fact relates to the tenor, import and enforceability of clause 16(ii) of the sale agreement.
11. Whereas PW1 contended that the clause precluded the defendant from using the access road that was planned and reserved in the approved subdivision plan and subsequently surveyed, DW1 contended that the sale agreements did not contain the waiver and that the defendant was neither aware nor alive to the interpretation attributed to clause 16(ii) by the plaintiff. DW1 added that the defendant's understanding was that once the subdivision plan was approved as proposed by the plaintiff and the survey plans registered, the access road to the two parcels was surrendered to road authorities to control and regulate its use, hence the plaintiff's attempt to claim proprietary rights over it and restrict members of the defendant's church from using it was illegal and unlawful.

## Submissions

12. Urging the court to grant the reliefs, Mr Kingara, counsel for the plaintiff, submitted that there was a distinction between the sub-division process and the sale processes. Counsel contended that the two processes were independent of each other. Counsel argued that the subdivision exercise did not involve the defendant, adding that the defendant came into the scene much later. Counsel contended that the mutation plan which gave rise to the five subdivisions and the access road was not for the benefit of the defendant because the defendant was not a party to the subdivision plan.
13. Mr. Kingara argued that whereas the defendant had alleged illegality, they had failed to lead evidence to demonstrate illegality in the submission of the mutation forms for approval. Counsel made reference to the *Physical and Land Use Planning Act* 2019 and submitted that there was "very little application" of the Act to the suit properties. Citing Section 9 of the *Public Roads and Roads of Access Act*, counsel submitted that the road at the centre of the dispute in this suit was not a road of access as contemplated under the *Act* because it was not created through the procedure laid down under the said section of the *Act*.
14. On the question as to whether the access road shown in the mutation form was a public road, counsel made reference to the definition of a public road under Section 2 of the *Public Roads and Roads of Access Act* and submitted that the access road provided for in the mutation forms is not a public road because it did not exist prior to the drawing of the mutation forms. Counsel argued that the defendant purchased defined parcels of land that did not include the access road.
15. Mr Kingara argued that clause 16(ii) of the sale agreements was binding on the parties. Citing various decisions, counsel submitted that the defendant was asking this court to re-write the contracts for the two parties. On public policy, counsel submitted that there was nothing to show that the contracts between the two parties were based on any illegality, adding that were this to be the case, the defendant's ownership of the two titles would be under challenge. Counsel for the plaintiff urged the court to grant the reliefs sought in the plaint.
16. Through Mr Njoroge Baiya, the defendant submitted that clause 16(ii) of the sale agreements was futile and incapable of enforcement. Counsel argued that registration of access roads at the instance of the



plaintiff during subdivision implied surrender of the access roads. Counsel added that only the Board appointed under Section 3 of the *Public Roads and Roads of Access Act* had the mandate to cancel or alter a road of access.

17. Counsel for the defendant argued that the plaintiff's attempt to rely on Section 9 of the *Public Roads and Roads of Access Act* was mistaken, adding that Section 9 applied where the owner of land had no access to a public road and sought access through an adjoining parcel of land. Counsel added that the plaintiff had no proprietary rights over the road in dispute capable of disposal vide private agreements. Counsel argued that the road in dispute was subject to statutory provisions and could not be the subject of a private agreement.
18. Counsel for the defendant submitted that clause 16(ii) of the sale agreements overlooked the provisions of the *Public Roads and Roads of Access Act*, adding that a court of law would not enforce a contract whose intent and subject matter was illegal or contrary to public policy. In conclusion, counsel argued that the prayers in the plaintiff's pleadings erroneously equated the road in dispute to the plaintiff's three parcels of land. Counsel urged the court to dismiss the plaintiff's claim

### **Analysis and Determination**

19. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in this suit. Parties to this suit did not agree on a common set of issues to be determined by the court. As earlier observed, there was common ground on various facts.
20. Taking into account the parties' pleadings, evidence and submissions, the following are the four key issues that fall for determination in this suit: (i) Whether the plaintiff retained any private land interest in the road that was planned and surveyed out of land parcel number Ndumberi/Ndumberi/1327, capable of enforcement through private contracts; (ii) Whether clause 16(ii) of the sale agreements dated 16/8/2016 and 28/9/2018 is enforceable; (iii) Whether the plaintiff is entitled to any of the reliefs sought in the plaint; and (iv) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the four issues in the above order.
21. The first issue is whether the plaintiff retained any private land interest in the road that was planned and surveyed out of land parcel number Ndumberi/Ndumberi/1327, capable of enforcement through private contracts. Issue number two is whether clause 16(ii) of the two sale agreements, dated 16/8/2016 and 28/9/2018, is enforceable. The two issues are intertwined. For this reason, I will dispose them simultaneously.
22. A perusal of the exhibits tendered in evidence reveals that the subdivision giving rise to the road which is the subject of this dispute was carried out between 2015 and 2016. The relevant mutation is dated 28/12/2015. The parcel registers relating to the subdivisions that were sold to the defendant by the plaintiff were opened on 15/1/2016, meaning that the parcel register relating to parcel number Ndumberi/Ndumberi/1327, which was the subject of the division, was closed on the same day. From the above evidence, it is clear that the subdivision, the survey, and the registration of the new titles were carried out when the repealed *Physical Planning Act of 1996* [hereinafter referred to as "the repealed Act"] was still in force. Also in force at the time were the *Physical Planning (Subdivision) Regulations, 1998*. The subdivision approval was sought and granted within the frameworks in the above legislations.
23. Part VI of the *Repealed Act* contained an elaborate framework on subdivision of land. A key requirement under the framework was that any subdivision of land had to be approved by the physical planning authority [see Section 41 of the *Repealed Act*]. An application for approval had to be



- submitted to the physical planning authority in the form prescribed under the Forth Schedule. Section 41(5) of the Repealed Act gave the physical planning authority powers to approve the application for subdivision with or without modifications and subject to such conditions as the physical planning authority would deem fit or refuse to approve the application.
24. Section B of the Fourth Schedule to the Act dealt with the requirements that were to be met in relation to subdivision of land. Of relevance to this dispute is that under paragraph 8 of the Forth Schedule, the proponent of the subdivision scheme was required to disclose whether the construction of a new or an alternative of an existing means of access to or from a road was involved in the subdivision.
25. Of key significance to this dispute is that, Regulation 5 of the Physical Planning (Subdivision) Regulations 1998 empowered the physical planning authority to grant approval subject to any of the conditions that were set out in the Second Schedule of the Regulations. One of the conditions for approval under the Second Schedule was the reservation of land for roads and public purposes or for other purposes. The Second Schedule of the Regulations provided that upon implementation of the subdivision plan, the approval condition became binding upon the land owner, his successors and his assigns.
26. For avoidance of doubt, the relevant part of the Second Schedule to the Physical Planning (Subdivision) Regulations, 1998 provided as follows:
- When considering applications for subdivisions the local authority or liaison committee may impose conditions of approval in respect of the matter enumerated below, and after implementation of such approval the conditions shall be binding upon the owner, successors and assigns:
1. The type and form of development to be carried out or permitted and the size, form and situation of holding and the conditions on which such holdings may be transferred.
  2. The reservation of land for roads and public purpose or for other purposes referred to in the Act for which land may be reserved. (underlining is by the court)
  3. The character and type of roads and public utilities or other works, including the standard of construction and/or maintenance of a road, water supply, drainage and sewerage works which are to be undertaken and completed by the applicant for subdivision at the applicant's cost.
27. Suffice it to state that, the purpose of approval of a subdivision plan under the repealed Act was to ensure orderly physical activities and land use. It was intended to ensure that necessary public amenities such as roads, schools, health facilities, markets etc were in place. Secondly, once a subdivision was implemented pursuant to a conditional approval, land that was reserved for public roads and other public amenities ceased to be the property of the proponent of the subdivision scheme. Thirdly, once land was planned for public amenities, it vested in the relevant public agencies. Lastly, a road planned and surveyed in pursuance of Part VI of the Repealed Act became a public road within the meaning of Section 2(c) of the Public Roads and Roads of Access Act.
28. Did the plaintiff retain a private land interest in the planned and surveyed road? My answer to this question is in the negative. Once the plaintiff's subdivision plan was approved and implemented, the road that was planned and surveyed in the subdivision scheme was deemed to have been reserved as a public road and became a public road within the meaning of Section 2(c) of the Public Roads and



Roads of Access Act. The reserved road became public land under the management of the National Land Commission within the framework of Articles 62(1)(h) and 67(2)(a) of the Constitution. Day to day management of the road reserved in the implemented subdivision scheme vested in the relevant public agency established under the Kenya Roads Act. The road ceased to be the plaintiff's private property. Put differently, upon approval and implementation of the subdivision plan, the part of the land constituting the reserved road or roads was no longer private property of the plaintiff. It became public land.

29. Not too long ago, a three Judge bench of this court said the following in National Land Commission v Afrison Export Import Limited regarding land that was reserved for public amenities in an approved subdivision scheme:

“Our understanding of the physical planning laws at that time is that, once the subdivision scheme was approved and implemented on the ground, the public utility plots were deemed to have been surrendered for the designated public amenities.”

30. The above is the fate of the road that was planned, reserved and surveyed out of land parcel number Ndumberi/Ndumberi/3727. The road is a public road within the meaning of Section 2 of the Public Roads and Roads of Access Act. Consequently, this court's finding on the first issue is that the plaintiff did not retain any private land interest in the road that was planned, reserved and surveyed out of land parcel number Ndumberi/Ndumberi/3727.

31. Is clause 16(ii) of the two agreements enforceable? The wording of clause 16(ii) in the two agreements is slightly different but the tenor and import are the same. For avoidance of doubt, clause 16(ii) in the agreement dated 16/8/2016 provides as follows:

“16(ii) The parties have reviewed the cadastral mutation plans extracted by the surveyor for purpose of carrying out and obtaining the necessary approvals for sub-division of the original title into various subdivisions. There is provided for in the said plans an access road from the purchaser's property into the resultant subdivisions and which access road the parties hereby agree shall only be for purposes of carrying out and obtaining the approval for the said subdivision and shall in no way infer or confer any right of access to the purchaser's property from the vendor's property before or the subdivision exercise is determined.” [sic]

32. Clause 16 (ii) in the agreement dated 28/9/2018 provides as follows:

“16(ii) the parties have also reviewed the cadastral mutation plans extracted by the surveyor for purposes of carrying out and obtaining the necessary approvals for subdivision of the original title Ndumberi/ Ndumberi/3727 into various subdivisions. There is provided for in the said plans an access road for the purchaser's properties namely: Ndumberi/ Ndumberi/ 4323 and Ndumberi/Ndumberi/4322 (currently under purchase) – into the vendors properties: Ndumberi/ Ndumberi/4319/4320 and 4321 and which access road the parties hereby agree shall only be for and the purpose of carrying out and obtaining the approval for the said subdivision and shall in no way infer nor it was intended to confer any future grant of easement nor right of access to the purchaser into its property by way of vendor's property before or after the subdivision exercise.”

33. I have made a finding to the effect that the road planned and surveyed out of land parcel number 3727 is a public road and that the plaintiff did not retain any private land interest in it. Through clause 16(ii) of the two sale agreements, the plaintiff purported to appropriate the public road to himself. The road was not available for a private agreement between the two parties. The road is a public road



that was planned, reserved, and surveyed for use by the general public. The road vests in the relevant government agency created under the [Kenya Roads Act](#) and in the National Land Commission as the constitutional manager of public land. Neither the plaintiff nor the defendant had a right to enter into private contracts restricting the use of the public road by the general public.

34. It does emerge from the pleadings and from the evidence of PW1 that clause 16(ii) was intended to achieve an illegality. I say so because the plaintiff testified that the planning and reservation of the road was merely made for the purpose of deceiving the physical planning authority into granting its approval for the subdivision and that it was never intended to be actualized on the ground. If indeed that was the intention, then the plaintiff's intention was illegal and went against public policy.
35. The totality of the foregoing is that clause 16(ii) contravened Article 62 (4) of [the Constitution](#); Section 2(c) of the [Public Roads and Roads of Access Act](#); Part VI of the [Repealed Physical Planning Act 1996](#); and Regulation 5 and Condition 2 of the [Physical Planning \(Subdivision\) Regulations 1998](#).
36. What is the effect of the illegality? In [Patel v Singh](#) [2][1987] KLR 585, Nyarangi JA quoted with approval the below pronouncement from the decision in [Archbolds \[Freightage\] Ltd v S Spanglet Ltd](#) [1961] IQB374 at Page 388 on the fate of an illegal clause in a contract:

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”
37. For the above reasons, it follows that clause 16(ii) is unenforceable.
38. It did emerge during trial that all the other clauses of the two contracts were performed and the parties to the two contracts have been discharged from their respective obligations under the contracts. Indeed, the two parcels of land that were sold to the defendant were conveyed to the defendant and titles were issued to them. The defendant paid the agreed purchase price. The defendant was given possession and have enjoyed possession from the time of purchase. In the circumstances, it is the finding of this court that the above illegal and unenforceable clause is severable from the rest of the contracts and does not affect the validity of the other clauses of the contracts.
39. For the above reasons, my finding on the second issue is that clause 16(ii) of the two agreements is unenforceable but severable from the other clauses of the two agreements.
40. Is the plaintiff entitled to any of the reliefs sought in the plaint? The totality of my findings on the first and second issues is that the plaintiff has failed to prove his claim to the required standard. The result is that he is not entitled to any of the reliefs sought in the plaint.
41. On costs, the genesis of this dispute is the illegal and unenforceable clause that was included in the two sale agreements. Both parties executed the sale agreements. For this reason, they will bear their respective costs of this suit.



### **Summary of Findings**

42. In summary, my findings on the four issues that were identified for determination in this suit are that: (i) the plaintiff did not retain any private land interest in the road that was planned and surveyed out of land parcel number Ndumberi/Ndumberi/3727; (ii) clause 16(ii) of the sale agreements dated 16/8/2016 and 28/9/2018 is unenforceable but severable from the rest of the clauses, hence it does not affect the other clauses of the agreements which have been fully performed; (iii) the plaintiff is not entitled to the reliefs sought in the plaint; and (iv) since this dispute arose out of an unenforceable clause in the sale agreements, parties will bear their respective costs of this suit.

### **Disposal Orders**

43. Consequently, the plaintiff's suit is dismissed for lack of merit. Parties shall bear their respective costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Mr Kingara for the Plaintiff

Mr Baiya for the Defendant

Court Assistant: Ms Osodo

