



Mugo v Kenya Urban Roads Authority (KURA) & 5 others (Environment & Land Case 4 of 2020) [2023] KEELC 16607 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 4 OF 2020**

**CK YANO, J
MARCH 29, 2023**

BETWEEN

ELIAS MICHENI MUGO PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY (KURA 1ST DEFENDANT

THE ADMINISTRATOR CHUKA TOWNSHIP 2ND DEFENDANT

THE COUNTY GOVERNMENT OF THARAKA NITHI 3RD DEFENDANT

**HYPER CONSTRUCTIONS AND EQUIPMENTS COMPANY
LIMITED 4TH DEFENDANT**

RACHAEL NJERI NDOHO 5TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by a plaint dated May 20, 2020 which was amended on June 29, 2020 and further amended on May 31, 2021 seeking for the following reliefs:
 - a A declaration that plot No M26 A II a subdivision of Plot No M26A a subdivision of plot No M26 Parcel No 227 Chuka Township which measures 60 feet by 20 feet is the property of the Plaintiff.
 - b A declaration that the Plaintiff is at liberty to reconstruct and rebuild part of Plot No. M26A 11 a subdivision of Plot No M26A a sub division of Plot No. M26 parcel No. 227 Chuka Township measuring 20 feet by 20 feet that was demolished by the 4th and 5th Defendants at the instance of the 1st Defendant without any interference by the Defendants, their agents, servants or any person acting at their behest.



- c The Defendants to pay the Plaintiff Kshs 8,078,157.60 being the assessed value of the demolished part of the Plaintiff's plot No M26 A 11 a subdivision of Plot No M26 A a subdivision of plot No M26 parcel No 227 Chuka Township which is inclusive of valuers report and survey report charges.
- d) The Defendants to pay the Plaintiff Kshs 34,904 being the charges for the assessment report.
- e) The Defendants be restrained by way of permanent injunction restraining them either by themselves, their agents or servants or any person acting at their behest from interfering in any manner with the Plaintiff's developments and improvements of the Plaintiff's plot No M26A2 which measures 60 by 20 feet.
- e. The Defendants be restrained by way of permanent injunction restraining them either by themselves, their agents or servants or any person acting at their behest from interfering in any manner with the Plaintiff's developments and improvement of the Plaintiff's Plot No M26Aii A subdivision of Plot No M26A a subdivision of Plot No M26 parcel No 227 Chuka township which measures 60 feet by 20 feet.
- f. The Defendants to pay mesne profits and non-user of the premises of Plot No M26A11 a subdivision of Plot No M26A a subdivision of Plot No M26 parcel No 227 Chuka township.
- g. Cost and interest from the date of filing suit.

Plaintiff's Case

2. In a nutshell, the Plaintiff's case is that Plot No. M26a 11 a sub division of Plot No. M26 A a subdivision of Plot No. M26 parcel No. 227 Chuka township measures 20 feet by 60 feet according to the records held by the director of survey, Ruaraka, Nairobi. The Plaintiff contends that he is and has been the owner of the said plot having purchased the same from the late Richard Gakuri, the original owner and as of 4th April, 2020, the Plaintiff had constructed a two storied commercial building on the suit plot in which he was carrying on hardware business on one part of the premises while he rented the rest of the rooms in the building.
3. The Plaintiff avers that by a general notice, one engineer D. Nderitu an agent of the 1st Defendant gave notice to the Plaintiff to demolish a portion of the said plot measuring 20 feet by 20 feet. That on April 4, 2020, the 4th and 5th Defendants at the instance of the 1st Defendant demolished, damaged and destroyed the said portion measuring 20 feet by 20 feet occasioning the Plaintiff great loss and damage. It is the Plaintiff's contention that the said demolition was in contravention of the Constitution and the law and was an affront to the cardinal principle of natural justice that demands that a person should not be condemned unheard.
4. The Plaintiff avers that on April 28, 2020, the District Surveyor mapped and marked the beacons of the suit plot and made a finding that the same was not on the road or road reserve. That on 24th and April 25, 2021, Kananu Geospatial Surveyors & Consultants Ltd surveyed the plot and also returned a finding that it was not on the road or road reserve, and that the demolished portion was part and parcel of the Plaintiff's plot.
5. The Plaintiff contends that he suffered loss and damage and has given the particulars of special damages.

The Plaintiff's Evidence

6. At the hearing, the Plaintiff testified as PW1 and called five witnesses. The Plaintiff testified that he purchased a portion measuring 20 feet by 60 feet out of Plot No M26 A II ("the suit property") from



Richard Gakuri and produced the sale agreement as P Exhibit 5. That the late Richard Gakuri wrote to the municipal council of Chuka asking for permission to subdivide Plot No M26a and to authorize the transfer of the suit property that was sold to the Plaintiff and that the application to transfer was forwarded to the commissioner of lands. However, the municipal council delayed in forwarding the transfer documents to the commissioner of lands for purposes of effecting the transfer and process lease documents. That the death of Richard Gakuri completed the matter further.

7. The Plaintiff stated that he has been in occupation of his plot for a period in excess of 27 years and has been paying rates to the County Government of Tharaka Nithi. The Plaintiff states that under the principle of long possession of the property, he has better claim over it more than any other person other than the owner.
8. It is the evidence of the Plaintiff that upon entry and occupation of the suit property, he embarked on serious developments thereon which were approved by the then municipal council of Chuka. That he constructed a two storied commercial house with a basement which he has been utilizing to earn income.
9. The Plaintiff testified that on or around February 14, 2020, he was surprised when some officials from the 1st Defendant came to the plot and stated that the same was on the road reserve. The Plaintiff states that he could not comprehend these allegations granted that parcel No 227 Chuka township was a surveyed plot with fixed coordinates which are intact todate. That the 1st Defendant's surveyor purported to measure part of the plot that was on the road and/or on the road reserve.
10. That on February 18, 2020 the Plaintiff was surprised when one Engineer Nderitu served the Plaintiff's workers with a demolition notice marking 20 feet by 20 feet for demolition to pave way for a road construction. The Plaintiff however did not obey the notice.
11. That on April 4, 2020, the 5th Defendant at the instance of the 1st and 4th Defendants demolished part of the Plaintiff's plot measuring 20 feet by 20 feet. It is the Plaintiff's evidence that the said plot was not on the road reserve. The Plaintiff states that this fact was established by the district surveyor and a private surveyor whom he hired, Kananu Geospatial surveyor consultants Ltd. The Plaintiff states that the demolition was unlawful and has suffered loss and damage and he produced as exhibits the letter of allotment of parcel No M26 parcel No 227 Chuka township, PDP (F/R No 230/171 Folio No 253) for Chuka Town, letters of administration in Embu SRM Succession Cause No 45 of 1986 in respect of estate of Japhet Njiru, sale agreement, application for subdivision of plot No M26A, letter dated May 15, 1994, approval of transfer, certificate of confirmation of grant in succession cause No 66 of 2002, land rates payment receipts, approved plan, photographs notice of demolition, demand and statutory notice.
12. When cross-examined by Mr. Mugambi learned counsel for the Attorney General for the 1st and 6th Defendants, the Plaintiff stated that he owns the suit plot though he did not have title, as the acquisition process is incomplete. He did not know whether every plot has a road reserve. When re-examined by Mr Mugo, learned counsel for the Plaintiff, the Plaintiff maintained that the Defendants are liable to compensate him.
13. Harriet Igoki Gakuri testified as PW2 and testified that the suit plot belongs to the Plaintiff as the same was sold by her father to the Plaintiff in 1994. She did not know if part of the plot was on a road reserve. PW2 adopted her witness statement dated May 31, 2021 as her evidence-in-chief.
14. Cecilia Mukiri, the Chuka sub-county Administrator, Chuka sub-county testified as PW3. She stated that she coordinates devolved functions of the county Government and her work entails keeping some records while others are kept by the departments. That the records for the suit plot are kept by the



office of the physical Planning department and therefore may not know the original allottees of plot No. M26. PW3 produced the documents marked as P. Exhibits 21(a), (b) & (c) being a letter, PDP and register of allottees. She was cross-examined and re-examined.

15. Cyprian Kirera Riungu testified as PW4. He is a registered valuer who prepared a report dated 24.4.2020 which he produced as P.Exhibit 15 and the receipt as P.Exhibit 16. He was cross-examined and re-examined.
16. Mwenda Kithinji Duncan testified as PW5. He is a Senior Physical Planner with the Tharaka Nithi County Government. He authored the letter of confirmation of ownership dated 19.5.2022 which he produced as P.Exhibit 21(a), (b) and (c). He stated that he obtained the details from the plot register. He was also cross examined and re-examined.
17. Zachary Thuku Kananu, a licensed surveyor who owns and works in the name of Kananu Geospecial surveyors consultants prepared the report produced as P.Exhibit 17 and issued the receipt produced as P.Exhibit 18. He was also cross-examined and re-examined.

Defendants' Case

18. The case against the 2nd and 3rd Defendants was withdrawn by the Plaintiff while the 4th and 5th Defendants never entered appearance.
19. The 1st and 6th Defendants filed a joint defence dated June 15, 2020 wherein they denied the averments in the plaint. They denied that the Plaintiff has been the legally registered owner of parcel No. 26A Chuka Township. They averred that the suit land is the property of the Republic of Kenya and that the Plaintiff's interests in the suit land was fraudulently and illegally procured contrary to the Government Lands Act and the repealed constitution and all enabling laws. They have listed the particulars of fraud and illegality. They also deny the use and developments in the suit land, adding that the suit land was reserved for Government purpose and was not available for disposal to private entities and that by dint of the doctrine of radical title ought to revert back to the Government as the owner. It is their contention that the suit does not disclose any reasonable cause of action and prayed for it to be dismissed with costs.

The 1st and 6th Defendants Evidence

20. The 1st and 6th Defendants called one witness, Dorcas Kanana Mungai a Senior Lands Surveyor at the Kenya Urban Roads Authority (KURA), the 1st Defendant herein. It was her evidence that the development plan for Chuka township which was approved by the commissioner of lands in 1988 provided a road for 15 metres. That plot No M26 was not provided for in that plan and so the planner developed a PDP in 1993 that allocated plot No 26 and reduced the road from 15 metres to 9 metres. It was the evidence of DW1 that the suit property has encroached into the road or road reserve. It is her evidence that the 1988 plan supersedes the one of 1993. She also confirmed that the letter of allotment produced by the Plaintiff as P.Exhibit 1 was over an unsurveyed plot and that the allottee was supposed to have surveyed the plot before developing it. That in this case, the building that was demolished was on a road reserve and was removed at the cost of the owner as stipulated in the letter of allotment. That if one does not comply with the conditions in the letter of allotment, the plot reverts back to the Government.
21. The witness testified that the owners of the structures that were to be demolished were issued with notices to carry out the demolitions and denied that the 1st Defendant carried out the demolition. The witness was also cross-examined and re-examined.



Submissions

22. At the close of both the Plaintiff's and the 1st and 6th Defendants case, the parties filed written submissions through their respective advocates on record on 5.12.2022 and which I have read and considered and therefore I need not repeat them here.

Analysis And Determination

23. The court has carefully considered the pleadings, the evidence adduced. The court has also taken into account the submissions filed and the cited authorities and the relevant provisions of law. The court identifies the following issues for determination:
- i. Whether the Plaintiff has satisfied the court as to the ownership of the suit property.
 - ii. Whether the property had encroached into a road or road reserve.
 - iii. Whether the Plaintiff is entitled to the reliefs sought.

Whether the Plaintiff has satisfied the court as to the ownership of the suit property

24. The Plaintiff's case is that he purchased a plot measuring 60 feet by 20 feet which he purchased from the original allottee of plot No M26a, Richard Gakuri. The Plaintiff produced the agreement for sale dated May 16, 1994 between him and the said Richard Gakuri. He also produced an application made by Richard Gakuri to the then Chuka Municipal Council for subdivision of Plot No M.26A into M.26A1 and M26A II with a view to transferring the latter portion to the Plaintiff. Among the documents produced by the Plaintiff as P. Exhibit 5 was an approval for the said application for subdivision and transfer.
25. The Plaintiff's asserted ownership of the suit property is founded upon the sale agreement between him and the late Richard Gakuri. The deceased only had a letter of allotment and it appears that the process of issuance of a lease was yet to be completed. The Plaintiff called witnesses, including PW3 who confirmed that as per their records, the Plaintiff is the owner of the suit property. Based on the evidence adduced and the documents produced in this case, I am satisfied that the Plaintiff has satisfied the court that he is the owner of the suit plot measuring 60feet by 20 feet. In that regard, it is my finding that the Plaintiff is the owner of the suit property.

Whether the property encroached on the road reserve

26. It is trite law that whoever asserts the existence of a legal right or liability has the burden of proving the existence of that right or liability asserted. Section 107 of the [Evidence Act](#) (cap 80 Laws of Kenya) states:
- “ whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
27. Section 108 of the [Evidence Act](#) further states thus:
- “ The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
28. As already stated, the Plaintiff testified that he purchased the suit plot No M26A II which was a subdivision of plot No M26a A subdivision of Plot No M26 parcel No 227 Chuka Township. Therefore, the root of the ownership of the suit property is the letter of allotment dated February 7, 1994 issued to Richard Gakuri and Rebecca M Njiru. The court has perused the said letter of



appointment. The same was in respect of an unsurveyed plot No 26 Chuka. The original allottees were being offered government land measuring 0.036 hectares (approximately). Before the issuance of a lease, the allottees were required to comply with certain conditions stipulated in the letter of allotment. Among the conditions that the allottee were required to comply with was payment of certain charges within 30 days. The charges include stand premium, rent, conveyancing fees, registration fees, stamp duty and survey fees. As already stated, the plot was unsurveyed. Being unsurveyed plot, the allottees were warned in the letter of allotment that at the time they commence building, they should exercise the greatest care to ensure that any building or other work are contained within the boundaries of the plot and that should they inadvertently overstep the aforesaid boundaries, the cost of removal and reconstruction will be borne by them.

29. In this case, the size of the plot that was allocated to the original allottees was measuring 0.036 hectares. The Plaintiff's case is that the plot was subsequently surveyed. However, the survey report prepared by Kananu Geospatial surveyors and consultants Ltd and which was produced by Zachary Thuku Kananu as part of the Plaintiff's exhibits (P. Exhibit 17) has given the area of the parcel No. 227 as 0.0469 Hectares. Therefore, if the original plot allocated was measuring 0.036 hectares, it is clear that the developments undertaken on the ground covered a bigger area by 0.0109 hectares. There was no evidence adduced that there was any amendment made on the original letter of allotment dated February 7, 1994 which was for an area of 0.036 hectares. There was also no evidence to show that another letter of allotment granting the original allottees or the Plaintiff herein an additional 0.0109 hectares. The only conclusion that the court can make, and I so find, is that the extra area of 0.0109 hectares could as well be a road reserve and the Plaintiff is the one who had encroached on the road reserve.

Whether the Plaintiff is entitled to the orders sought

30. Having perused the evidence adduced and specifically the letter of allotment dated February 7, 1994 and the survey report prepared and produced by PW4, the court finds that the Plaintiff's plot could only fall within 0.036 hectares. Any building that went outside the boundaries of 0.036 hectares was an encroachment on the road reserve. The letter of allotment expressly stated that since the plot was unsurveyed, anyone building should exercise the greatest care to ensure that any building or other works are contained within the boundaries of the plot and if one inadvertently overstepped the said boundaries, the cost of removal and reconstruction will be borne by him or her.
31. Having evaluated the matter and the evidence adduced, it is my finding that the Plaintiff has failed to prove his case on a balance of probabilities.
32. Consequently, this suit fails and the same is hereby dismissed with costs to the 1st and 6th defendants.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF MARCH, 2023.

CK YANO,

JUDGE.

In the presence of:

CA: Martha

Mugo for Plaintiff

Ms. Kendi for 1st & 6th Defendants

No Appearance for 3rd & 4th Defendants



No Appearance for 5th & 6th Defendants

