



Nume (Suing as the legal representatives of the estate of the late James Nami Nume) v Kironji (the chairman of Kiambu Indian Bazaar Jua Kali association) & another (Environment and Land Case Civil Suit 1067 of 2015) [2022] KEELC 13447 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13447 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1067 OF 2015
SO OKONG'O, J
OCTOBER 6, 2022

BETWEEN

WAMBUI MAMI NUME PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
JAMES NAMI NUME

AND

MICHAEL KIRONJI (THE CHAIRMAN OF KIAMBU INDIAN BAZAAR JUA
KALI ASSOCIATION) 1ST DEFENDANT
MAN NJENGA (THE MCA OF KIAMBU TOWNSHIP
WARD) 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the 1st defendant as the chairman of the Indian Bazaar Jua Kali Association and the 2nd defendant as member of the county assembly of Kiambu representing the Kiambu township ward through a plaint dated October 28, 2015 seeking the following reliefs;
 - a. General damages for trespass and damage to the plaintiff's crops, and compensation for the destroyed trees.
 - b. A permanent injunction restraining the defendants, their servants, agents and all other members of the Indian Bazaar Jua Kali Association from entering upon, occupying, working on or cutting trees on plot No 40/97/19 Kangoya (hereinafter referred to only as "the suit property").
 - c. Costs of the suit.
 - d. Any other relief that the court may deem fit to grant.



The Plaintiff's Case:

2. The plaintiff averred that at all material times to this suit the late James Mami Nume (hereinafter referred to only as “the deceased”) was the owner of the suit property. The plaintiff averred that on October 17, 2015, the 1st and 2nd defendants incited motor vehicle mechanics who were members of the Indian Bazaar Jua Kali Association (hereinafter referred to only as “the association”) to trespass upon the suit property and cut down the plaintiff's fence, trees, bananas, crops and to damage tree nurseries.
3. The plaintiff averred that the defendants asked the members of the association to take possession and occupy the suit property which call they heeded and they had since occupied half of the suit property from which they served their customers. The plaintiff averred that the defendants had threatened to evict the plaintiff and her family from the suit property and to dispossess them of the entire parcel of land comprised in the suit property.
4. At the trial, the plaintiff testified as PW1. The plaintiff adopted her written witness statement filed on December 7, 2018 as part of her evidence in chief and produced the documents attached thereto as PEXH.1.
5. The plaintiff told the court that the defendants brought a group of people to the suit property claiming that she had grabbed the same. The plaintiff stated that the people brought to the suit property by the defendants who were numbering around 300 destroyed all that was on the property. She stated that they destroyed the fence and tree nursery, cut down the trees and bananas and set the latrine on fire. The plaintiff stated that the suit property belonged to her husband, James Mami Ndume (“the deceased”) and that the defendants entered therein without her permission. The plaintiff urged the court to grant the reliefs sought in the plaint.
6. On cross examination, the plaintiff stated that she did not have a title deed for the suit property and that the title document in her possession was an allotment letter that was issued to the deceased in respect of a parcel of land measuring 2 acres. The plaintiff stated further that she had been paying rates for the suit property.
7. The plaintiff stated that although public toilets had been constructed at the edge of the suit property which was also adjacent to a river, the suit property was not public land. The plaintiff stated further that the suit property had not been acquired by the government for road expansion. The plaintiff stated that the property had no beacons and that she wished to carry out a survey of the property. The plaintiff stated that the suit property measured 2 acres and that there were other parcels of land next to it.
8. The plaintiff stated that it was not necessary to join Kiambu county government to the suit. The plaintiff stated that Kiambu county government had denied involvement in the invasion of the suit property and that it was the defendants who brought the invaders to the property. The Plaintiff stated that the defendants were present when the property was invaded. The plaintiff stated that the mechanics who invaded the suit property were brought by the 2nd defendant. The plaintiff denied that there was a public toilet on the suit property. The plaintiff stated that she was not given a notice to vacate the property before the invasion. The plaintiff stated that neither the road nor the public toilet were on the suit property. She stated that she had not surveyed the land and as such had nothing showing the boundaries of the suit property.

The Defendants' Case:

9. The defendants filed a joint statement of defence on November 16, 2017 denying all the allegations made against them in the plaint and in particular that the plaintiff was the owner of the suit property.



10. The defendants averred that the suit property was a public utility land and that the same was reserved for a garage and public toilets. The defendants averred that the plaintiff's documents of title were forgeries. The defendants averred that they were wrongly sued as it was the Kiambu county government that built a public toilet on the disputed land. The defendants averred that this court had no jurisdiction to hear the plaintiff's suit since an issue regarding the legality of allocation of a public utility land should be heard and determined by the National Land Commission in the first instance.
11. The 2nd defendant gave evidence as DW1 on behalf of the defendants. The 2nd defendant adopted his witness statement dated November 16, 2017 as part of his evidence in chief. The 2nd defendant told the court that the dispute before the court was over unsurveyed piece of land in which he had no interest. The 2nd defendant stated that when he was elected as a member of county assembly in 2013, mechanics were operating on the suit property on which there was also a public toilet.
12. The 2nd defendant denied that he trespassed on the suit property. The 2nd defendant produced the documents attached to the defendants' list of documents as Dexh1. The 2nd defendant stated that the suit property was reversed as a motor vehicle garage and there was a part development plan in that respect. The 2nd defendant stated that it was agreed that the plaintiff be allocated a portion of the suit property measuring 50 feet by 100 feet on humanitarian grounds and that the process of that allocation had commenced when this suit was filed.

Submissions:

13. After the close of evidence, the court directed the parties to make closing submissions in writing. I have not seen the plaintiff's submissions on record.
14. The defendants filed their submissions dated February 11, 2022 on February 17, 2022. The defendants submitted that this court lacked jurisdiction to entertain the dispute as the matter had been reported to the National Land Commission (hereinafter referred to only as "NLC") for investigation. The defendants submitted that the grant in favour of the plaintiff was canceled and the suit property planned as a public utility land for a garage in 1981 for the benefit of Kangoya community in accordance with the part development plan No 42. The defendants submitted that the court should refer the matter to NLC for the determination of the issue of the legality or propriety of the grant to the plaintiff of public land in accordance with section 14(1) of the [NLC Act](#).
15. On whether the plaintiff was the owner of the suit property, the defendants submitted that the plaintiff was not the rightful owner of the suit property and that she failed to produce in court any legal document of title. The defendants submitted further that public land is held by county governments in trust for the people residing in the counties and the same cannot be allocated to private individuals.
16. The defendants submitted further that the letter of allotment that was produced by the plaintiff in evidence was subject to the provisions of the [Government Land Act](#), chapter 280 Laws of Kenya (now repealed) which provided that only unalienated government land could be allocated. The defendants submitted that the suit property was alienated as a garage in accordance with Kiambu municipality development plan dated April 7, 1977 and as such ceased to be unalienated government Land. The defendants submitted that the suit property was not available for allocation to the plaintiff. In support of this submission, the defendants cited [Kenya Anti-Corruption Commission v Lima Limited & 2 others](#) [2009]eKLR. The defendants submitted further that in any event, the plaintiff was allocated an unsurveyed plot measuring about 0.05 hectares which is equivalent to 50 feet by 100 feet by the municipal council of Kiambu and not the suit property which measures 2 acres.



17. The defendants submitted further that they were wrongly joined in the suit. The defendants submitted that the 1st defendant was sued as the chairman of Indian Bazaar Jua Kali Association (“the association”) without proof that he held that position and in a representative capacity without seeking the requisite leave to sue him in that capacity. The defendants submitted that in a suit against a welfare group or unincorporated association, the right parties to sue are the three officials of the entity which the plaintiff failed to do.
18. The defendants submitted that the 2nd defendant was sued in his capacity as a member of county assembly of Kiambu. The defendants submitted that the 2nd defendant had no direct or personal claim over the suit property. The defendants submitted that the plaintiff’s claim should have been directed against the county government of Kiambu which held the suit property in trust for the residents of Kiambu county and the National Land Commission which had the sole mandate of administering public land and not against the defendants who had no interest in the property.
19. On the issue as to whether the defendants trespassed on the suit property, the defendants submitted that the ownership of the suit property by the plaintiff was disputed as she held no legal title. The defendants submitted that the plaintiff’s claim was solely based on a letter of allotment for unsurveyed plot which was incapable of identification for the purposes of a claim for trespass. The defendants submitted that the members of the association were legally in occupation of the suit property having been allocated the land by the government to use as a garage. The defendants submitted that in any event, the plaintiff had consented to the association’s occupation of the suit property for several years. The defendants urged the court to find that the defendants did not trespass on the suit property and that they did not incite the members of the association to take possession of the suit property.

Determination:

20. I have considered the evidence tendered by the parties and the submissions by the defendants. From the pleadings, there are only two issues arising for determination in this suit namely, whether the defendants trespassed on the suit property and secondly, whether the plaintiff is entitled to the reliefs sought in her plaint. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. To establish, trespass, the plaintiff had a duty to prove that she owned the suit property or that she held any other interest recognized in law in the suit property that entitled her to quiet possession thereof. The plaintiff also had the burden of proving that the defendants entered the suit property without her permission.
21. From the evidence on record, the root of the plaintiff’s claim over the suit property can be traced to a letter dated January 15, 1970 that was written by the plaintiff’s deceased husband, James Mami Nume (“the deceased”) to the district commissioner Kiambu district requesting to “hire” a portion of land measuring 2 acres opposite Indian Bazaar Riara River Nursery. The deceased required the land for growing vegetables for transplanting, seedlings for different types of trees and fruits, and grass for mulching. The plaintiff has contended that following this letter, the said district commissioner allowed the deceased to occupy the suit property and to develop a tree nursery thereon as he pursued official allocation.
22. The plaintiff has contended that the deceased continued to run a tree nursery on the suit property until his demise in June 2001 when the plaintiff took over the venture. The plaintiff has contended that on January 24, 1997 the Kiambu district plots allocation committee resolved to allocate to the deceased the suit property which was referred to as plot No 40/97/19. The plaintiff averred that to the deceased’s



surprise, the suit property had been subdivided into three portions of which only one was allocated to the deceased with the remaining two being allocated to the then mayor of Kiambu municipal council and a councilor in the same municipality. The plaintiff has contended that the deceased protested against the subdivision of the suit property and the allocation of portions thereof to the said people. The plaintiff has contended that the said protest resulted in the deceased being issued with a letter of allotment for the suit property by the commissioner of lands on May 25, 2011. The plaintiff has contended that she remained in occupation of the suit property paying land rates as and when the same fell due awaiting processing of a title deed in favour of the deceased.

23. I have not seen any letter from the district commissioner Kiambu district in response to the deceased's letter dated January 15, 1970. I therefore find the plaintiff's claim that the said district commissioner allowed the deceased to occupy the suit property not proved. I have also not seen any evidence showing that the offer contained in the letter of allotment by the commissioner of lands dated May 25, 2011 that was purportedly issued several years after the death of the deceased was accepted and the requisite payment made. In the absence of evidence that the offer was accepted and the requisite payment made, I am not persuaded that the letter of allotment created any proprietary interest in favour of the deceased or the plaintiff in the suit property.
24. Of more concern is the fact that the suit property was purportedly allocated to the deceased pursuant to a part development plan(PDP) reference No KBU/40/97/19 dated April 8, 1998. On the face of it, this PDP was not approved by the commissioner of lands. I have seen from the exhibits produced by the plaintiff that the commissioner of lands had in a letter dated October 7, 1998 to the district physical planning officer, Kiambu indicated that the suit property was reserved for a garage and that no reason had been given for re-planning the same for residential purposes. From the correspondence submitted to the court by the plaintiff, the same PDP was disowned by the director of physical planning who claimed that the document was not approved by his department and as such was not a valid document for land allocation. This PDP was said to have superseded an earlier PDP reference No KBU/40/97/17. I have not seen on record this PDP No KBU/40/97/17. This I presume is the PDP that was the basis of the first allocation of the suit property on January 24, 1997 that was objected to by the deceased. The PDP on record that was signed by the director of physical planning and approved by the commissioner of lands is PDP reference No C/40/77/3B dated June 30, 1981. It is pursuant to this PDP that the suit property was reserved for use as a garage. I have noted that after the filing of this suit and while the suit was pending, the Kiambu county director of physical planning prepared another PDP reference No KBU/40/015/01 dated December 8, 2015 for the suit property in which part of the property was set a part for existing "jua kali" and existing public toilet. This PDP was also not produced in evidence. I am of the view that as far as the dispute before me is concerned, the only valid PDP for the suit property is PDP reference No C/40/77/3B dated June 30, 1981 through which the suit property was reserved for a garage.
25. I am in agreement with the defendants' submission that the suit property having been reserved for public use as a garage, the same was not available for allocation to the deceased or the plaintiff for residential purposes. In *Republic v Land Registrar Kilifi & another ex-parte Daniel Ricci* [2013] eKLR, the court stated that:

"... If the suit property was indeed set aside for public purpose, then such land cannot be available for allocation. Where public land is allocated to a private person, the court has an obligation not to recognize such title, because as it has been said time and again, public interest in a property will always outweigh an individual right to own the same property."



26. I am alive to the fact that the property could be re-planned by the county government of Kiambu for similar use of a public nature. There is however no evidence that any lawful re-planning was done in respect of the suit property. From the totality of the evidence before the court, I am not satisfied that the deceased or the plaintiff has any valid proprietary interest in the suit property. I am not persuaded that the lengthy occupation of the property by the deceased or the plaintiff conferred any proprietary interest in the suit property upon the deceased or the plaintiff.
27. I have noted however that the plaintiff is in occupation of the suit property and has been paying rates to Kiambu county government. I have not found any legal basis for this occupation or payment of rates. The occupation and payment of rates is however evidence of the fact that the plaintiff is in occupation of the suit property with the permission of the Kiambu county government which is the owner of the property. I am of the view that unless Kiambu county government terminates the plaintiff's occupation of the property by withdrawing the license that it has extended to the plaintiff, the plaintiff is entitled to quiet enjoyment of the suit property.
28. From the evidence on record, I am not satisfied that the defendants trespassed on the suit property. There is evidence that the defendants incited motor vehicle mechanics to occupy the suit property. That is however not the same thing as trespassing on the suit property. There is no evidence that any of the defendants entered and occupied any portion of the suit property. There is also no evidence that any of the defendants participated in the destruction of the plaintiff's tree nursery, fence and toilet. It is not clear why the plaintiff did not deem it fit to sue the mechanics whom she has accused of carrying out the activities complained of. I am in agreement with the defendants that the suit against the 1st defendant was not a representative suit but a suit against an individual. The 1st defendant is therefore not liable for the illegal acts that were committed by the members of the association. There was also no evidence of the existence of the association and of the fact that the 1st defendant was its chairman. It follows therefore that whereas there is evidence that there were acts of trespass committed against the plaintiff in respect of the suit property, the plaintiff has not demonstrated that the defendants were involved.
29. The plaintiff having failed to prove that the defendants trespassed on the suit property, the plaintiff is not entitled to the reliefs sought.

Conclusion:

30. In conclusion, I find no merit in the plaintiff's suit. The suit is dismissed accordingly. Since the defendants incited the invasion of the suit property as I have found earlier, I will deny them the costs of the suit. Each party shall bear its own costs of the suit.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Karanja for the Plaintiff

Mr. Gatitu for the Defendants

Ms. Joan-Court Assistant

