



**Thiongo v Mirugi & another (Environment & Land Case 564 of 2012)
[2023] KEELC 17141 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 564 OF 2012**

LN MBUGUA, J

APRIL 27, 2023

BETWEEN

JOHN NDUNGU THIONGO PLAINTIFF

AND

MICHAEL KARIUKI MIRUGI 1ST DEFENDANT

VERONICA WAKONYO CHEGE 2ND DEFENDANT

JUDGMENT

1. The Plaintiff Commenced this suit by a paint dated 29.8.2012 and amended on 25.3.2013. He contends that he owns the property known as Plot No X38 Huruma Estate by virtue of allotment on 7.6.1999 by the City Council of Nairobi. He further contends that he erected residential houses and had tenants living thereon for more than 10 years as at the time of filing this suit. It is his case that sometime from July 2012, the Defendants jointly encroached on the suit plot, demolished the said rental houses and chased his tenants away. He accuses the Defendants of fraudulently fabricating and forging ownership documents to the suit plot. He seeks a permanent injunction restraining them from dealing with Plot No X 38 Huruma.
2. The suit is opposed by the Defendants by way of their statement of defence dated 18.4.2013.
3. The Plaintiff testified as PW1, where he adopted his witness statement dated 7.8.2013 as his evidence. He also produced the 18 documents in his supplementary list of documents filed on 7.8.2018 as P. Exhibit 1-18.
4. The plaintiff's case is that he was allotted Plot Number X 38 in 1999, he took possession of the suit plot and has developed 6 houses using mabati (iron sheets). He added that he has been paying all the required levies. It was his testimony that on 2.10.2012, the 1st Defendant unlawfully entered his plot and commenced construction works thereon.



5. On cross-examination, he stated that he has 2 plots in Kiamaiko being H18 and X38. That for plot X38, the letter X was inserted in ink and it does not appear in other related ownership documents being the lease, KRA slip and receipt from Department of lands. He further stated that the allotment letter shows the user as residential while the lease refers to a commercial purpose. He contends that the 1st Defendant was charged at a Makadara Law Court for entering the suit plot, but he does not know the outcome thereof.
6. Referred to City Council of Nairobi's memo dated 2.9.2010 at page 29 of his bundle, he stated that it shows there was revocation of allocation of plots bearing the X series. He also stated that the houses on the suit property were not for rental purposes.
7. On re-examination, he stated that page 11 of his bundle contains a letter dated 4.10.2012 from City Council of Nairobi addressed to the Commissioner of Lands confirming that plaintiff was the legitimate allottee of the suit property. Referred to the revocation memo dated 2.9.2010, he stated that he is not aware of any revocation. He also reiterated that he is in possession of the suit property and that the receipts at page 12 and 14 of his bundle of documents capture his plot No X 38.
8. The Defendants who are spouses testified as DW1 and 2. DW1, Michael Kariuki adopted his witness statement at page 4 of their bundle of documents as his evidence. He avers that he is not aware of Plot No X38 alleged to be situated at Kiamaiko area Nairobi. What he knows is that his wife, the 2nd Defendant owns Plot No H110 Huruma Estate (Kia-Maiko) Infil.
9. When cross-examined, he stated that he is not sure about the measurement of the 2nd Defendant's plot but it can accommodate about 6 rooms. He also stated that the Plaintiff has never stayed on the suit plot. He stated that they had built rentals by the time the Plaintiff obtained status quo orders but before putting them up, the plot was vacant.
10. He also stated that he stays in the same village with the Plaintiff and that the Plaintiff has a plot H18 which is not near the road as he claims. It is far beyond Huruma Road which is on 2nd row from his house.
11. When re-examined, he stated Plot H18 is different from H110 owned by the 2nd Defendant.
12. DW2, Veronica Wakonyo adopted her witness statement at page 5 of their bundle of documents as her evidence. She also produced 8 documents in the said bundle as D. Exhibits 1-8. She contends that she is the proprietor of Plot No H110 Huruma Estate (Kiamaiko) Infil and that she has invested heavily thereon, as she is putting up 12 residential rooms for rental purposes. At the time an injunction was issued herein, she had completed constructing the ground floor having sought approval from City Council of Nairobi on 1.4.2012, and was to complete the project within 6 months (estimate), but the project has since stalled due to the status quo orders issued herein causing her to suffer damage. She also stated that she is not aware of Plot No X38 Huruma, in terms of its ownership and location.
13. It was also her testimony that Plot No H110 was issued to her through an allotment by the City Council of Nairobi on 22.11.1998 and she subsequently paid the requisite fees as was required. On 18.08.2011, a 99 year lease was executed between her and Nairobi City Council.
14. On cross-examination, she stated that she started staying on Plot H110 where she has built her house from the time it was allocated to her by City Council of Nairobi around the year 2000 or 1998. The said plot is located along Huruma Road as you go to Kiamaiko, but she does not know where Plot No X 38 is located. She added that the Plaintiff has a plot nearby which can be seen from her place and that it does not have permanent houses.



15. On re-examination, she stated that all surrounding plots bear H series.
16. The Court directed the Plaintiff to file written submissions by 2.2.2023 and the Defendants to file theirs by 2.3.2023. However, the parties had not complied by 3.3.2023.
17. I have considered all the pleadings and the evidence tendered herein. I frame the issues falling for determination as follows;
- a. Is there nexus between Plot X 38 and Plot H110?
 - b. Have the Defendants encroached on plot X 38?
18. The Plaintiff claims ownership of a plot known as Plot No X38 Huruma. He produced a letter of allotment dated 7th June 1999 for allotment of the said plot conditional upon payment of stand premium of Kshs 7,200/= and Annual rent of Kshs 1,440/= within 30 days. The document at page 12 of the Plaintiff's bundle dated 6.6.2019 shows that stand premium and ground rent was payed after 12.11.2008 and the said document is endorsed with the words 'please accept payment' on that date.
19. The map at page 35 of the Plaintiff's bundle shows plots marked with the 'H' series. Plot X38 is entered in ink between Plot H8 and H9. I find the 'X' is out of character with the H series. There is a lease entered between the Plaintiffs and the City Council of Nairobi on 10.9.2006. It is not logical that a lease would be registered before ground rent and stand premium were payed. Further, receipts for stamp duty payment are issued in 2012.
20. The Defendants on the other hand led evidence that the 2nd Defendant was allocated Plot H110 Huruma Infills (Kiamaiko) on 22.11.1988 by Nairobi City Council. There is a receipt indicating that the 2nd Defendant paid stand premium for the plot on 24.9.2004. A lease was then executed between the 2nd Defendant and the City Council of Nairobi on 18.8.2011. There is also a map at page 18 of the Defendants' bundle of documents showing the Location of Plot No H110 which is at the corner of a 9m wide road. This evidence is in tandem with the evidence of DW1 and DW2 that Plot H110 is located along Huruma road and that the plots in the vicinity bear the H, series. In contrast, the plot no X38 being claimed by the plaintiff is tucked in between the H series plots and is inserted in ink as per the document availed by the plaintiff at page 35 of his bundle.
21. The provisions of Section 107 of the *Evidence Act* stipulate that:
- “(1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
22. In *Samson S. Maitai & another v African Safari Club Limited & another* [2010] eKLR, the court had this to say in relation to proof.
- “Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”
- Also see *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR.



23. In totality, the Plaintiff failed to establish nexus between the alleged Plot X38 and Plot H110. What more, the allocation of a plot to the 2nd Defendant was the first one in time on 22.11.1998 whereas that of the plaintiff came on 7.6.1999. I therefore proceed to dismiss the plaintiff's suit with costs to the defendants; Any injunctive orders given herein are hereby discharged.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mathenge for Defendant

Court assistant: Vanilla

