



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ELC NO. 114 OF 2012**

**MARY MAINA ONYANCHA..... PLAINTIFF**

**VERSUS**

**ZEPHANIA NYAMBANE..... 1ST DEFENDANT**

**MARY B. BOSIRE.....2ND DEFENDANT**

**EDWARD OMWANZA.....3RD DEFENDANT**

**JUDGMENT**

**Background**

1. The dispute herein relates to an open space situated along Maragoli Road, next to **Nakuru Municipality Block 12/54** and **Nakuru Block 12/53**, (hereinafter called “the suit property”).
2. The plaintiff, **Mary Maina Onyancha**, claims that she applied to the Municipal Council of Nakuru for allocation of the suit property sometime in 1998. After her application was approved, she took possession, occupied and developed it by constructing temporary structures thereon to wit, a bar and a butchery.
3. The plaintiff alleges that between 2007 and 2011 the defendants' entered into the said business premises, took possession and started carrying business thereon.
4. Terming the defendants' aforesaid actions trespass to land and unjustified interference with her enjoyment of the suit property, the plaintiff claims that she has suffered and continues to suffer loss and damage as a result of the defendants' activities on the suit property. For the foregoing reasons the plaintiff seeks judgment against the defendants jointly and severally for:-
  - i) An injunction to restrain the defendants by themselves, their agents, servants, employees or others whomsoever from being in possession and occupation or carrying on business upon the suit property, selling, leasing, transferring, sub-letting, building upon the suit property or in any other manner dealing with the suit premises;
  - ii) Possession and in default eviction;
  - iii) Damages for trespass;
  - iv) Costs of the suit and interest.

5. In the statement of defence filed on behalf of the defendants it is contended that Block No. 12/54 where the plaintiff claims the suit property is situated is private property fully developed with a storey building erected thereon; that contrary to the plaintiff's allegations, the 1st defendant was allocated by the Municipal Council of Nakuru, a portion of the suit area, measuring 15m by 20m next to Block No.12/53; that the 1st defendant's portion is next to the site where the plaintiff has erected her structures and that the 1st defendant was allocated his parcel of the suit area on **17th April, 1998**.

6. Concerning the plaintiff's allegation that she sub-let the suit property to the 1st defendant on understanding that he would be paying rent to her, the defendants argue that an allottee of temporary licence by the Council is supposed to personally conduct business on the suit property and not let, sub-let or part with the possession as the plaintiff purports to have done. Further that the Temporary Occupation Licence (TOL) is renewable every year. In this regard the defendants argue that there is no evidence that the plaintiff has been complying with the conditions for issuance of the TOL.

7. In view of the foregoing the defendants' contend that their activities on the suit property are not unlawful or do not amount to trespass to land. The plaintiff's claim against them is said to be misconceived, incompetent, disclosing no reasonable cause of action against them and is bad in law.

## **EVIDENCE**

### **The plaintiffs case**

8. When the matter came up for hearing, the plaintiff led evidence to the effect that she was allocated the suit property by the Municipal Council of Nakuru (hereinafter referred to as "the council") in 1995. She renewed the allocation in 1999. To prove those facts she produced a letter from the council dated **18th March, 1998** as **Pexbt 1**. Through that letter, the council gave her permission to renew erection of a temporary shed on Block No.12/54 and to retain the shade she had constructed thereon.

9. Following the said allocation, it is explained that the plaintiff started the business of a bar but stopped running it after she got saved and following the 2008 post elect violence which made the business unprofitable.

10. It was the plaintiff's testimony that the 1st defendant approached her to rent to him the premises. She complied and as a consequent, they orally agreed that the 1st defendant would renovate the premises at his own costs which he would recover in the form of rent. They also agreed that after recovering the costs incurred in renovating the premises, the 1st defendant would start paying her rent at the rate of Kshs. 2000/= per month.

11. The court heard that in breach of the said agreement, the 1st defendant refused to pay rent and instead made plans for take over of the premises.

12. Upon getting information concerning the 1st defendant's plan, the plaintiff complained to the council and the council through a letter dated **7th April, 2010** confirmed that it had not revoked its allotment of the suit property to her. She produced the letter from the council as **Pexbt 2**.

13. The plaintiff further testified that the 1st defendant had leased the suit property to another person who had brought materials to the site in readiness to begin construction thereon. To prove that fact, she produced photographs showing the building materials brought to the site as **Pexbt 3**.

14. The court further heard that after the plaintiff confronted the 1st defendant concerning the intended activities on the suit property, he became rude. That state of affairs caused the plaintiff to engage services of an advocate who wrote to the 1st defendant demanding that he ceases his unlawful dealings on the suit property.

15. In reply, the 1st defendant wrote the letter dated **22nd September, 2011** where he contends that he was the owner of the space on which he has erected the structures in dispute. The plaintiff produced the

letter from the 1st defendant as **Pexbt 4**.

16. The court further heard that before engaging an advocate the plaintiff had referred the dispute to the area chief who ruled that the 1st defendant should pay rent to her. To prove that fact the plaintiff relied on the minutes from the area sub-chief marked as **Pexbt 6**. In those minutes the chief ruled that the 1st defendant should pay ground rent to her (the plaintiff). The court also heard that despite the 1st defendant having agreed to pay rent to the plaintiff, in breach of that promise, the 1st defendant refused to pay rent as agreed and instead began harassing her.

17. On **20th September, 2011** the plaintiff wrote to the council concerning the 1st defendant's harassment. She produced the letter to that effect as **Pexbt 5**.

18. On **27th November, 2012** the Town Clerk wrote to the plaintiff confirming that the TOL which the 1st defendant had was in respect of the space allocated to her. The Town Clerk also confirmed that the TOL which the 1st defendant had was forged. She produced the said letter from the Town Clerk as **Pexbt 7**. Thereafter she obtained some documents which the 1st defendant had presented at the council and which were deemed by the council to have been forgeries.

19. In further proof of her case, the plaintiff produced a liquor licence issued to her on **2nd December, 1996** and the demand letter by her advocate, dated **13th August, 2012** as **Pexbt 9** and 10 respectively.

20. Concerning the reason for enjoining the 2nd and 3rd defendant to the suit, the plaintiff explained that the 2nd defendant was the one who had obtained a licence in respect of the TOL. As for the 3rd defendant she explained that he once operated the butchery on the suit premises as the 1st defendant's partner.

21. Contending that the defendants have denied her access to the suit premises, the plaintiff urged the court to assist her regain the premises by evicting the defendants. She also urged the court to award her damages for trespass and costs of the suit.

22. Upon being cross-examined by counsel for the defendants, the plaintiff admitted that the liquor license she produced as **Pexbt 9** was in respect of a business she carried elsewhere on Block 12/54. She, however, maintained that she was allocated the suit property in 1995.

23. With regard to documentary proof of the allotment, the court heard that the original TOL got lost. The only document the plaintiff possessed to prove the said allotment, was the letter from the council dated **18th March, 1998 Pexbt 1**. The plaintiff gave an account of the process upon which one is given a TOL and conceded that an allottee has to meet certain conditions before he/she could be granted a TOL.

24. With regard to her TOL she conceded that it does not indicate where her space is situate.

25. With regard to the contention that she let the premises contrary to the conditions imposed in the TOL, she explained that an allottee could sub-let the premises if the council did not object.

26. **Wilson Waweru Kinyua**, an employee of the County Government of Nakuru, who testified as P.W.2 informed the court that in 2012 he was asked to verify the two letters of allotment held by the parties in this dispute. In this regard, he informed the court that the letter dated **17th April, 1998** which the 1st defendant held was suspicious. He gave the reason for holding that opinion to be that it was computer generated yet at that time (1998) the council used type writers to generate letters of allotment. The court also heard that the records of the council only contained the letter held by the plaintiff, dated **18th March, 1998**.

27. P.W.2 further informed the court that he was not aware of any other beneficiaries of the suit area. Like P.W.1, he acknowledged that the letter dated **18th March, 1998** which forms the basis of the plaintiff's did not indicate the space the plaintiff was allocated.

28. **Evaline Cherotich Langat**, a tenant of the plaintiff testified as P.W.3. She informed the court that she has been a tenant of the plaintiff since 1999. She further informed the court that the 1st defendant leased the suit premises that the plaintiff operated as a bar. He renovated the premises and began running the business of a bar therein. The court heard that the 1st defendant renovated the bar by changing the roof, repairing the floor and the walls which were in poor condition.

29. According to P.W.3, contrary to the testimony of some of the defence witnesses, there was no dump-site in the vicinity.

30. Concerning her source of information, P.W.3 informed the court that she got the information concerning the leasing of the bar from the plaintiff.

### **The Defence Case**

31. On his part, the 1st defendant, **Zephaniah Nyambane Ochieng** who testified as D.W.1 informed the court that he carries out his business on an open space outside Medical Training College Nakuru. The space measures 15m by 20m. He informed the court that the space was allocated to him by the council in 1998. To prove that fact he produced a copy of the TOL issued to him as **Dexbt I**.

32. In 2004, he constructed a food kiosk which he later upgraded to a mini bar and butchery. He stated that before he undertook the construction, the space allocated to him was being used as a dump-site by the residents.

33. The court heard that the plaintiff had her own structures which shared a common wall with his structures.

34. D.W.1 testified that the plaintiff began complaining that he had constructed his structures on a space which belonged to her. This was so despite having been shown his space and the beacons thereto being established by two officers from the Council namely, **John Obunga** and **Dickson Ojiambo**.

35. The court also heard that upon being allocated his space and being issued with the TOL, the 1st defendant was given the conditions for use of the TOL which he complied with and has continued to comply with. He produced a receipt dated **16<sup>th</sup> March, 2014** as **dexbt 2** as proof that he had been renewing the licence annually.

36. D.W.1 vehemently denied the allegation that the plaintiff had leased the premises to him. He also denied the allegation that his letter of allotment was forged. In this regard he contended that P.W.2 was not an investigator. He termed the contention of the town clerk that his documents were not genuine mere allegations and contended that if the documents had not been genuine he would have been arrested and arraigned in court for the alleged forgery.

37. Concerning the dispute between the plaintiff and himself, he explained that he had severally approached the plaintiff to resolve the dispute between them before the council but the plaintiff was disinterested.

38. Concerning the dispute herein, the court heard that the plaintiff had taken the 1st defendant to court twice-first through criminal proceedings where he was charged with causing disturbance and now in this suit. He explained that the criminal charge arose when the plaintiff locked his premises.

39. With regard to the letter of the councils' town clerk where it is contended that his documents in respect of the suit property are suspect, he explained that the letter was in response to a letter by the plaintiff to the town clerk and stated that he was not aware of the documents the plaintiff had annexed to her letter which made the town clerk hold the said opinion. He explained that the council had never asked him to surrender the documents he held in respect of the suit property.

40. D.W.2, **Emily Langat**, who was one of the plaintiff's tenants from 2003, informed the court that the

1st defendant was not one of the tenants of the plaintiff. She stated that the 1st defendant erected his structures on what used to be a dump-site. According to her, the 1st defendant put up new structures on the suit property as opposed to renovating the plaintiff's structures which existed at the time. According to D.W.2, the plaintiff and the defendant kept quarrelling over monies the plaintiff demanded from the 1st defendant.

41. **Leah Njeri Kamau**, who testified as D.W.3, echoed the testimony of D.W.2 by stating that the 1st defendant operated a bar and a butchery on his own premises. She claimed to have witnessed the 1st defendant construct his own premises on a vacant area which was initially a dump-site. Unlike D.W.2, DW.3 stated that she was not aware of any dispute between the plaintiff and the 1st defendant.

42. **Joseph Mathangu Njuguna**, D.W.4 informed the court that he was contracted by the defendant in 2004 to construct some structures on the suit property. Because the site was full of garbage, he contracted some boys to clear the site. After the site was cleared, some people from the council came and took measurements of the site. Thereafter the 1st defendant put up a kiosk measuring 20 feet by 18 feet at the front of the suit property and other structures at the back of the suit property.

43. D.W.4 testified that he was not shown any documents by the 1st defendant. He only constructed where the 1st defendant asked him to construct. He informed the court that next to the area, where they constructed the 1st defendant's structures were two kiosks and a permanent storied building. There was no other butchery in the area at the time.

44. **Dickson Ojiambo** D.W.5, who was an officer of the council at the material time, informed the court that in 2004 the 1st defendant went to their offices (Development Control Department of the council) and requested them to assist him pay ground rent. They advised him to get a letter of allotment of the area he wanted. After the 1st defendant obtained a letter of allotment, together with the head of the department, they visited the site to confirm that the site existed on the ground.

45. According to D.W.5 they visited the site identified by the 1st defendant and upon taking measurements, found the area which looked like a dump-site, to be measuring 10 by 15 feet.

46. He acknowledged that the plaintiff had also been allocated a space at the area but contended that her space was different.

47. D.W.5 informed the court that when they visited the site, they found some existing structures. The structures were made of timber and grass thatched. The structures were being used as a hotel/butchery. The structures belonged to the plaintiff.

48. The court heard that D.W.5 was aware of the dispute between the plaintiff and the 1st defendant over ownership of the suit property.

49. On her part, **Agueta Amondi Abiya** D.W.6, the officer in charge of records at the County Government of Nakuru informed the court that they were unable to locate the TOLs issued to both parties herein because documents that are more than 10 years old were kept at the National Archives.

50. Reacting to the testimony of PW.2 which tended to cast aspersions on the authenticity of the letter of allotment which the 1st defendant had, she stated that P.W.2 did not ask her to avail to him any documents yet she was the custodian of the said documents.

51. As for the contention that in 1998 the council used to produce letters of allotment using a typewriter as opposed to a computer, D.W.6 informed the court that some documents were computer generated.

52. After the close of hearing advocates for the respective parties filed submissions which I have read and considered.

### **Issues for determination**

53. In the submissions filed on behalf of the plaintiff four issues are framed for the courts determination to wit,

**a) Whether the open space occupied by the defendants is one and the same space allocated to the plaintiff sometime in 1995 and renewed in 1998?**

**b) Whether the 1st defendant was allocated any open space on 17th April, 1998?**

**c) Whether the plaintiff is entitled to the prayers sought?**

**d) Who should pay the costs of the suit?**

### **Analysis and determination**

54. With regard to the first question, it is submitted that from the testimony of the plaintiff concerning how the defendants' came into the suit property, read alongside the defendants' letters in reply to her claim against them, it is clear that the open space occupied by the defendants is the same space allocated to the plaintiff. It is contended that since the defendants did not allege that the suit property was allocated to the 1st defendant in their responses to the plaintiff's claim (in the various letters exchanged between the parties), the 1st defendant's contention that the same space was allocated to him is an afterthought. The testimonies of the defendants witnesses to the effect that the 1st defendant was also allocated a space within the open space allegedly allocated to the plaintiff, is said to be conjured up to distance the defendants from the scene of the suit property around 2007-2008. Wondering why the 1st defendant did not raise the issue of the open space having been allocated to him in his letters to the council, the plaintiff maintains that the said claim is an afterthought.

55. In reply, it is submitted that the plaintiff has not proved her case as the only evidence produced in support of the plaintiff's allegation that the suit property was allocated to her is the letter dated 18<sup>th</sup> March, 1998 which is not a TOL. The said letter is said to be incapable of proving the size of the space the plaintiff was allocated. Without any evidence of the size of the open space that was allocated to the plaintiff, it is submitted that it would be unreasonable to assume that the entire road reserve was allocated to the plaintiff. Besides, the said letter is said to have given the plaintiff permission to construct one shade only and not several shades as the plaintiff purported to do. It is also contended that the conditions of the TOL do not support the plaintiff's case in that they prohibited the allottee from sub-letting the space allocated. The conditions also required the plaintiff to renew her licence annually. There being no evidence that the plaintiff had been renewing her TOL as required, it is submitted that her rights were extinguished the moment she failed to renew the licence.

56. In determining this question, I begin by pointing out that under **Section 107** of the Evidence Act, Chapter 80 Laws of Kenya, the plaintiff being the one who asserted that she was allocated the whole of the open space described as, a parcel of land known as an open space on **Nakuru Municipality/Block 12/54**, she bore the burden of proving that fact. To do so, she needed to lead evidence capable of proving that she was allocated the entire space described in her plaint.

57. It is noteworthy that whereas the plaintiff has pleaded that between 2007 and 2011 the defendants entered into her business premises, took possession and started carrying business therein, in her testimony before court, she deviated from that pleading and led evidence to the effect that the 1st defendant was her tenant. By so doing the plaintiff violated the provisions of **Order 2 Rule 6** of the Civil Procedure Rules which prohibit parties to a suit from making an allegation of fact, or raising any new ground of claim, inconsistent with a previous pleading of theirs. Be that as it may, her testimony to that effect was effectively controverted by the testimonies of the defendants' witnesses who led evidence to the effect that the 1st defendant was not a tenant of the plaintiff. In this regard see the testimonies of D.W. 2 and D.W.3.

58. Although the oral testimonies of the defendants' witnesses contradict the contents of the letters written by the defendants' in response to the plaintiff's claim, especially on the time the 1st defendant erected his

structures on the suit property, what those inconsistencies do is to cast aspersions on the propriety of the defendant's claim to the suit property. The inconsistencies do not in my view aid the plaintiff, who had a duty to prove on a balance of probabilities that she was allocated the entire open space on which her structures and those allegedly constructed by the 1st defendant are erected.

59. The minutes by the area Assistant Chief, Milimani Sub-location, dated **27th May, 2010** which in my view would have boosted the plaintiff case, were unfortunately not produced in evidence.

60. In view of the foregoing, this court finds that the plaintiff's evidence is insufficient to prove, on a balance of probabilities that the portion of the suit property allocated to her is one and the same parcel of land allocated to the 1st defendant.

61. Having so found, it would be superfluous to examine the other issues framed for the court's determination.

62. The upshot of the foregoing is that the plaintiff has failed to prove her case against either of the defendants to the required standard of prove. Consequently, the suit is dismissed with costs to the defendants.

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of January 2015.**

**L N WAITHAKA**

**JUDGE**

**Present**

Mr Ndubi for the defendant

Ms Omwenyo for the plaintiff

Emmnauel Maelo : CA

**L N WAITHAKA**

**JUDGE**