



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**ELC NO. 983 OF 2005**

**JOSEPH MWANGI MUNYUA & OTHERS**

(All suing on their own behalf and on behalf of all the residents of Oloorien, Mukondo & Mukenya Courts, BuruBuru Phase 1 (Small Numbers Block 74), Nairobi.....**PLAINTIFFS**

**VERSUS**

**GEORGE MWAI MBURU.....1<sup>ST</sup> DEFENDANT**

**NAIROBI COUNTY GOVERNMENT.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. This suit was listed before me for hearing on 2<sup>nd</sup> November 2018 at Milimani ELC (Nairobi) when I was part of a team of ELC Judges who were doing a service seek at Milimani ELC to assist in the clearance of backlog at the station. I completed the trial on the same date and directed the parties to file written submissions and attend a mention before the Presiding Judge on 22<sup>nd</sup> January 2019 for further directions. On the date the parties had not filed their submissions and the Presiding Judge directed a further mention on 4<sup>th</sup> March 2019 when he confirmed the filing of submissions and made an order directing the Deputy Registrar to forward the file for preparation of judgment to me at Kisii ELC where I was then stationed. Through inadvertence the file was not forwarded to me immediately as directed. The file was transmitted to me via the Deputy Registrar's letter dated 1<sup>st</sup> February, 2022 and was received at the Nakuru ELC where I am presently stationed on 3<sup>rd</sup> February 2022. That explains the delay in having the judgment prepared in time.

2. The plaintiff commenced the instant suit by way of plaint dated 4<sup>th</sup> August 2005 which was subsequently amended on 28<sup>th</sup> February 2018. The plaintiffs vide the amended plaint dated 10<sup>th</sup> January 2018 prayed for judgment against the defendants jointly and severally for:-

- (a) *A declaration to issue that the 1<sup>st</sup> defendant has no legal right to construct any building of whatever description on the open public utility plot bordering **LR No NBI Block 74/282 and NBI Block74/383 BuruBuru Phase 1 (small numbers)**.*
- (b) *An order for injunction do issue to restrain the 1<sup>st</sup> defendant either by himself, his servants and/or agents at any one time from constructing or purporting to construct **NBI Block74/282 and NBI Block 74/282 and NBI Block 74/283 Buruburu Phase I**.*
- (c) *A declaration to issue directed to the 1<sup>st</sup> defendants that the open public utility plot bordering **NBI Block74/282 and NBI74/283** is such a public utility plot incapable of utilization by the 1<sup>st</sup> defendant as a private developer and ought to be preserved as such utility plot unless otherwise conveniently declared useful by any relevant authority for public good.*
- (d) *An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendant to demolish and/or remove any purported buildings on or being constructed on the public utility plot between **LR No. NBI Block 74/282 and NBI Block 74/283** within 30 days of the court' order in default of which the plaintiffs be at liberty to execute the demolition forthwith.*
- (e) *An order for revocation of the 2<sup>nd</sup> defendant's allocation, if any, of the open public utility plot bordering **LR No.NBI Block 74/282 and NBI Block 74/28 Buruburu Phase I** to the defendant.*

(f) *An order restraining the 3<sup>rd</sup> defendant from howsoever preparing and/or issuing any title documents to the 1<sup>st</sup> defendant respecting the plot bordering **LR No. NBI Block 74/282 and NBI Block 74/283 Burubuu Phase 1.***

(g) *Costs of this suit an interest thereon.*

3. It was the plaintiffs case and assertion that the 1<sup>st</sup> defendant had unlawfully encroached into and commenced construction of a permanent building on a public and open space that was intended for the benefit and use by the Residents of **Buruburu Phase 1 Block 74.**

4. The 1<sup>st</sup> defendant filed a statement of defence and counterclaim dated 24<sup>th</sup> March 2006 filed in court on 28<sup>th</sup> March 2006. The 1<sup>st</sup> defendant in the statement of defence admitted he had commenced construction of a permanent residential building on plot **No B10 Buruburu Phase 1 in fills** which was within and part of **Nairobi/Block 74.** He averred the plot had been allocated to him by the Nairobi City council vide a letter of allotment dated 7<sup>th</sup> September 1996. He denied the plot was public plot as pleaded by the plaintiffs. The 1<sup>st</sup> defendant vide the counterclaim claimed that the plaintiffs were unlawfully interfering with his right to develop the property that belonged to him. He averred that the plaintiffs by instituting the instant suit were seeking to circumvent an order of restraint issued by the court in HCCC No. 762 of 2005 against the residents of the court. The 1<sup>st</sup> defendant in the court claim prayed for :-

(a) *The dismissal of the plaintiff's suit with costs.*

(b) *A permanent injunction restraining the plaintiff by themselves, their agents and/or servants from interfering with the 1<sup>st</sup> defendants quite possession.*

5. The 3<sup>rd</sup> defendant did not file any pleadings and neither did he participate in the proceedings. At the hearing the plaintiffs called one witness in support of the plaintiffs case while the 1<sup>st</sup> defendant testified as the sole witness in support of his defence and counterclaim. The 2<sup>nd</sup> defendant did not adduce any oral evidence at the hearing.

#### **Evidence by the Parties**

6. Joseph Mwangi Munyua (PW1) the 1<sup>st</sup> plaintiff testified on behalf of the plaintiffs. It was his evidence that he had been a resident in Buruburu, Nairobi since 1974 and that he was the owner of house number 237 within **Buruburu Phase I Block 74.** He produced a bundle of documents as per the list dated 31<sup>st</sup> July 2012 filed in court on 15<sup>th</sup> August 2012 which the court admitted in evidence as **"PEX1-5"**. Amongst the documents were copies of official search certificates that showed the witness and others owned houses in Nairobi/Block74 within Buruburu Phase I.

7. The 1<sup>st</sup> plaintiff testified that in Buruburu the houses are arranged in courts and that each court has an open area. He stated that their court was "Mukenyua Court" and that it had the largest open area. He testified it was onto this open area that the 1<sup>st</sup> defendant encroached and commenced construction of a permanent building. The witness testified that the 1<sup>st</sup> defendant's building had interfered with the drainage of the various courts. The 1<sup>st</sup> plaintiff referred to a NEMA letter dated 22<sup>nd</sup> July 2005 which he stated had affirmed that the 1<sup>st</sup> defendant's building had interfered with the drainage system. The witness further testified that the 1<sup>st</sup> defendant was constructing a block of flats which was out of character from the generally allowed type of buildings within the area stating that the type of houses accepted in the area was maissonates and not flats.

8. The witness further took issue with the 1<sup>st</sup> defendant's letter of allotment which he stated had allocated the 1<sup>st</sup> defendant a plot in Block 73 and not in Block 74 where the 1<sup>st</sup> defendant was constructing the house. The 1<sup>st</sup> plaintiff maintained that the 1<sup>st</sup> defendant was constructing his house on an open public space and the construction had adversely affected the Buruburu Block 74 Residents who were not consulted before the allotment was made to the 1<sup>st</sup> defendant. The plaintiffs sought orders for the demolition of the structure put up by the 1<sup>st</sup> defendant on the open space.

9. In cross examination by Mr. King'ara advocate for the 1<sup>st</sup> defendant the plaintiff affirmed that Block 74 had four courts namely Mukondo, Mukenyua, Mukumuti and Ollerian courts. The 1<sup>st</sup> plaintiff admitted he was aware that the 1<sup>st</sup> defendant had filed a suit against the Residents of Mukumuti vide HCCC No.762 of 2005 in June 2005 where he was seeking to stop the Residents from interfering with construction in his plot. He admitted that they were aware that the 1<sup>st</sup> defendant was granted an order barring the Residents of Mukumuti court from interfering with the construction of his house on plot B10 Buruburu Phase I. The 1<sup>st</sup> plaintiff denied they filed the present suit to circumvent the order issued in favour of the 1<sup>st</sup> defendant in the said suit. The 1<sup>st</sup> plaintiff further affirmed from the documents exhibited, the City Council of Nairobi approved the 1<sup>st</sup> defendant's building plans but contended the approvals were irregularly obtained since the City council had no land it could have allocated in Buruburu. The witness confirmed they did not make any inquiries and /or raise any complaints with City Council regarding the allotment and/or approval of the 1<sup>st</sup> defendant's building plans.

10. The 1<sup>st</sup> defendant, George Mwai Mburu (PW1) testified and in his evidence he relied on his filed witness statement and the bundle of documents that he had filed in support of his defence and counterclaim. The 1<sup>st</sup> defendant's documents exhibited in his bundle of documents were admitted in evidence as **"DEX1-15"** as numbered in the list of documents. The 1<sup>st</sup> defendant testified that he was allocated a plot No. B10 by the Nairobi City Council in Mukumuti Court Buruburu Phase I vide a letter of allotment dated 7<sup>th</sup> September 1996 (**"DEX1"**), was shown the plot on the ground and was issued a beacon certificate on 17<sup>th</sup> May, 2002 (**"DEX5"**) which showed the delineation of the plot in relation to the adjacent plots. He stated that even though the letter of allotment had made reference to Block 73 being where the plot was located, that was an error which the Nairobi County Council corrected vide its letter dated 14<sup>th</sup> December 2005 where they confirmed the plot was within Buruburu Block 74.

11. The 1<sup>st</sup> defendant testified that following allocation of the plot, he submitted drawing plans for a residential house for approval (“PEX11”) to the City Council which were duly approved by the relevant committee. He stated that he took possession of the plot which hitherto was being used as dumpsite and cleared the same by carting away the solid waste which contractors had been dumping on the site. He denied the plot was being used as a playing ground by the residents. The 1<sup>st</sup> defendant testified that after he commenced construction and had done the foundation and the ground floor slab, some residents started interfering which prompted him to institute Nairobi HCCC No. 762 of 2005 against Mukumiti court Residents Association, Buruburu Phase 1 and the court issued an order of injunction.

12. The 1<sup>st</sup> defendant further testified that after he had gotten the order of injunction he continued with construction of the Maisonnette on the plot and not flats as alleged by the plaintiffs. He stated he stopped construction after he was served with an order in present case.

13. In cross examination, the 1<sup>st</sup> defendant stated that he claims ownership of the property as the allocation to him had never been cancelled and/or revoked. The 1<sup>st</sup> defendant further maintained the plot B10 he was allocated was within Buruburu Block 74 and not 73 as indicated in the letter of allotment. He stated the error was acknowledged and corrected by the City Council. He indicated the plot was between plot Nos 282 and 283 as shown in the beacon certificate. He stated he had not processed title to the plot owing to the pendency of the instant suit. He explained that he constructed on the plot that was shown to him as plot No. B.10.

14. The plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants after the close of the trial filed written submissions as per the directions of the court. The parties filed a set of agreed issues for determination on 20<sup>th</sup> July 2007 but upon review of the pleadings, the evidence and the submissions filed by the parties, the following are the issues that arise for determination.

**1. Whether the open space between Buruburu Phase 1 LR No. 74/282 and LR No.74/283 was reserved for public purpose?**

**2. Whether the allocation to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant of plot No. B10 of the open space between LR No.74/282 and LR No. 74/283 was irregular and unlawful and ought to be cancelled.**

**3. Whether the 1<sup>st</sup> defendant had valid approval for the construction he was doing on plot B10 that had been allocated to him by the 2<sup>nd</sup> defendant?**

**4. What orders and/or reliefs should the court grant?**

15. The facts in this case are fairly straight forward. There is no dispute that the plaintiffs are residents of Buruburu Phase I Block 74 where they each own residential houses. It is also not disputed that the 1<sup>st</sup> defendant was allocated a plot described as B10 vide a letter of allotment dated 7<sup>th</sup> September 1996. The user for the allocated plot was stated to be Residential purposes and to be developed in accordance with approved plans. The letter of allotment however indicated the plot allocated to be within Nairobi Block 73- Buruburu- (Phase1- infill) and the plaintiffs took issue with this. The 1<sup>st</sup> defendant however stated he was shown the plot on the ground and was issued with a beacon certificate that clearly showed the delineation of the plot on the ground (“DEX5”). The beacon certificate was issued on 17<sup>th</sup> May 2002 and was duly signed by the Surveyor who pointed out the beacons and the Chief Land Surveyor of the 2<sup>nd</sup> defendant. The beacon certificate carried a plot diagram and the dimensions of the plot. As per the diagram the plot was rectangular and measured 24.00M by 14.42 M and as stacked between plot Nos 282 and 283. The certificate carried a notation as follows:-

*“This certificate is not valid without sketch”*

*PS ADOLWA- REGISTERED PHYSICAL PLANNER DIRECTOR OF CITY PLANNING DEPARTMENT*

16. When attention was drawn to the 2<sup>nd</sup> defendant that the letter of allotment referred to Block 73 and not Block74, the 2<sup>nd</sup> defendant through it’s Chief Land Surveyor issued a letter dated 4<sup>th</sup> December 2005 to the 1<sup>st</sup> defendant which was in the following terms: -

*RE: CORRECTION TO ALLOTMENT LETTER*

*Refer to your allotment letter under ref No. CP & ARCH/2595 dated 7<sup>th</sup> September, 1996.*

*In the letter the plot reference should have read NRB/BLK 74-Buruburu (Phase I Infill) and NOT BLK 73.*

*The error is regretted*

*Signed*

*A M KARIUKI*

*CHIEF LAND SURVEYOR*

17. The survey map (“PEX5”) tendered in evidence by the plaintiffs shows between plot No.282 and 283 there was what appeared to be an open space which must be what the 2<sup>nd</sup> defendant was referring to as “Infills”. In the concise Oxford English Dictionary “Infill is defined thus: -

*“ Material or buildings used to fill a space or hole; or fill or block up ( a space or hole).*

18. As per the Survey Map the open space between the two houses was not continuous and was therefore not a service road. The survey Map showed there was ample open space both in front and at the back of the plots/ houses which no doubt served as visitors parking. No evidence was tendered by the plaintiff to prove that the open space between plot Nos.282 and 283 was reserved for any specific public purpose. There was no evidence adduced to show that the space was set aside for the benefit of the residents. The 1<sup>st</sup> defendant gave evidence that the space was being utilized by contractors to dump waste and that he had to cart out the waste before he commenced construction. Perhaps if the initial Part Development Plan (PDP) was availed it would have shown how the Block 74 was planned and whether any space were set aside for public purposes. Without any such evidence I am not able to find that the said open space was intended for any public purposes

19. The 2<sup>nd</sup> defendant had mandate under the law to plan, regulate and coordinate the management and utilization of land within the city. In that regard the Nairobi City Council before the advent of the County Government of Nairobi had the authority and power to allocate land within the City boundaries that fell under its mandate. In my view any unutilized land following the development of residential estates such as Buruburu Phase I that had not been designated for public utility purposes remained the property of the Nairobi City Council which the council could plan and allocate in accordance with its bye laws.

20. On the basis of the evidence adduced, it is not disputed that the 2<sup>nd</sup> defendant allocated the 1<sup>st</sup> defendant plot No. B10 vide letter of allotment dated 7<sup>th</sup> September 1996. Though the letter referred to Nairobi Block 73 Buruburu Phase 1- Infill. The reference to Block 73 was later corrected to Block 74 as earlier explained in this judgment. In my view the ground inspection was done and the Beacon certificate issued, that was sufficient to clarify that indeed plot B10 allocated to the 1<sup>st</sup> defendant was indeed within Block 74 and not Block 73. It was within the mandate of the 2<sup>nd</sup> defendant to make the correction in order for the letter of offer to correspond with the ground position of the plot allocated to the 1<sup>st</sup> defendant. The submissions by the plaintiff that the correction/amendment to the letter of allotment was irregular and unlawful has no basis as the location of the plot allocated remained the same on the ground. In the premises, I hold that the plot No. B10 allocated to the 1<sup>st</sup> defendant was lawfully done and its positioning was between plot No.282 and 283 as depicted in the survey map. The allocated plot was within Buruburu Phase I Block 74.

21. The 1<sup>st</sup> defendant testified that he obtained approval for the residential building he was putting up on the plot he had been allocated. There is clear evidence that the 1<sup>st</sup> defendant accepted the allotment in writing and paid the stand premium and the land rent and was issued with a receipt acknowledging payment for Residential plot- Buruburu phase I Infills Plot No. B10. The 1<sup>st</sup> defendant's plans/drawing were approved at the Town Planning meeting of the 2<sup>nd</sup> defendant held on 17<sup>th</sup> February 2005 vide letter dated 20<sup>th</sup> May 2005 (“DEX6”).

22. Although the plaintiff in their evidence appeared to challenge the validity of the approvals given, contending the 1<sup>st</sup> defendant was constructing flats which were out of character of the permitted user, the plaintiffs conceded that they did not complain and/or raise any issue with the 2<sup>nd</sup> defendant and/or the relevant Physical Planning Liaison Committee established under the Physical Planning Act, Cap 286 of the Laws of Kenya. If the plaintiffs had any objection to the approved Plans, their recourse would have been to follow and exhaust the appeals process provided under the Physical Planning Act. They did not invoke the dispute resolution mechanism provided under the Act.

23. On the basis of the evidence, I am satisfied that the 1<sup>st</sup> defendant had valid and proper approval to construct on the plot that he had been allocated by the 2<sup>nd</sup> defendant. The plaintiff, as I have observed, never challenged the approval of the plans. The Town Planning Committee through the Directors of City Planning in approving the 1<sup>st</sup> defendant's plans and drawings must have been satisfied they conformed to the permitted user of the plot and was not going to interfere with the amenities of the residents. The 2<sup>nd</sup> defendant vide letter dated 16<sup>th</sup> August 2005 (“DEX14”) affirmed that 1<sup>st</sup> defendant's building would not interfere with drainage and/or other utilities.

24. The plaintiffs have submitted forcefully that the 2<sup>nd</sup> defendant had no power to amend the letter of allotment in the manner they purported to do. The plaintiffs argued, rectification of the letter of allotment ought to have been under the same circumstances as the registrar would have rectified an error in titles or any other instruments under Section 60 and 61 of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed). With respect I do not think that would be the correct position. Section 60 and 61 of the Registration of Titles Act, related to grants and certificate of title registered under the Act unlike a letter of allotment that is issued subject to terms by the issuing authority and specifically subject to survey and delineation of the plot allocated. In the case of the 1<sup>st</sup> defendant, the plot allocated to him was delineated and he was issued a Beacon certificate which clearly identified the exact location of the plot on the ground. In my view until such time as the property was registered and title issued by the Land Registrar, the 2<sup>nd</sup> defendant had the right to effect amendments to the letter of allotment to correct any errors. As pointed out earlier in this judgment the plot B10 that as allocated to the 1<sup>st</sup> defendant was not altered but the block within which it was stated to be located. The Beacon certificate clearly indicated the plot was between plot No.282 and 283 which were in Block 74 and not within Block 73.

24. In the result after a careful evaluation of the evidence, I find and hold that the plaintiffs, have failed to prove their case on a balance of probabilities. The 1<sup>st</sup> defendant however has proved his counterclaim on a balance of probabilities and is entitled to have judgment. I accordingly enter judgment in favour of the 1<sup>st</sup> defendant on the counterclaim and make the following final orders:-

**1. The plaintiffs suit is hereby ordered dismissed.**

**2. The order of injunction issued in favour of the plaintiffs against the 1<sup>st</sup> defendant is ordered lifted and vacated.**

**3. A permanent injunction is herein issued restraining the plaintiffs, their agents and/or servants from interfering with the 1<sup>st</sup> defendant's quiet possession, developments or in any manner whatsoever encroaching onto the 1<sup>st</sup> defendant's plot No. B10 Buruburu Phase I - Infills Nairobi Block 74.**

**4. The parties to bear their own costs of the suit and counterclaim.**

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF FEBRUARY 2022.**

**J M MUTUNGI**

**JUDGE**