



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 65 OF 2014

CHARLES MBOGO GITHINJI 1ST PLAINTIFF

JOSEPH WAINAINA MUNGAI2ND PLAINTIFF

VERSUS

TERESIA MWIHAKI1ST DEFENDANT

MWANGI MIANO2ND DEFENDANT

JOHN MUGO3RD DEFENDANT

JUDGMENT

The plaintiffs filed this suit against the defendants seeking the following orders:-

1. ***An order directing the defendants to vacate plot No. 3C KUTUS MJINI in 7 days and in default, they be forcefully evicted by Auctioneers of the plaintiff's choice***
2. ***Costs***

The three defendants were all duly served with the plaint on 11th March 2014 but only the 2nd defendant entered appearance but filed no defence. The 1st and 3rd defendants neither entered any appearance nor filed any defence.

On 24th April 2014, interlocutory judgment was entered against all the defendants and the case fixed for formal proof on 16th March 2015 and all the defendants were again duly served with notices for the hearing.

According to the evidence of the 1st plaintiff CHARLES MBOGO GITHINJI (PW1), he, the 2nd plaintiff and two others who are now deceased, were the joint owners of a plot known as PLOT NO. 3C KUTUS MJINI (hereinafter the plot). The original owner of the plot was his brother GACHOKI KITHINJI who was allocated the same in 1992 before inviting other partners to join him including the two plaintiffs. A letter of allotment for the same (Exhibit 1) issued by the Commissioner of Lands was produced as well as the Part Development Plan PDP – Exhibit 2.

However, the defendants trespassed onto the land and put up temporary structures and also cut down trees which they sold. The matter was reported to Kutus Police Station vide O.B No. 35 of 2010 and the defendants were summoned by the Police but did not attend. They also did not attend when summoned by the Kerugoya/Kutus County Council – see plaintiffs Exhibits 4 and 5. The plaintiffs

have been paying the required land rates and rent (see Exhibits 6) and before filing this suit, a demand was made by their advocate (Exhibit 8) and when the 2nd defendant was served with Court summons, he approached the plaintiffs seeking to be given time to vacate the plot but has not done so.

I have considered the plaintiff's pleadings and the un-controverted oral evidence of the 1st plaintiff together with his documentary evidence. It is clear from the letter of allotment (Exhibits 1) that the plot subject of this dispute was allocated to the 1st plaintiff's brother GACHOKI KITHINJI on 16th October 1992. He thereafter invited three other persons including the two plaintiffs herein to join him as partners. The plaintiff's claim of ownership of the plot is anchored on the letter of allotment issued to his brother on 16th October 1992 (Exhibits 1). It has been held, however, that a letter of allotment per se is nothing but an invitation to treat and which does not confer interest in land – see **WRECK MOTOR ENTERPRISES VS COMMISSIONER OF LANDS AND THREE OTHERS C.A. CIVIL APPEAL NO. 71 of 1997** and also **DR JOSEPH N.K. arap NGOK VS JUSTICE MOIJO OLE KEIYUA & OTHERS CIVIL APPLICATION NO. 60 of 1997 (NBI)**. Therefore, a party who has a document of title to a property under dispute would take precedence over one who only has a letter of allotment subject of course to there being no proven allegations of fraud. However, in the case before me, the plaintiff's assertion of ownership based on the letter of allotment issued to one of the partners has not been disputed by the defendants or any other party. Indeed the plaintiffs ownership of the plot is confirmed by the Municipal Council of Kerugoya/Kutus vide their letter dated 2nd February 2011 – see Exhibit 5. In the said letter, the Municipal Council of Kerugoya/Kutus has addressed itself on the matter as follows:-

“According to the Council records, the above plot was allocated on 16th October 1992 to Mr. Gachoki Kithinji of Kutus through letter of allotment ref No. 87280/1/111 by Commissioner of Land on an acre of 0.095 hectares for a period of ninety nine years. A plot allocation Committee for Kirinyaga held on 24th March 1992 opened a file for the same vide file No. 122251/226 a.

However, on 14th June 199, Mr. Gachoki Kithinji applied for addition of partners as follows:-

- 1. Sospeter Gikunju Kamutu ID/NO. 0254132/63***
- 2. Joseph Wainaina Mungai ID/NO. 5912314/68***
- 3. Charles Mbogo Githinji ID/NO. 1401016/64”.***

In addition to that, the plaintiffs have been paying the necessary land rates and rent as demanded by the Municipal Council of Kerugoya/Kutus – see Exhibits 6. Further, there is evidence that following the plaintiffs' complaint that the defendants had trespassed onto his plot, the parties were summoned by the Kerugoya/Kutus Council so as to determine the issue of ownership. In the said letter summoning the parties and dated 15th April 2011, (Exhibit 4), the Municipal Council of Kerugoya/Kutus addressed the parties in paragraph two thereof as follows:-

“It is the expectation of this Council that any one claiming ownership of part or whole of plot No. 3C Kutus Mjini has the right ownership documents and it is these documents you are expected to come with on 5th May 2011.Thursday at 10 a.m. without failure”

The plaintiff's evidence is that the defendants did not honour that summons to attend the meeting. Clearly therefore, if the defendants had a better claim to the plot, nothing would have been easier than for them to attend the meeting and avail whatever documents of title they had in their possession. In the absence of any other better evidence of title to the plot, this Court can only go by the letter of allotment produced by the plaintiffs as the best evidence.

Considering all the above, I am satisfied that the plaintiffs have established on a balance of probabilities that they are the rightful owners of the plot in dispute.

The plaintiffs seek the eviction of the defendants from the plot in 7 days. There is evidence that the defendants have put up some structures on the plot and therefore it may be in the interest of justice to give them some reasonable time to remove those structures. I notice also that the 2nd defendant has previously sought time to vacate but has not done so. I therefore order that the defendants do vacate the plot and remove their structures within 30 days of this decree being served on them failure of which the plaintiffs shall be at liberty to remove them.

I therefore enter judgment for the plaintiffs against the defendants jointly and severally in the following terms:-

- 1. An order that the defendants do vacate plot No. 3C KUTUS MJINI within 30 days of being served with the decree herein and in default the plaintiffs be at liberty to evict them.***
- 2. Costs and interest.***

B.N. OLAO

JUDGE

22ND APRIL,2015

22/4/2015

Before

B.N. Olao – Judge

Gichia – CC

1st Plaintiff – present

2nd Defendant – present

3rd Defendant – present

COURT: Judgment delivered this 22nd April, 2015 in open Court

1st Plaintiff present

2nd & 3rd Defendants present

Right of appeal explained.