



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL CASE NO. 74 OF 2006**

DISMAS PAUL NYONGESA .....PLAINTIFF

VERSUS

LAWRENCE MOKAYA .....DEFENDANT

**JUDGMENT**

1. The plaintiff brought his suit against the defendant for a claim of;

- (a). An order of permanent injunction
- (b). An order of eviction
- (c). Cost of the suit
- (d). Interest at court rates on costs
- (e). Any other relief the hounorable court deems to grant.

2. In his pleadings, the plaintiff avers he is the registered proprietor and leasehold owner of plot no. Bungoma Municipality/572. The defendant trespassed on his plot in August 2006 and unlawfully commenced construction on it. He brought this suit to permanently stop the defendant from his acts of trespass. On receipt of the summons to enter appearance and plead, the defendant filed his defence to the claim on 8<sup>th</sup> March 2006 in which he denied the plaintiff's claim. He pleaded that he is a bonafide allottee of plot no. Bungoma Municipality/572 and cannot be restrained from his parcel of land. He pleaded further that the plaintiff's suit is frivolous and does not raise a reasonable cause of action.

3. The parties then adduced oral evidence in support of their claims. Dismas Paul Nyongesa testified as PW1. He told court that plot no. Bungoma Municipality/572 (hereinafter referred to as the suit plot) is his. He purchased it from Richard Masinde Wafula and produced sale agreement between them as Pex. 1. He obtained a lease on 19th March 1999 and produced a certified copy of the lease as pex. 2 and a copy of a certificate of title as Pex. 3. PW1 stated that he submitted approval plans in 2005 copies of which he produced as Pex. 4 and reminder letter asking them to approve the plans dated 7.6.2005 as pex. 5. That

the municipality has not approved those plans to date. On a visit to the council to inquire about his development plans, he saw building materials had been deposited on the suit plot. He asked the town clerk why the building materials on his plot but the clerk confirmed from their records that the plot was still his.

4. He did a search at the Bungoma lands office which showed the lease had not been issued. He went to Nairobi in August and the commissioner of lands confirmed their records showed he was the plot owner. He produced a certificate of official search as pex. 6 (a) and receipt for payment as 6(b). He also produced a letter of allotment earlier issued to Richard Masinde as pex. 7 and a letter seeking consent to transfer the plot to him as pex. 8 and letter of consent dated 19.8.1998 as pex. 9. He therefore instructed his advocate to do a demand to the defendant to stop using his plot. According to the witness, the advert contained in the daily nation of 2<sup>nd</sup> Feb 2004 did not include the suit plot. He produced the newspaper cutting as pex. 10. He also produced a letter dated 10<sup>th</sup> August 2006 from the council showing he was still the owner of the suit plot as pex. 11. He also produced receipts as evidence of payment of rates for the period 1999 – 2004 as Pex. 12(a) – 12(g) and a certificate of rates clearance upto 2011 as pex. 13.

5. PW1 continued that he was not aware of any order from the court that allowed the municipality to repossess his plot. He had also not been served with any notice concerning his plot. He asked the court to grant him a permanent injunction, and order for removal of the materials from his plot and costs of the suit. Mr. Onyando for the defendant put the witness to cross examination. He said in Pex. 3, in condition no. 3 required the lessee to submit development plans within 6 months but which PW1 did not comply with. Clause 2 of the lease document also required the building to be completed within 24 months and PW1 did not fulfill this. He did not question the restriction placed on the title. He continued paying the rates because he was receiving demand notices. That clause 2 did not give the municipality authority to repossess the plot. He maintained that he submitted his plan within time. He saw people building on his land in July/August 2006.

6. He was unaware the municipality had placed notices on their boards within their offices. He was not aware the suit plot was marked for repossession for non-development. He was not aware of a meeting of the council which took place on 12<sup>th</sup> Nov 2004 as regards the suit plot neither of the meeting of 7<sup>th</sup> December 2004. He is unaware the defendant was a bidder for his plot and that the defendant was allotted the suit plot vide letter dated 11<sup>th</sup> Feb 2006. He was not aware of the approved plans of the defendant. PW1 did not have receipt for payment of his development plan he had submitted before court. He was not allotted the land but he bought it and has been paying rates. On cross examination by Makali for the Bungoma council, he said he had no claim against the municipality. The claim against the municipality was introduced by the defendant who joined them as a 3<sup>rd</sup> party. The defendant later withdrew the suit as against the defendant before the hearing was closed. It is therefore not necessary to go into details of cross examination on behalf of the 3<sup>rd</sup> party as they are no longer parties to these proceedings. After re-examination by Mrs. Mumalasi, the plaintiff's case was closed.

7. The defendant Lawrence Mokaya testified as DW1 on 14<sup>th</sup> March 2013. He is a civil servant stationed at Nyamira North. On 19<sup>th</sup> March 2004, he saw an advert in the newspaper in respect of plots to be sold which had either defaulted in rates payments or those which were not developed. The advert invited members of the public to bid. He produced the advert cutting as dex.1. He visited the council notice board and found the suit plot as one of the plots to be sold listed as no. 60. The list was marked as DMFI 2 after the plaintiff objected to its production. He visited the council offices and was advised by the town clerk to pay application fee of Kshs. 3,000 which he paid on 23<sup>rd</sup> April 2004 and produced a receipt thereof as dex.3. He also obtained minutes of 12<sup>th</sup> November 2004 which repossessed the plot. He also wished to rely on minutes of 30<sup>th</sup> August 2004 that was about repossession and reallocation. Upon objection, the minutes were marked as MFI D4 and D5 respectively. In the minutes, the suit plot was listed as no.11. The witness also referred to minutes of 7<sup>th</sup> December 2004 referred to balloting and reallocation and the minutes were marked for identification as D6 but not produced. He also referred to MFI D7 and D8 being the list of people that were to ballot.

8. He was told he was allocated the suit plot by a letter dated 14<sup>th</sup> February 2006, the letter was marked as MFI D9. He therefore prepared building plans to comply with the conditions of the allotment. He paid for inspection and paid rates all total of Kshs. 21,160/= and produced the application forms and receipts as dex. 10 (a) and (b). He submitted his plans which were approved on 24<sup>th</sup> January 2006 and produced copy of the approved plans as Dex 11 (a), (b) and (c). After approval of the plan, he began construction on the suit plot by digging a foundation. It is at this point he was served with summons to enter appearance and an order of injunction from this court. He visited the municipal council offices to ask what the status of the plot was but they advised him to continue with the building. He has denied trespassing on the suit plot as he was rightly allocated by the council. He could not tell that the suit plot belonged to the plaintiff as the same was not developed or occupied. He therefore blamed the plaintiff and the council in this case and therefore the plaintiff is not entitled to any costs.

9. In cross-examination by Mumalasi advocate on behalf of the plaintiff, DW1 admitted he has no letter of allotment from the Commissioner of lands. That he has not received any communication from the Commissioner of lands in respect of DMFI 9. He was served with a court order when he deposited building materials on the suit plot. In 2004, the plot did not belong to him. He paid rates in 2006. The approval of development was done on 24.1.06. In Ex D1 (newspaper cutting), suit plot was not listed. The minutes of 30<sup>th</sup> August 2004 does not specify plot numbers while minutes of 12<sup>th</sup> November 2004 talks of obtaining a court order before selling the plots. He admitted the municipality gave him incorrect information. His prayer is for the municipality to reinstate him on the suit plot to enable him continue with his development. He was not aware if the council had sued the plaintiff for breach of the lease. The minutes of re-allocation and balloting are for August 2004. In re-examination, he said he paid what was required. He was processing lease when he was served with the summons to enter appearance in this suit and he therefore stopped. The ballots were marked 'Yes' and 'No'. When he picked 'Yes', it was the obligation of the council to allocate the plots. The defendant thereafter applied for adjournment thrice and being unable to secure a witness from the council to produce the documents marked closed their case.

10. The advocates then filed their submissions. Mrs. Mumalasi advocate gave a summary of the evidence and submitted that the plaintiff had proved his case on a balance of probabilities. That neither the municipal council nor the county government has sued the plaintiff as regards breach of the terms of his lease. If the council or the county government wanted to repossess the suit plot, then they were required to file a suit and obtain repossession order yet none was obtained. The plaintiff submitted the defendant did not deny commencing construction on the suit land and putting building materials on it.

11. The defendant on its part submitted that plaintiffs Pex. 3 provided special conditions to be fulfilled. Non-compliance of clause 2 of the lease prompted the council to repossess suit plot L.R. No. Bungoma Municipality/572 and allocate it to the defendant. That the plaintiff failed to show that he had submitted building plans to the council which default is fatal to the plaintiff's case. The defendant submits further that the plaintiff is guilty of laches and therefore his case fails. He concluded that should the court find for the plaintiff then he be pardoned not to pay costs as he was misled by the reckless and negligent employees of Bungoma council that the suit plot had been repossessed through various minutes and documents supplied to him.

12. I have analyzed the evidence and submissions presented by the parties herein. There are only two questions I find as arising for determination by this court.

i. Was there a valid repossession of plot Bungoma municipality/572 and lawful allocation to the defendant?

ii. who should bear the costs of this suit?

13. In answering question 1, I shall compare and contrast the evidence adduced by the plaintiff and the defence and also the provisions of the law. It is not in dispute that the plaintiff is the registered lessee of the suit plot (pex. 2) and he did acquire certificate of lease on 19.3.99. He adduced evidence laying basis on how he acquired the suit plot. He produced a sale agreement, application for consent, letter of

consent and transfer documents as pex. 1, 8 and 9 respectively. The defendant on his part said he was on the process of securing a lease for the suit title when he was served with summons to enter appearance in this case and therefore stopped. He did not have any certificate of lease or any document to prove that he had commenced the process of title acquisition for the suit plot. Under section 25 of the Land Registration Act, certificate of title is to be held as conclusive evidence of proprietorship and can only be challenged as provided in the Act, i.e on ground of fraud or misrepresentation to which the title holder is proved to be a party to or where the certificate of title is acquired illegally. In the newspaper cutting daily nation of 2<sup>nd</sup> February 2004 (produced as Pex. 10 and Dex. 1) the advert put by the council of intention to repossess plots with outstanding rates and undeveloped, the suit plot was not among those listed in the advert.

14. Besides this advertisement, the defendant was unable to produce any other document which formed his basis for applying to be allotted this plot. This is because he paid an application fee for a plot on 23<sup>rd</sup> March 2004 (dex 3) and said the basis of making the payment was in response to the advertisement. The minutes he chose to rely on to claim the plot were meetings held subsequent to the advertisement and payment of application fee and they were never produced in evidence. The first was minutes of 30th August 2004 and second minutes of 12th November 2004. In the absence of proper notice and advert (assuming the council had power to repossess) then any purported repossession was invalid. Further to this, the plaintiff demonstrated that he had paid all outstanding rates to the council vide receipts Pex. 12 (a) payment made on 12<sup>th</sup> October 1999, 12 (c) dated 29<sup>th</sup> June 2000, 12(d) dated 31<sup>st</sup> May 2001 12 (b) dated 26<sup>th</sup> June 2003 and 12(a) dated 28<sup>th</sup> June 2004.

15. The plaintiff said he submitted his building plans for approval to the council and he was yet to receive it back. Although the defendant submitted there was nothing to show that the plans were submitted, pex 4 and 5 are correspondences to the council asking the council why the plans submitted had not been approved. These letters were dated before the plans for the defendant were approved in 2006. The plaintiff also contended that the council never sued him for breach of the terms of the lease. It is not open to the defendant to rely on non-compliance of the lease terms to alienate the plaintiff of his plot as he is not an officer of the municipal council to take that line of defence. I find therefore that there was no valid repossession of the suit plot as undertaken by the council and subsequently they had no plot to allocate to the defendant. It follows that the defendant's action of carrying out developments on Bungoma Municipality/572 amounts to trespass and must be stopped. In the result that I find the plaintiff has proved his case on the standards set by law.

16. The defendant submitted that should this court find the Plaintiff, then he be pardoned from paying costs to the plaintiff. The defendant filed a defence in which he denied the plaintiffs claim in its entirety and demanded full proof. After the plaintiff had testified and produced his documents which then became available to him, he still chose to take the witness box to prove he was entitled to the plot. It beats logic therefore for the defendant to say he was misled by the reckless and negligence officers of the council who made him believe the plot was genuinely his even after he heard the plaintiff's evidence. Having put the plaintiff to do the case to conclusion, it would be unfair to deny the plaintiff costs completely. However this court takes into account the fact that the municipal council was the origin of the plaintiff's misfortune. Taking all matters into account, I allow the plaintiff suit with half costs of the suit to be paid by the defendant.

**DATED, SIGNED and DELIVERED** this 26<sup>th</sup> day of June 2014

**A. OMOLLO**

**JUDGE.**