



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 46 OF 2019**

**ESTHER MUMBI NDEGWA**

**suing as the legal Representative of the Estate of Francis Ndegwa, Deceased.....PLAINTIFF**

**-VERSUS-**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> DEFENDANT**

**SAMUEL WAMBU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. Vide Plaintiff dated the **31<sup>st</sup> December 2018**, the Plaintiff has sought for the following Reliefs;

- a. *Permanent injunction restraining the Defendants from alienating, entering upon, taking possession, selling, developing, transacting and/or in any other way dealing with plot number 93, Kariobangi Light Industries.*
- b. *An order compelling the 1<sup>st</sup> Defendant to stop processing a title Deed for the Plot in the name of the 2<sup>nd</sup> Defendant.*
- c. *Declaration that Plot number 93 is legally owned by the Estate of the late Francis Ndegwa, now Deceased.*
- d. *Costs of the suit and Interest hereof.*
- e. *Any other or further orders that this honourable court may deem fit so to grant.*

2. Upon being served with the Summons to Enter Appearance and Plaintiff, the 1<sup>st</sup> Defendant herein duly entered appearance on the 20<sup>th</sup> March 2019, and thereafter filed a Statement of Defense on the 22<sup>nd</sup> July 2019, whereby the 1<sup>st</sup> Defendant denied the claim by and/or on behalf of the Plaintiff over and in respect of the suit Property.

3. On the other hand, the Plaintiff herein was unable to personally serve the summons to Enter Appearance and Plaintiff upon the 2<sup>nd</sup> Defendant. Consequently, the Plaintiff sought for and obtained leave to serve the Summons to Enter Appearance vide substituted means, namely advertisement in one of the Daily Newspapers.

4. Pursuant to and in line with the Leave granted, the Plaintiff proceeded to and indeed served the Summons to Enter Appearance and the Plaintiff by advertising same in the Standard Newspaper of 17<sup>th</sup> February 2020.

5. Nevertheless, despite being served vide substituted means, the 2<sup>nd</sup> Defendant neither entered appearance nor filed a Statement of Defence. Suffice it to say, that the 2<sup>nd</sup> Defendant, has therefore not opposed the subject suit.

**EVIDENCE BY THE PARTIES:**

**PLAINTIFF'S EVIDENCE:**

6. The Plaintiff herein testified as PW1 and same averred that the suit property herein was duly allocated to and/or in favor of one Francis Ndegwa, now deceased and that the allocation thereof was duly gazette by the 1<sup>st</sup> Defendant herein on the 27<sup>th</sup> August 1982.

7. It was the Plaintiff's further evidence that upon the gazette by and/or at the instance of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant herein proceeded to and issued a confirmation letter dated the 24<sup>th</sup> May 1985, which essentially confirmed that the Deceased was the owner of the suit Property.

8. Be that as it may, the Plaintiff further testified that sometimes after the confirmation that the suit plot belonged to and/or was owned by the Deceased, one namely, P. M. Kinyanjui, for and/or on behalf of the 1<sup>st</sup> Defendant, attempted to cancel the allocation in favor of the Deceased, but the attempted cancellation was challenged in court vide Nairobi HCC 1674 of 1982.

9. Further, the Plaintiff testified that after the allocation and/or alienation of the suit property to and in favor of the deceased, same entered upon, took possession and constructed a two-storey stone building, over and in respect of the suit property.

10. Be that as it may, the Plaintiff further testified that without any lawful authority and due regard to the rights and/or interests of the estate of the Deceased, the 1<sup>st</sup> Defendant herein, commenced a process, whereby same started to process a title in favor of the 2<sup>nd</sup> Defendant.

11. Owing to the foregoing, the Plaintiff testified that it therefore became necessary and/or appropriate to file and/or commence the subject suit, so as to avert the offensive activities by and/or on behalf of the Defendants, jointly and/ or severally.

#### **EVIDENCE BY THE 1<sup>ST</sup> DEFENDANT:**

12. Even though the 1<sup>st</sup> Defendant duly entered appearance and filed a Statement of Defense, same neither filed a list of witnesses nor witness Statements or at all.

13. Owing to the fact that the 1<sup>st</sup> Defendant neither filed a list of witness nor witness statements, same therefore had no witnesses to call.

14. In short, the 1<sup>st</sup> Defendant herein did not tender any evidence or at all, to controvert the evidence tendered by and/or on behalf of the Plaintiff.

#### **EVIDENCE BY THE 2<sup>ND</sup> DEFENDANT:**

15. On his part, the 2<sup>nd</sup> Defendant neither entered Appearance nor filed any Statement of Defense. Consequently, same similarly tendered no Evidence before the court.

#### **SUBMISSIONS:**

16. At the close of the Plaintiff's case, the advocate for the Plaintiff and the 1<sup>st</sup> Defendant sought the liberty of the court to file and exchange written submissions. In this regard, the Court thereafter obliged and directed that the Parties do file and exchange the Written Submissions.

17. Pursuant to and in line with the directions of the court, the Plaintiff filed her written submissions on the 10<sup>th</sup> February 2022, whereas the 1<sup>st</sup> Defendant filed same on the 13<sup>th</sup> February 2022.

18. The two sets of written submissions are on record and the same have been duly considered, taken into account and appreciated. For clarity, the relevant portions thereof, shall be utilized in resolving the subject dispute.

#### **ISSUES FOR DETERMINATION**

19. Having reviewed the contents of the Plaint dated the 31<sup>st</sup> December 2018, the witness Statements which was filed therewith, as well as the Oral testimony by the Plaintiff and having similarly taken into account the Statement of Defense dated the 15<sup>th</sup> July 2019, and which was filed by the 1<sup>st</sup> Defendant, the following issues are germane for Determination;

*a. Whether the Plaintiff is the lawful owner and/or registered Proprietor over and/or in respect of the suit Property.*

*b. Whether the Defendants have any lawful Rights and/or claim over the suit Property.*

*c. Whether the 1<sup>st</sup> Defendant has been Mis-joined in the Subject suit.*

#### **ANALYSIS AND DETERMINATION:**

##### **ISSUE NUMBER 1**

**Whether the Plaintiff is the Lawful Owner and/or Registered Proprietor over and/or in respect of the Suit Property.**

20. The Plaintiff has tendered before the court evidence showing that the suit plot namely, Plot number 93, Kariobangi Light Industries, was duly and lawfully allocated to one Francis Ndegwa, now deceased vide letter dated the 24<sup>th</sup> May 1985. For clarity, the letter of allotment, was neither challenged nor impeached by the 1<sup>st</sup> Defendant.

21. On the other hand, the Plaintiff also adduced evidence vide Kenya gazette notice, which was published on the 27<sup>th</sup> August 1982, which similarly confirmed that Plot number 93, was duly registered in the name of the Deceased.

22. It is worthy to note that the various documents, which were filed and relied upon by the plaintiff herein were issued by and/or at the instance of the 1<sup>st</sup> Defendant and not otherwise.

23. In my humble view, having issued and/or generated the letter of allotment, the letter of verification of ownership, as well as the gazettelements, it was not open for the 1<sup>st</sup> Defendant to challenge and/or otherwise contest the Plaintiff's ownership of the suit Property.

24. However, despite the plethora of evidence, the 1<sup>st</sup> Defendant herein still had the audacity to contend that the Plaintiff was not the owner of the suit property and that in any event, the Plaintiff had sold the suit Property to a 3<sup>rd</sup> party, but was now seeking to repudiate the sale.

25. In my humble view, the suit Plot had been alienated to and/or in favor of the Plaintiff and consequently, the Plaintiff acquired and/or accrued lawful and legitimate rights thereto, which could only be defeated via a lawful process and not otherwise.

26. In a nutshell, the Plaintiff was entitled to absolute and exclusive rights to occupy, possess and or use of the suit property, to the exclusion of all and sundry, the Defendants herein not excepted.

27. In support of the foregoing holding, it is imperative to take cognizance of the decision in the case **Ocean View Plaza Ltd v Attorney General [2002] eKLR**, where the honourable court observed as hereunder;

***Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act.***

#### **ISSUE NUMBER 2:**

##### ***Whether the Defendants have any lawful Rights and/or claim over the suit Property.***

28. Having allocated and/or alienated the suit property to and in favor of the Plaintiff, the 1<sup>st</sup> Defendant herein, was obliged and/or obligated to respect the Plaintiff's title to and in respect of the suit property.

29. However, if there arose a situation that would warrant and/or necessitate the revocation of title and repossession thereof, it would have been obligatory upon the 1<sup>st</sup> Defendant to issue and/or generate the requisite notices and thereafter serve same upon the Plaintiff.

30. Notwithstanding the foregoing, the Defendant herein has denied and/or disputed the ownership of the suit property by the Plaintiff, in terms of the Statement of Defense that was filed.

31. Be that as it may, when it came to the hearing, the 1<sup>st</sup> Defendant abandoned the allegation and/or contentions disputing ownership of the suit property by the Plaintiff. To the contrary, the 1<sup>st</sup> Defendant essentially conceded ownership of the suit plot by the Plaintiff.

32. On his part, the 2<sup>nd</sup> Defendant, failed to enter appearance or file Statement of Defense. Consequently, it thus means that the 2<sup>nd</sup> Defendant, has no interest, stake, Rights and/or claim thereto.

33. Nevertheless, having assessed the totality of the evidence tendered, it is my finding that no basis has been laid out, exhibited and/or espoused by the Defendants herein that the Plaintiffs title was procured by fraud, illegally and/or by corrupt practice.

34. In the premises, it is worthy to state and hold that the Defendants herein have no lawful and legitimate basis to interfere with the Plaintiffs ownership, occupation and/or title, whatsoever.

35. Consequently, the actions by the Defendants herein, whose effect, is to interfere with and/or restrict the Plaintiffs rights, entitlement to and in respect to the suit land, constitutes an illegality and thus same must be restrained.

36. For the avoidance of doubt, the extent and scope of a registered owners rights to land were discussed and delineated in the decision in the case of **Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR**, where the court held as hereunder;

**I take the view stated in the case of *Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported) at para. 64 that,***

***“The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra) where the Court stated as follows,***

**‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’**”

**ISSUE NUMBER 3:**

**Whether the 1<sup>st</sup> Defendant has been Mis-joined in the Subject suit.**

37. Upon being served with the Plaint and Summons to enter appearance, the 1<sup>st</sup> Defendant duly Entered appearance and filed a Statement of Defense and in respect of which same contended as hereunder;

**“.para 4**

***.The contents of paragraph 5 & 6 of the Plaint are hereby denied and the Plaintiff put to strict proof thereof. In further reply to paragraph 6 of the Plaint, the Defendants avers that if at all there is any storey building on the plot, which is denied, the same do not belong to the late Francis Ndegwa as alleged.***

**Para 6**

***The Defendants denies the contents paragraph 8 of the Plaint and the Plaintiff is put to strict proof of the same, in further response to paragraph 8 and without prejudice to the foregoing, the 1<sup>st</sup> Defendant avers that the Plaintiff has willfully and/or negligently refused to take notice of a sale agreement dated the 23th July 1984, in which Francis Ndegwa transferred the suit to another person.***

**Para 7**

***The contents of paragraph 9 of the plaint are hereby denied and the Plaintiff put to strict proof thereof. The Defendants denies that the Plaintiff has been in possession of the suit property since 27<sup>th</sup> August 1982 to date. If at all the plaintiff is in possession of the suit property to date, which is denied then possession is illegal.***

38. From the foregoing paragraphs, which I have reproduced above, it is apparent that the 1<sup>st</sup> Defendant was contending that the Plaintiff herein was neither legally nor lawful the owner of the suit property.

39. On the other hand, it is also apparent that the 1<sup>st</sup> Defendant, seems to alleging that the Plaintiff’s predecessor, namely, Francis Ndegwa, now deceased had sold the suit property to and/or in favor of a third party and that the Plaintiff was merely intent on reneging from the sale of the suit property.

40. Essentially, it is evident that the 1<sup>st</sup> Defendant seems to have been intent on alienating and/or transferring the suit property to and/or in favor of some undisclosed third party, whom the 1<sup>st</sup> Defendant purported to have bought the suit property from the deceased.

41. Based on the foregoing, it is therefore obvious that the Plaintiff was within her lawful rights, to commence and/or maintain the subject suit as against both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.

42. In the premises, I find and hold that the allegation that the 1<sup>st</sup> Defendant was mis-joined in the subject suit, is erroneous, misleading and/or misguided.

43. Simply put, the 1<sup>st</sup> Defendant herein had engaged and/or indulged in certain activities, which were calculated to interfere with and/or defeat the rights of the Plaintiff over the suit property. In this regard, the Plaintiff was obliged to implead the 1<sup>ST</sup> Defendant.

44. In short, there was a lawful cause of action as against the 1<sup>st</sup> Defendant and in this regard, the suit against the 1<sup>st</sup> Defendant, was well grounded and thus disclosed a reasonable cause of action.

**FINAL DISPOSITION:**

45. Having reviewed the issues for determination, it is now appropriate to make final orders as pertains to and/or concerns the subject matter.

46. Consequently, I find and hold that the Plaintiff has proven her case against the Defendants herein on a balance of probabilities and in this regard I enter judgment in favor of the Plaintiff as hereunder;

a. *Permanent Injunction be and is hereby granted restraining the Defendants from alienating, entering upon, taking possession, selling, developing, transacting and/or in any other way dealing with plot number 93, Kariobangi Light Industries.*

b. *The 1<sup>st</sup> Defendant be and is hereby restrained from processing any title deed for the suit Plot, to and in the name of the 2<sup>nd</sup> Defendant.*

c. Declaration be and is hereby issued that plot number 93, Kariobangi Light Industries, belongs to and is legally owned by the estate of the late Francis Ndegwa.

d. Costs of the suit be and is hereby awarded to the Plaintiff.

47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula      Court Assistant**

Ms Purity Makori for the Plaintiff.

N/A for the Defendants.