



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.174 OF 2012

JANE KARAMBU MBURUGU.....PLAINTIFF

VERSUS

ELIZABETH WAMBUI KAMACHIR.....DEFENDANT

RULING

By plaint amended on 29/9/2012, the plaintiff herein described as the legal representative of the estate of Eliud Mburugu Kanjau (deceased) avers that the property known as Unsurveyed Residential A5 plot No.99 in Nanyuki Municipality is a property belonging to the deceased's estate to which he is the legal representative.

He claims that the defendant entered upon the property and is committing waste thereon by erecting buildings, sewer system, fences among other things. Despite demand and notice of intention to sue having been given the defendant has refused and/or neglected to stop the said acts of waste. The plaintiff avers that there is no other suit between her and the defendant over the very matter in this court or in any other court.

The plaintiff prays for a declaration that the defendant, her servants and/or agents are trespassers upon the property known as Unsurveyed Residential A5 plot No.99 – Nanyuki Municipality belonging to the estate of Eliud Mburugu Kanjau. An order for eviction to be issued against the defendant, her servants and/or agent from Unsurveyed Residential A5 plot No.99 Nanyuki Municipality. An order for permanent injunction restraining the defendant, her servants and/or agents from committing waste, interfering or in any other way dealing with the property known as Unsurveyed Residential A5 plot No.99 Nanyuki Municipality. Lastly the plaintiff prays for costs of this suit and interest at court rates.

Accompanying the suit is an application dated 1/8/2012 commenced by way of Notice of Motion. He seeks for orders that the Honourable Court be pleased to issue an order of injunction restraining the respondent herein, her employees, agents, servants or anybody claiming any right under her from committing waste, interfering or in any other way dealing with the property known as Unsurveyed Residential A5 plot No.99 Nanyuki Municipality pending the hearing and determination of this suit.

The application is grounded on facts that the applicant is a legal representative of the estate of Eliud Mburugu Kanjau to which estate the property known as Unsurveyed Residential A5 plot No.99 Nanyuki Municipality belongs and that the respondent herein has without any color of right entered upon the property and is committing waste thereon by way of erecting a residential house, sewer system among other developments. That if the wastage on part of the respondent goes on unchecked, the applicant stands to suffer irreparable loss.

In the supporting affidavit, the applicant states that she is the legal representative to the estate of Eliud Mburugu Kanjau (deceased). One of the properties to the estate of the deceased is a property known as Unsurveyed Residential A5 plot No.99 Nanyuki Municipality. Lately, she came to know that the respondent herein is committing waste on the property by erecting a residential building, sewer system thereon amount other developments. The plaintiff believes that if the development by the respondent continues unchecked the estate of the deceased to which she is the legal representative stand to suffer irreparably. The respondent insisted on continuing with her acts even after being served with a demand letter. The loss likely to be suffered cannot be compensated by way of damages and hence the application for injunction to last until the matter is heard and determined.

The respondent filed a replying affidavit whose import is that the suit property was allotted to her on the 3/7/1998. She paid for the allotment fees on the same day within the 30 days as required by the allotment letter. The applicant has totally failed to exhibit any payment of the allotment fees. That the respondent was informed by her advocates on record, which information she verily believes to be true, that an allotment, as it was, lapsed if a party failed to pay within 30 days and the Commissioner of Lands was then at liberty to allocate the subject property to any other deserving person. That she has done major developments on the suit property as shown by the applicant's own annexures. She was informed by her advocates on record, which information she verily believe to be true, that the balance of convenience lies with her having paid, taken possession and developed the suit property.

The applicant filed a supplementary affidavit stating that she had the opportunity to inspect the file at the Municipal Council of Nanyuki which are the offices holding the document belonging to the respondent. The allotment letter in the said file is different from what is annexed to the respondent replying affidavit. It is apparent therefore that the respondents documents are illegally manufactured in contemplation of her response to the application. That it defeats logics how an allotment can be done on 3/7/1998 acceptance is written the same day in Nairobi and payment done vide a bankers cheque on the same day, which is not reflected on the fee receipts. She believes that the documents stated above being respondents annexure number E2 are a manufacture. When she applied for inspection of the plot on 10/5/2011 the plot was still in the names of her deceased husband hence the reasons why the receipts were issued in his names. That her deceased husband had accepted the allotment and todate there has never been an official communication in revocation of his allotment which standard procedure demands must done if one fails to accept an offer.

The applicants submits that it is the applicant contention both in the pleadings and affidavits that she is a legal representative to the estate of Eliud Mburugu Kanjau which estate has as one of its assets plot No.Unsurveyed Residential A5 plot No.99 Nanyuki Municipality.

The applicant has gone to the pain of attaching copies of the letter of allotment dated 7/10/1993 showing well that the suit property was allotted to Eliud Mburugu to whose estate the applicant represents. The applicant contends further that the respondent has trespassed into the suit property and is committing waste thereon by putting up unauthorized constructions. She annexed to the affidavit the photographs of the said developments. The above facts are controverted as no evidence in rebuttal has been filed by the respondent. In other words the location and extend of the suit property is not in dispute.

The source of annexure JKM-A is explained in the supplementary affidavit as the file was found in the registry of Municipal Council of Nanyuki after an inspection request was paid for and conducted by the applicant. This can only confirm the applicant's view as explained in paragraph 5 of the applicant's supplementary affidavit that the documents by the respondent are manufactured. The applicant contends that the suit property is still in the names of the deceased and hence the reasons why the official receipts were still issued in the names of the deceased. Further it is noteworthy that the respondent has not exhibited any official communication indicative of the revocation of the applicant's letter of allotment as to tilt the balance of probability to the respondent's side. With allotment being in force they urge the court to invoke the provisions of article 40 of the Constitution of Kenya, 2010 as read with article 60(i) (b) of the said Constitution.

This court finds that there exist three documents that should assist it to make an informed decision.

On the 7th of October, 1993 a letter of allotment was issued to Eliud Mburugu (deceased). The letter read and I quote;

“I have the honour to inform you that the government on behalf of the County Council hereby offers you a grant of the above plot shown edged red on the attached plan No..... subject to your formal written acceptance of the following conditions and to the payment of the charges as prescribed hereunder:

Area – 0.10 hectares (approximately)

Term – 99 years from the 1/9/1993

Stand premium Sh.5,000/=

Annual rent Sh.1,000/=.....”

This allotment letter is not signed. There is no receipt by the Commissioner of Lands of the monies paid by the plaintiff to show acceptance of the offer.

The second document is a letter of allotment issued to Elizabeth Wambui Kamachir, the defendant herein in respect of the same parcel of land that states;

“I have the honour to inform you that the government on behalf of the County Council hereby offers you a grant of the above plot shown edged red on the attached plan No..... subject to your formal written acceptance of the following conditions and to the payment of the charges as prescribed hereunder:

Area – 0.10 hectares (approximately)

Term – 99 years from the 1/7/1998

Stand premium Sh.5,000/=

Annual rent Sh.1,000/=.....”

The second allotment letter is signed by a Mr. Odhiambo D. the respondent accepted the offer in writing and paid the fees that were required on 3/7/1998.

The third document is the allotment letter dated 18/8/2011 that was introduced by the plaintiff but the defendant has not controverted it's existence.

The three documents put this court in serious doubt as to who is the proprietor of the property hence the matter will only be understood after full hearing of case. The doubts will be cleared by witnesses from the lands office and the Nanyuki Municipal Council. ***In Giella -VS- Cassman Brown***, the court of appeal observed that where the court is doubt, the matter must be decided on a balance of convenience. This court finds that the balance of convenience tilts towards not granting the injunction as the defendant has already taken possession and has developed the property though neither party has a certificate of lease and the lease itself. The defendant has made acceptance and paid the prerequisite fees. This court notes that though where two equities are equal the first in time prevails, the plaintiff has not complied with the letter of offer which lapsed 30 days after offer.

The upshot of the above is that the application is dismissed with costs in the cause.

Dated, signed and delivered at Nyeri this 24th day of September 2014.

A. OMBWAYO

JUDGE