



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CASE NO. 352 OF 2010**

**EPHANTUS KAGUTHA MWANGI.....PLAINTIFF**

**-VERSUS-**

**COUNTY COUNCIL OF THIKA.....1<sup>ST</sup> DEFENDANT**

**WIMANO WA KYAUMA WOMEN'S GROUP.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The Plaintiff by a plaint dated 21<sup>st</sup> July, 2010 filed the instant suit and seeks judgment against the defendants jointly and severally for:-

- a. Delivery of vacant possession of Plot No. 90 Ithanga Market and/or in the alternative;
  - i. Special damages in the sum of Kshs. 80,178.50 plus interest thereon at commercial rates from 2004 to date, or;
  - ii. Payment of the full value of the suit property at commercial rates as at the judgment date, whichever sum is higher.
- b. An order of mandamus against the 2<sup>nd</sup> defendant to remove any and all structures erected on the suit property.
- c. Permanent injunction orders as against the 2<sup>nd</sup> defendant to refrain from construction of any structures on the suit property.
- d. General damages for trespass.
- e. Loss of user from September, 2004 till the date of delivery of vacant possession or payment as in prayer (a) above.
- f. Interest on 9a) (i) and (ii) and (e) above at commercial rates.
- g. Costs and interest at court rates.
- h. Any other relief the Honourable Court deems fit and just to grant.

The plaintiff's claims is that the purchased the suit property in 2004 and paid the requisite transfer processing fees to the 2<sup>nd</sup> defendant who duly approved the transfer to the plaintiff.

The plaintiff has since the approval of the transfer paid and continues to pay all dues payable to the 1<sup>st</sup> Defendant in respect to the said plot.

The plaintiff claims the 1<sup>st</sup> defendant illegally and fraudulently allocated the suit plot to the 2<sup>nd</sup> defendant and has allowed and/or permitted the 2<sup>nd</sup> defendant to occupy and utilise the suit property to the exclusion of the plaintiff. The 1<sup>st</sup> defendant filed a defence and denies allocating a plot No. 90 Ithanga market to the 2<sup>nd</sup> Defendant and/or allowing the 2<sup>nd</sup> defendant to construct and/or trespass on the said plot. The 1<sup>st</sup> defendant states it is the plaintiffs' responsibility to evict any trespassers from his property. The 2<sup>nd</sup> defendant did not appear nor file a defence in the suit.

The matter was listed for hearing before me on 26<sup>th</sup> December, 2012 when on the application for adjournment by the 1<sup>st</sup> Defendant I adjourned the hearing to 24<sup>th</sup> January, 2013 when the matter was once more listed for hearing before me. On the said date only the plaintiff together with his counsel appeared and I allowed the hearing to proceed in the absence of the plaintiff since the hearing date had been fixed in court in the presence of the 1<sup>st</sup> defendant's counsel.

The plaintiff testified as PW1 and he adopted the witness statement made by him on 24<sup>th</sup> April, 2012 as evidence and relied upon and produced the bundle of documents filed in court on 10<sup>th</sup> March, 2012. It is the plaintiffs' evidence that he purchased the suit property in August 2004 from Cephas Mbugua Ngugi for Kshs. 70,000/= and paid all the necessary transfer fees to the 1<sup>st</sup> Defendant and that on 17<sup>th</sup> August 2004 the 1<sup>st</sup> defendant's Town Planning Committee approved the transfer to the plaintiff and henceforth the plaintiff has continued to pay all the council dues to the 1<sup>st</sup> Defendant but he 1<sup>st</sup> Defendant has despite repeated demands neglected and/or refused to point out the Plot beacons to the plaintiff. The plaintiff states that he is the rightful and legal owner of Plot No. 9 Ithanga Market and wishes the court to direct the defendant to point out the plot beacons to him and for the 2<sup>nd</sup> defendant to vacate the plot and deliver vacant possession to the plaintiff.

Alternatively, the plaintiff seeks compensation from the 1<sup>st</sup> defendant in the sum of Kshs. 500,000/= being the current market value of a similar plot in the same locality.

The plaintiff called one witness one Zacharia Makenzi Ndeti who testified as PW2. The witness is a practising valuer and he testified that he on the instructions of the plaintiff visited the suit property for purposes of advising on the current value of the plot. The witness produced a valuation report marked as exhibit 2. As per the valuation he confirmed there is a permanent building on the suit property. The witness valued plot No. 90 Ithanga Trading Centre Thika District on the basis of it being undeveloped at Kshs. 500,000/=. This according to the witness would be the current market value of Plot NO. 90 Ithanga Trading Centre in a vacant state.

I have reviewed the pleadings and the evidence tendered by the plaintiff and make the following factual findings;

- i. That the plaintiff purchased the subject suit property from Cephas Mbugua Ngugi and the 1<sup>st</sup> defendant duly approved the transfer of the property to the plaintiff after the necessary processing fees for the transfer was paid to the 1<sup>st</sup> defendant.
- ii. That the plaintiff has since 2004 when the transfer was effected to him continued to pay to the 1<sup>st</sup> defendant the ground rent and rates as per the payment receipts issued by the 1<sup>st</sup> defendant to the plaintiff and produced in evidence.
- iii. That the plaintiff has not been able to take possession and develop the plot as the 1<sup>st</sup> defendant has failed to point out the plot beacons of the plot and that the 2<sup>nd</sup> defendant has with the approval of and/or concurrence the 1<sup>st</sup> defendant occupied and constructed a permanent building on the suit property.
- iv. That a vacant plot of similar size to the suit property at the Ithanga market would have a current market value of Kshs. 500,000/=.

The 1<sup>st</sup> defendant did not participate in the hearing and the 2<sup>nd</sup> defendant did not appear in the case at all

and nor file any defence and in the result the evidence of the plaintiff was uncontroverted. The plaintiff testified that he has made various efforts to have the county council point out his plot to him and/or in case there is a case of double allocation the 1<sup>st</sup> defendant to allocate the plaintiff an alternative plot. There is no doubt that in the records of the 1<sup>st</sup> defendant the plaintiff is recorded as the owner of Plot No. 90 Ithanga Market as the 1<sup>st</sup> Defendant continues to issue the plaintiff with rates and land rent demand notes which the plaintiff has dutifully paid. As the 2<sup>nd</sup> defendant never appeared in this suit it is not clear and/or apparent what the 2<sup>nd</sup> Defendant's to or interests claim to Plot No. 90 Ithanga Market is but if there is a permanent building on the plot as the plaintiff states, then the construction of the same must have been with the approval of the 1<sup>st</sup> defendant otherwise it would have been condemned as an illegal structure and ordered to be demolished.

Having regard to all the evidence tendered by the plaintiff I am satisfied that the plaintiff as at 11<sup>th</sup> August, 2004 when the 1<sup>st</sup> defendant approved the transfer to him became legally entitled to ownership of Plot No. 90 Ithanga market, Thika county. As the plaintiff claims the 1<sup>st</sup> defendant is yet to point out the plot beacons to him I do not consider that it has been established that the 2<sup>nd</sup> defendant is in trespass onto the plaintiff's plot and I therefore cannot grant the prayers prayed under prayers (b) (c) and (d) of the Plaintiff. The plaintiff has also not demonstrated what loss and/or damage he has suffered on account of loss of user and I accordingly cannot grant any orders under payer (e) of the plaint.

In the premises therefore I enter judgment against the 1<sup>st</sup> defendant in favour of the plaintiff in the following terms:-

- a. That the 1<sup>st</sup> defendant do point out the beacons of Plot No. 90 Ithanga Market Thika County to the plaintiff within 45 days of being served with the decree in this case and/or;
- b. Failing (a) above judgment be and is entered in favour of the plaintiff against the 1<sup>st</sup> defendant for Kshs. 500,000/= being the current market value (undeveloped) of Plot 90 Ithanga market whereupon the plaintiff will relinquish any further claim to the suit property.
- c. Interest at court rates on (b) above from date of judgment until payment of the amount in full.
- d. Costs of the suit with interest at court rates.
- e. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants