



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**Civil Appeal 83 of 1998**

**ROBIN GITHINJI .....PLAINTIFF**

**VERSUS**

**PETER WANJOHI WARUL.... 1<sup>ST</sup> DEFENDANT**

**J U D G M E N T**

The Plaintiff's claim against the Defendant is for;

- 1. A declaration that plot No.90 Kutus Town belongs to the Plaintiff***
- 2. Eviction from plot No.90 Kutus town.***

The brief facts of the case are that on 29/4/1983 the Plaintiff applied for a plot in Kerugoya/Kutus Town Council. He was allocated plot No.88 which was later changed to plot No.90 (P.EXB.2). He occupied the plot as a garage and has paid land rates (P. EXB.3 & 4). In 1989 he left the 1<sup>st</sup> Defendant (his son in law) to use the plot as it had electricity. He was to vacate it once he got his own. He got his own plot adjacent to plot No.90 but he refused to move out when requested to in 1996. He got a 99 year old lease in 1994. The plot given to the Defendant was No.91.

The Municipal surveyor was called upon to identify the boundary between the plot belonging to the Plaintiff and that belonging to the Defendant. He did file a report dated 14/12/2004. In this report he states that the Plaintiff's plot is No.90 measuring 15ftx30ft while that of the Defendant is plot No.592 measuring 15ftx30ft. He also attached a PDP showing the location of the 2 plots.

The said surveyor was cross-examined by both parties' Counsels. He stated that the Plaintiff's plot measures 50ft x 100ft. The town clerk indicated in his evidence that the plot No.90 measured 100ft by 100ft. He stated that vide the minutes of 14/7/1997 the plot was divided into two plots of 50ft by 100ft each. The Plaintiff was not present when this was passed and there was no approval by the Commissioner

of lands for the sub-division. The subdivision was to benefit the Defendant who was on the plot.

She confirmed that the Defendant owns an adjacent plot. To her the subdivision was irregular as the Plaintiff did not apply for it.

The Defendant's case is that he was allocated plot No.592 in 1972. He has developed it. The Plaintiff has plot 12 and 88 at new Kutus town. There was subdivision through minutes, where by he occupied one side while the Plaintiff occupied one side. He had been paying rates and rent (D. EXB.2). He denied occupying the Plaintiff's plot.

Both Counsels filed written submissions. Mr. Maina Kagio for the Plaintiff submitted that plot No.90 Kutus belongs to the Plaintiff. And that it measures 100ft x 100ft. There was no approval for the sub-division of the plot into two plots. He therefore urges the Court to enter Judgment in favour of the Plaintiff.

Mr. Githinji Karuri for the Defendant submitted that there was no evidence to show that the Plaintiff applied for any plot in 1983. And that there is no plot in Kutus town measuring 100x100ft.

Issues for determination are;

1. Who the owner of plot No.90 Kutus town is.
2. Whether the Defendant is occupying plot No.90 or any part thereof.
3. Whether the declaration sought and the eviction orders should issue.

I have considered the evidence that was adduced plus the submissions made by both Counsels. The record confirms through P.EXB1 that the Plaintiff applied for a timber yard at Kutus town in 1983. The same was approved subject to availability of a site at Kutus town.

And on 27<sup>th</sup> October 1994 vide minute TPW & H 39/94 the Plaintiff's application for a 99 years lease to plot No.90 Kutus was approved. The Municipal Surveyor Mr. T.K. Muchemi in his report to the Court dated 14/12/2004 and in his evidence upon cross-examination confirmed that plot No.90 belongs to the Plaintiff. The Deputy town clerk (PW 3) told the Court that from the records plot No.90 belongs to the Plaintiff. And that there had been an attempt to subdivide it but it was not approved.

The evidence also shows that plot No.592 belongs to the Defendant. He has been paying rates and rents on it. These plots Nos. 90 and 592 are two distinct plots. Even the part Development plan (PDP) annexed to the surveyor's report confirms that.

My finding on the 1<sup>st</sup> issue is therefore that the plot No.90 Kutus belongs to the Plaintiff. The next issue is whether the Defendant is in occupation of that plot No.90 or a part thereof.

The evidence before the Court is that plot No.90 like any other plot in Kutus measured 100ft x 100ft. The Council on 14/7/1997 decided that this plot should be sub-divided into 2 equal plots of 50ft x 100ft each, so that the Plaintiff and Defendant could each get a plot out of this. There is no evidence that plot No.592 resulted from the sub-division.

There is no evidence that the said subdivision was even effected. From the evidence of P.W.3 the deputy town clerk plot no.90 belongs to the Plaintiff. It was initially measuring 100ft by 100ft and divided into 2 plots i.e. 50ft x 100ft each. This was on 14/7/1997. There was no approval from the commissioner of lands. And he stated that there are plots measuring 100ft by 100ft. Within Kutus town. To him the subdivision was irregular. Further to this when the decision to subdivide the plot was arrived at the Plaintiff was not present but the Defendant was present as a committee member. They unanimously agreed to subdivide the plot.

The Plaintiff has explained the circumstances under which the Defendant came to work on his plot. The Council after allocating the plot to the Plaintiff had no authority whatsoever to subdivide the plot without;

- i) the owner's approval
- ii) the approval of the Commissioner of Lands.

The two above approvals are missing.

The evidence of the surveyor (P.W.2) was that each of the two plots i.e. plot No.90 and 592 measure 50ft by 100ft. Plot 90 does not measure 100ft by 100ft. What happened? I do find that the following have not been established by the Plaintiff;

- i) That plot No.592 which belongs to the Defendant is part of plot No.90 Kutus.
- ii) That plot No.592 is a result of the sub-division of plot No.90.
- iii) That what the Plaintiff is claiming is in fact plot No.592.

Even his pleadings don't talk of plot No.592. In fact it's the Defendant who has tried to explain in his defense that indeed plot No.90 was divided and he got his part which is plot NO.592 and he has developed it for commercial purposes. If that is the case then the people who offended the Plaintiff are the Kerugoya/Kutus Municipal Council whom the Plaintiff withdrew his claim against. Therefore no orders can be made against the Council in respect of the sub-division since the council is not a party to these proceedings.

As per the records at the Council the plot No.90 surveyed by P.W.2 belongs to the plaintiff while plot No.592 belongs to the Defendant. There is no evidence of encroachment. If the Defendant is crying foul on the sub-division which was done so many years ago then the Council ought to have remained a party in this suit.

I will therefore make a declaration that the Plaintiff is the owner of plot No.90 Kutus. However I will not issue any eviction orders as there has been no proof of encroachment on plot No.90 by the Defendant. That prayer for eviction is therefore dismissed.

Each party to bear his own costs due to the family ties between the parties.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 7<sup>TH</sup> DAY OF JUNE 2012.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**

**Mr. Igati for Maina for plaintiffs**

**Njue CC**