



**MOSES ATUTA & ANOTHER ..... PLAINTIFF**

**VERSUS**

**SUSANE WANJIKU AND SIX OTHERS ..... DEFENDANT**

**JUDGMENT**

The plaintiffs through their amended plaint averred that the seven Defendants herein have trespassed their land bearing L.R. No.209/1147 ( hereinafter referred to as ‘the suit property’).

According to the plaintiffs the Defendants have committed acts of trespass on or about November, 1993 by dumping building materials and erecting structures which are unlawful and without colour of any right. Thus they seek eviction of the Defendants from the suit property. Mesne profits and permanent injunction from and against the Defendants, are thus prayed for.

The Defendants have denied the claim of the plaintiffs and issues have been raised namely:

- “a. whether the 1<sup>st</sup> and 6<sup>th</sup> Defendants occupy a different portion of land being plot No.C Kibera Nairobi, allocated to them in 1994**
- b. Whether the 7<sup>th</sup> defendant occupies a different portion of land being plot No. A and B allocated to him**
- c. Whether the plots A, B, and C border the suit property**
- d. Whether there is any dispute as to the boundary and whether such dispute can be determined pursuant to provisions of registered Land Act (Cap 300)”**

The above issues are raised over and above the issues as to competency of the suit and whether the same is frivolous and without any cause of action.

The 1<sup>st</sup> Plaintiff gave evidence on behalf of the 2<sup>nd</sup> Plaintiff who is the registered proprietor of the suit land, through a power of attorney (P.Ex.3).

He gave history of events leading to the issuance of title deed in the names of the 2<sup>nd</sup> Plaintiff (Ex.10). He has adduced evidence as to payment of all required charges as specified in the letter of allotment dated 12<sup>th</sup> August, 1992 (P.Ex.5, 6) 7 and 7A). He also produced certificate of beacons. He also showed to the court that since then he has been paying rents. He however agreed that there were temporary structures present on the suit property, one on the south which belonged to 7<sup>th</sup> Defendant and a structure bordering the west of his property was occupied by a woman group officials 1<sup>st</sup> to 6<sup>th</sup> Defendants. After the allotment more structures were erected.

The Plaintiffs also called Mr. Martin Kavita Wambua a surveyor with the Department who produced a survey plan of the suit property which according to him was completed on 20<sup>th</sup> June, 1993 and asserted

that there is no other survey plan in respect of the suit property.

He further confirmed that the Deed plan attached to the grant No.I.R.6233 and the survey plan produced by him are in respect of the same property i.e. suit property. It was further testified by him that on his site visit, he found some beacons on the suit property but could not get access to others due to occupation by some people. In other words there were structures on the spot where other beacons were, placed.

In cross-examination it was stated that any documents from city council can only be used if they have passed through authority of the Commissioner of Lands. He specified that he had seen the development plan but the plan refers only to the suit property. He agreed that in survey plan there are markings showing some buildings.

This witness visited the suit property once again as per the directions of the court. He visited the site and prepared the survey report after inspections. All the parties were present during that exercise. He came to the following conclusions:

The area occupied by the proprietor is 0.0374 hectares and the areas occupied by the Defendants are in total 0.0458 hectares.

He had drawn a map showing the position on ground, and concluded that the Defendants do occupy part of the suit land. He also confirmed that mapping is conclusive but what is inconclusive is the position of the beacons which are on the portions whereon the structures are erected.

It also emerged from the evidence that the area surrounding the suit property is occupied by slum dwellers and is thickly populated.

The 1<sup>st</sup> to 6<sup>th</sup> Defendants' case was put forth by the 1<sup>st</sup> Defendant. She is a member of a women group, called *Kujitolea Kianda Women Group*. She recalled the year 1994 when a surveyor visited the land and placed a beacon inside her house. Thereafter she produced a letter of allocation in respect of plot C Kibera, Nairobi. The group also paid Sh.19,114 towards the fees. However she did not produce any beacon certificate nor a title deed.

7<sup>th</sup> Defendant denied that he has constructed on the land of the Plaintiffs. He similarly produced letter of allotment dated 27<sup>th</sup> October, 1994 and receipt for Shs.201,847. He has constructed his home (mud house covered with cement) and has occupied the same since 1984. He also produced a letter dated 17<sup>th</sup> June, 2003 from the Commissioner of Lands addressed to the Plaintiff asking him to return the title deed. He however agreed that his plot is not surveyed and that he has not been given a title deed.

This in short is the evidence before the court. The Defendants' counsel did neither file the skeleton submissions nor appeared for oral submissions and hence the court has been deprived of any assistance from the Defendants as far as the final submissions are concerned.

I cannot but agree with the submissions of the Plaintiffs' counsel that the Defendants have not claimed ownership of the suit property by adverse possession. As has been specified earlier on, their case as per the issues raised, as it seems to be, is that the plots where their structures are situate belong to them and thus they are not trespassing on the property of the plaintiffs. It also cannot be disputed that none of the Defendants has either produced any survey report or map or has produced the title deeds.

The Plaintiffs on the other hand have shown with preponderance of probability that 2<sup>nd</sup> plaintiff is the registered proprietor of the suit property and the structures belonging to the 7<sup>th</sup> Plaintiff and those of 1<sup>st</sup> to 6<sup>th</sup> Defendants are shown to be existing on the suit property. There are documentary evidence shown to the court by the Plaintiffs to that effect and I have no option but to accept the same as the legitimate documents showing proprietary rights of the 2<sup>nd</sup> Plaintiff.

The registration of the 2<sup>nd</sup> Plaintiff is the first registration and can only be disputed on the ground of fraud. None is alleged herein. I am also aware of the legal position that a letter of allotment is merely an intent by the government to allocate the land and that it is not a title (see **Lillian Waithera Gachuhi vs. David Shikuku Mzee Eldoret H.C.10103 unreported.**)”

In the case **Wrek motors enterprises vs. Commissioners of Lands and 2 others Nairobi CA No.74 of 1997 versus Nairobi CA No.74 of 1997 (e KLR)** – The Court of Appeal held:

**“The endorsement or the appending of his signature by H.E. the President on the application to the Commissioner of Lands for the suit plot .... is not sufficient to grant title over land to anyone .... The title normally comes into existence after issuance of letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title documents pursuant to provisions held.”**

In this case the position is much stronger, as the title deed was issued and stamped on 20<sup>th</sup> August 1993 for the term of 99 years from 1<sup>st</sup> August, 1992. The Defendants asked for allocation in the year 1994 after the issuance of the Title deed to the 2<sup>nd</sup> Plaintiff.

It may be true that due to lack of survey the Defendants are presuming the ownership of the land occupied by them. They have not shown any documents to support their claims. The plaintiffs on the other side, have proved through the survey officials and survey maps and reports that the Defendants do occupy their land as shown in the markings of the survey plan. The Defendants are proved to be unlawfully occupying the land of the plaintiffs. They have no right over suit property and have no option but to vacate the same.

I therefore allow the plaint and grant the orders that:

- 1) The Defendants do vacate the part of the suit property occupied by them.
- 2) The Defendants are restrained by permanent injunction from entering, occupying or trespassing the suit property.
- 3) In the circumstances of the case, I do grant costs to the Plaintiff at lower scale.

I further direct that in the event of uncertainty on the execution of the order, P.Exs 9, 14 and 15 may be referred to, for the purposes of ascertaining the unlawfully occupied acres.

Dated and Signed at Nairobi this 27<sup>th</sup> day of February, 2008.

**K.H. RAWAL**

**JUDGE**

**27.2.08**