



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE 1441 OF 2005

HAROLD GERALD RURIGI PLAINTIFF

VERSUS

JOSEPH OUGO 1ST RESPONDENT

BENSON NDERITU 2ND RESPONDENT

EPHANTUS NJAGI..... 3RD RESPONDENT

STEPHEN ODALO 4TH RESPONDENT

ALICE WANGUI 5TH RESPONDENT

JOHN KIBIRO 6TH RESPONDENT

ANTHONY IRUNGU 7TH RESPONDENT

JULIUS NDUNGU 8TH RESPONDENT

FRANCIS NJENGA 9TH RESPONDENT

JOSEPH KIMANDU 10TH RESPONDENT

KIMANI NJOROGE 11TH RESPONDENT

NAIROBI CITY COUNCIL 12TH RESPONDENT

JUDGMENT

The Plaintiff herein claims that plot of land bearing L.R. No.22786 in Buru Buru River Bank Scheme was allotted to him and after finalizing all the process, he was given a lease for 99 years from the City Council of Nairobi executed on 6th July, 2004. Thus, he claims its proprietorship.

He further claims that on or about 11th January, 2004, 1st to 12th Defendants (12th Defendant being the City Council) illegally and without any colour of right entered the aforesaid property of the plaintiff

(hereinafter referred to as '**the plot**'). The Defendants also tried to allocate the said plot by subdividing and erecting some structures thereon.

In short, the plaintiff claims that the Defendants have trespassed on his plots and they should be evicted from there and that they should pay damages to the plaintiff as he has been deprived from its user and enjoyment.

The 1st to 11th Defendant filed their joint statement of defence. They denied that they have trespassed on the plot and claim that they have been allotted the plot by the City Council of Nairobi. They pleaded that 1st, 2nd, 3rd, 4th, 5th, and 7th Defendants are bona fide officials of Buru Buru Development Settlement Scheme (City carton).

They have pleaded in the plaint how from 17th March, 2000, they have been able to get allotments of the plots.

They thus pray that the plaint be dismissed with costs.

The 2nd Defendant, in its Defence filed on 21st June, 2007, denied that it allocated the plot to the Plaintiff and/or encouraged any of the 1st to 11th Defendant or other person to trespass on the plot or to erect structures thereon. However, after the evidence led by the Plaintiff, in its submissions, It was contended that the 1st to 11th Defendants have not shown their claims while the plaintiff has shown the letter of allotment and the lease agreement, Survey and Deed Plan.

It also denied that there is a case of double allocation.

After the close of pleadings, each party filed their respective issues.

On 24th September, 2007 it was consented that the issues filed by the Plaintiff on 25th July, 2007 along with issue No.4 of the statement of issues filed by 1st to 11th Defendants on 1st August, 2007 as well as issue No.7 of the statement of issues filed by the 12th Defendant on 11th July, 2007 be the issues to be determined by the court.

Thus, the issues are agreed as specified herein under:-

Plaintiff's list of Issues:

- 1. Did the 12th Defendant allot to the plaintiff un-surveyed residential plot BURU BURU RIVER BANK SCHEME?**
- 2. Did the Plaintiff pay the 12th Defendant KES 235 093 which was applied as allotment fee towards residential plot BURU BURU RIVER BANK SCHEME.**
- 3. Was the said residential plot BURU BURU RIVER BANK SCHEME surveyed and presently identified as L.R. NO.22786?**
- 4. Did the 12th Defendant grant to the plaintiff lease over the said L.R.NO.22784?**
- 5. Did 1st – 11th Defendants illegally enter into the plaintiff's parcel of land known as L.R. NO.22786 and purport to subdivide it among themselves?**
- 6. Do the 1st – 11th Defendants have any claim and or right over L.R. No.22786?**
- 7. Are the 1st – 11th Defendants committing waste on L.R. No.22786?**

8. Did the 12th Defendant encourage the 1st – 11th Defendants to invade the plaintiff's land?

9. Is the plaintiff denied use of the said plot due to the actions of the 1st – 12th Defendants?

10. Has the plaintiff suffered loss?

11. Is the Plaintiff entitled to the orders sought?

1st – 11th Defendants Issues:

4. Does the plaintiff have any or any proprietary rights over the property in light of the aforesaid allotment by the 12th Defendant?

12th Defendant's Issues:

7. Has the plaintiff disclosed a reasonable cause of action against the 12th Defendant?

Thereupon the hearing commenced.

The Plaintiff testified and his evidence was as under.

Back in 1978 – 79 he was allocated a plot by the Nairobi City Council (12th Defendant hereinafter referred to as 'NCC') at Jamhuri Phase II. When he was processing to get its title, he was told by NCC that the said plot was allotted to someone else and that he would be allotted an alternative plot at Buru Buru Phase II – 1982. It was an un-surveyed plot facing the Kenya Air Force. He produced a letter dated 24th September, 1992 from NCC addressed to him allocating an un-surveyed plot admeasuring 1.6 ha, referred as an un-surveyed Residential plot – Buru Buru River Bank Scheme and identified as plot C.

There was a Nota Bene to the said letter stating

“This is an alternative plot to another one previously allocated at Jamhuri Phase II vide letter ref. No.CV.470/5/7/18 of 3rd May, 1979”

The total payment including the stand premium and Annual Grand Rent was Shs.139,093 and there was an acknowledgement that KShs.235,093 has been received which include (amongst others) survey fees. The letter is marked as (PEx.1). The Plaintiff also produced two receipts in respect of payments made in respect of the previously allocated plot. (P.Ex.2). The plot was then surveyed and deed plan was also drawn describing the survey plot as L.R.22786. Thereafter the plaintiff and NCC entered into a Lease Agreement dated 5th July, 2004 for the term of 99 years in respect of plot C now known as L.R. 22786. The said lease also stipulated that a sum of Shs.235,093 has been received as a consideration for the said lease. The lease is signed by the Mayor and Town Clerk and sealed with the seal of NCC. He produced the said lease and Deed plan as P.Ex.Ann.3A and 3B.

He thereafter erected a boundary by affixing iron bars as beacons in 1998.

During one of his visits to the plot, in 2004, he found the boundary and beacons removed and found some people occupying the plot. He went to NCC but was told that it could not assist until a court order is obtained.

According to information which he gathered, one Mr. Gacha, the Deputy Mayor and senior officers of NCC along with elders had assisted 1st to 11th Defendants in occupying the plot.

He also produced a letter dated 15th January, 2007 from the Commissioner of Lands confirming the allotment by the NCC to him and promising to prepare a new title deed in his name as soon as some

technical problems were resolved (P.Ex.4).

He averred that the plot is his property and the 1st and 11th Defendants are trespassing on his land and should be evicted by an order of the court.

In cross-examination, he stressed that during the survey which lasted for two weeks during 1998, he did not see any one occupying the plot. He said he had not paid for rates as no demand has been made by NCC. In cross-examination by the counsel for NCC, it was agreed that he had not asked for any specific prayer against NCC.

This was the evidence from the Plaintiff.

The 1st Defendant Joseph testified on behalf of himself and on behalf of 2nd to 11th Defendants. He mentioned a Buru Buru River Bank Development committee and that he is its Chairman. According to him 12 members of the said committee represent the entire population of Buru Buru River Bank Scheme, who are about 476 in numbers.

According to him he came to know about the Plaintiff only when he was served with the summons of this case.

He initiated the process of permanent settlement project for the inhabitants with Mr. Mbugua the councilor of the area.

Although he did testify on the minutes of NCC Town Planning Committee meeting on 17th March, 2000, the same was not produced in evidence.

Thereafter he stated that the Deputy Director of the said committee agreed to give them the letter of allotment. He produced one given to him which was dated 14th October, 2002. It reflects plot No. 22 Settlement Scheme (City Carton). He also produced two receipts for Shs.1,500 and 6,500 for the above plot. The minutes of meeting on 8th May, 2002 though mentioned was not produced.

As per his claim the property is his and he has developed it by erecting permanent structures. Thus he denied having committed acts of trespass.

In cross-examination he stated that he was occupying the land in 1952 since his birth, but at the end he also stated that and I quote;

“I am not aware that in 1992, the land was vacant”

He also agreed that the land was not surveyed and that the settlement scheme was dissolved but a new one was registered. He, though failed to state the name of the new scheme or produce any certificate to that effect. The letter showing the membership of earlier scheme was for the year 2003. He was shown paragraph 5 of the defence which stated that the plot claimed by the plaintiff was allocated to the 1st to 11th Defendants but he just responded that his plot No. 22 is different from the plot allotted to the plaintiff but added that he did not know where the plaintiff's plot was.

In the end he stated that the area was surveyed and was sub-divided by the surveyors placing numbers on the houses as their beacons. He also agreed that his plot was surveyed in 2004 and other structures were removed which were coming within his plot. I do observe that this is what the plaintiff stated that his boundary and beacons were removed in the year 2004.

But he agreed that he was not aware that the Plaintiff had entered into a Lease Agreement with the NCC. He further agreed that eight years ago he just constructed a house next to his parents' house as it was a village. Although he did not specify which house as according to him, his house was only surveyed in 2004.

This in short is the evidence before the court.

The plaintiff has prayed for following orders.

- a) a declaration that he is the bonafide allottee of Land Parcel No. L.R. 22786.**
- b) Mandatory injunctions compelling the 1st to 11th Defendants either by themselves, servants, agents or persons claiming through them to vacate parcel Land LR. No.22786.**
- c) Costs**

In this evidence, the plaintiff has conceded that he has not claimed specific remedy or prayer against the 12th Defendant NCC. As per the above prayers specified in the plaint also it is so evident. Thus I do find that the plaintiff is not entitled to any prayer or remedy against the 12th Defendant.

I do agree thus with the submissions made on behalf of the 12th Defendant, wherein it was stressed that the remedy not sought for in the pleadings, cannot be granted. In this case it is also not shown that NCC was in occupation of the land. Thus even the remedy of damages cannot be granted against the 12th Defendant as the Plaintiff has failed to prove on balance of probability that it was at the behest and direct or indirect action of the NCC that 1st to 11th Defendants are occupying the plot.

However, I do find that 12th Defendant was a relevant party to the determination of this case because the Plaintiff relies on the lease agreement made with NCC in pursuance to letter of allotment and the premiums paid. Thus I do determine issue No.7 of the statement of issues filed by the 12th Defendant accordingly.

On the evidence produced as per the pleadings the submissions were made by the plaintiff, 1st to 11th Defendant and by the 12th Defendant.

First of all I would like to deal with the submissions made by the learned counsel for the 1st to 11th Defendants commenting on a letter of 13th February, 2007 allegedly produced by the plaintiff. I must state that although the said letter was in the list of documents filed by the plaintiff, the list of documents was not admitted by any of the Defendants. Hence the Plaintiff referred to some of the documents and produced them in his evidence. What he relied on was a letter dated 15th January, 2007 from the Commissioner of Land addressed to him which has been mentioned and specified in the earlier part of this judgment. I therefore in law cannot comment on any evidence which is not before the court, and an attempt to bring in the same by way of submissions cannot be encouraged.

The evidence of the Plaintiff is self-explanatory. Instead of a plot allotted to him in the year 1978 -79 he was then allotted an alternative un-surveyed plot by NCC and the payments made by him in respect of the earlier allotted plot was transferred to the second allotment. After survey of the said un-surveyed plot No. C at Buru Buru River Bank Scheme, the deed plan produced by the plaintiff showed that it was given number of LR.22786.

Thereupon the NCC entered into a lease agreement dated 5th July, 2004.

As against that out of 1st to 11th Defendants only 1st Defendant has produced a letter of allotment for plot 22 for Buru Buru River Bank Development Settlement (Carton Scheme). The said plot is not surveyed upto today. He has also paid the standing premium and Land Rent totaling Shs.8,000 after the lapse of prescribed period.

I have specified his evidence hereinbefore, and I do agree with the submissions from the counsel for the plaintiff and 12th Defendant that he has failed to prove the claim of ownership of a plot 22 which is not

surveyed and no evidence is given how and by whom the possession of the plot was given to him.

Both the counsel for the plaintiff and 1st to 11th Defendants relied on the case of **Wreck Motor Enterprises Vs. the Commissioner of Land and other (Nairobi Civil Appeal No.71 of 1997)** wherein the Court of Appeal held that

“a letter of allotment does not amount to the applicants obtaining title to such lands. Title to land property normally comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

It is also now trite law that a letter of allotment is merely an intent by the government to allocate land and it does not confer a title.

As regards the case of 1st to 11th Defendants, it is also evident that they were slum dwellers and apart from a letter of allotment produced by the 1st Defendant, no other evidence is produced to support the claim of ownership of the 2nd to 11th Defendants.

I shall thus wholly rely on the passage from the case of **Michael Githinji Kimotho Vs Nicholas Mwatha Mugo** (Civil Appeal No.53 of 1995, wherein Court of Appeal observed:

“If the Appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the Respondent’s claim. Though the appellant had for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent’s claim where the latter is registered as owner of the land. Similarly if he, the appellant had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect”.

In the premises aforesaid, I do find that 1st to 11th Defendants have failed to prove their claims of ownership on the plot namely LR. No.22786 and do reject their claim of any right of ownership over the said plot.

However, their counsel raised very interesting points against the claim of bona fide allotment by the plaintiff and/or his right over the plot in question vis-à-vis their claims.

Following issues were raised during the submissions despite the consent recorded before the hearing as regards issues to be heard and determined.

- 1. Did the city Council of Nairobi obtain a grant to itself from the Commissioner of lands to enable it purportedly lease the property to the plaintiff?**
- 2. Is the Plaintiff registered proprietor of the suit property?**
- 3. Is this a case of double allocation by the City Council of Nairobi?**
- 4. What is the consequences where both allottees have not obtained titles?**

I may observe first of all that it was never a claim of the plaintiff that he is a registered owner of the plot. The plaint and prayer make it very clear that he claims his right as an allottee and subsequent lessee. Thus the issue no.2 is not properly raised.

Looking at issues Nos. 1 and 3, they contradict each other. If it is the case of Defendants that NCC did not have any right to issue the allotment of the land, their own claim is defeated and the issue of double allotment cannot arise and cannot be allowed to be raised. So is the case with issue No.4.

In any event as the 1st to 11th Defendants have failed to show which land was allotted to them, even if it is agreed that they were allotted same land, the issue of double allocation must fail.

Thus even if those issues are validly raised despite not pleaded in their defence, they cannot be determined the way they are formed.

However, issue No.1 can be considered in respect of the claim of the plaintiff. NCC (12th Defendant) does agree with the contention of the plaintiff that he was allotted an unsurveyed plot 'C' on the basis of Letter of Allotment to the 12th Defendant. The premiums were paid for it and survey was made through its survey Department and deed plan was made creating LR. No. 22786. Thereafter, a lease was executed and stamped between the authorized office holders of NCC and the plaintiff on 5th July, 2004. The copy of the Lease produced (P. Ex 3a) is definitely stamped and duly executed.

The question was raised in the submissions made by 1st to 11th Defendants as regards validity of the lease. Reliance was placed on Section 40 of the Registration of Titles Act (Cap.281). It was contended that the lease is not valid and the plaintiff cannot derive any right or interest on the plot based on that lease.

However, I have Section 32 of the said Act, which stipulates:

“32.(1) No instrument, until registered in the manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render the land liable as security for the payment of money, but upon the registration of an instrument in the manner hereinbefore prescribed the land specified in the instrument shall pass, or, as the case may be, shall become liable as security in the manner and subject to the agreements, conditions and contingencies, set out and specified in the instrument, or declared by this Act to be implied in instruments of a similar nature.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.”

Thus Section 32(2) makes provisions to allow the unregistered instruments to operate as a contract.

This case has shown very interesting facts, where the 1st to 11th Defendants have agreed that they are occupying the land, and only the 1st Defendant has shown a letter of allotment of plot 22 for a specified scheme which is not detailed either in measurements or location. He has not even averred that L.R.No.22786 is the plot where his plot 22 is situated. His letter of allotment does not indicate any details as regards the location or Land Reference Number.

In the premises, no one from 1st to 11th Defendants has shown any proprietary interest or right or claim over the property in question as per law. They are thus simply squatters and their occupation will not give them any right on the property. The facts of the case of **Brig. Gilbert K. Seii Vs. Hon. Fredrick K. Cheserek. (Nairobi HCCS No.264/1997 (Unreported)** are different in all fours from those of this case. If there is no legal claim shown on the property, the facts of the occupation on the land cannot come to their rescue.

I may even go further and observe that they do not have any locus standi even to challenge the rights alleged by the plaintiff over the plot. I would not thus hear from them that the plaintiff has no good title over the matter.

I must state here though that it is true that the plaintiff has not been issued with a title deed, but he has a Lease Agreement for 99 years from July, 2004, and the Commissioner of Land has acknowledged that it is he who should be given the title as soon as some technical problems are resolved, thus his claim over the plot is recognized and his claim that he is a bona fide allottee has been proved on a balance of probability as against the 1st Defendant and also against 2nd to 11th Defendants. I advisedly say so in view of the observations made hereinbefore.

Thus, I find that the plaintiff has proved issues Nos. 1 to 7 of his statement against 1st to 11th Defendants and also issue no.4 of the statement of issues by 1st to 11th Defendants.

I further find that the plaintiff has been denied use of the plot due to actions of the 1st to 11th Defendants as raised in issue No.9.

Lastly, it was submitted that the trespass is actionable per se and the party aggrieved does not have to prove actual damages to get damages.

That may be so, but despite pleading that the plaintiff has suffered and continues to suffer irreparable loss and damages the plaintiff has failed to pray for award of damages. I do note that the usual prayer of any other relief to the effect that this court may deem fit and just be granted, is made but, in my humble view, the same cannot be interpreted to cover a substantive prayer of damages. In the case of **Lucy Jepchumba Murry Rienoldt vs. Sammy Chula (HCCC Mombasa 100/99)** relied by the plaintiff there was a specific prayer for the damages for trespass.

In the premises, I shall not award damages to the plaintiff.

The upshot of all the above is that the plaintiff is allowed in terms of prayers a, b and c, namely;

- 1. The Plaintiff be and is hereby declared as a bona fide allottee of the parcel No.L.R.22786.**
- 2. The 1st to 11th Defendants are to vacate the said parcel occupied by them forthwith.**
- 3. The 1st to 11th Defendants to pay the costs of the plaintiff.**
- 4. 12th Defendant to bear its own costs.**

Orders accordingly.

Dated and signed at Nairobi this 2nd day of July, 2008.

K.H. RAWAL

JUDGE

2.7.08