



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 597 OF 2012

GODFREY MAINA MWANGI.....PLAINTIFF

=VERSUS=

- 1. WILSON MAINA NEPHAT**
- 2. RAMADHAN NJOGU BAKARI**
- 3. CITY COUNCIL OF NAIROBI.....DEFENDANTS**

CONSOLIDATED WITH

ELC CASE NO. 571 OF 2012

- 1. WILSON MAINA NEPHAT**
- 2. RAMADHAN NJOGU BAKARI.....PLAINTIFFS**

=VERSUS=

- 1. STEPHEN MAINA**
- 2. CITY COUNCIL OF NAIROBI**
- 3. GODFREY MAINA MWANGI.....DEFENDANTS**

JUDGMENT

Through an amended plaint dated 16th October, 2012, Wilson Maina Nephath and Ramadhan Njogu Bakari brought ELCC No. 571/2012 against Stephen Maina, City Council of Nairobi and Godfrey Maina Mwangi. .

Godfrey Maina Mwangi, the 3rd defendant in ELCC No. 571/2012 filed ELCC No. 597/2012 against Wilson Maina Nephath, Ramadhan Njogu Bakari and City Council of Nairobi through a plaint dated 11th September, 2012. ELCC No. 571/2012 and ELCC No. 597/2012 were consolidated on 12th October, 2012 with ELC No. ELCC No. 597/2012 as the lead file. For the purposes of this judgment, I will refer to **Godfrey Maina Mwangi** as “**the plaintiff**” and his claim as “**the main suit**”; **Wilson Maina Nephath** and **Ramadhan Njogu Bakari** as “**the defendants**” and their claim as “**a counter-claim**”; **City Council of Nairobi** as “**the common defendant**” and **Stephen Maina** as “**the interested party**”.

In the main suit, the plaintiff averred that he was the owner of all that parcel of land known as Plot No. K10 which had been delineated after survey as L.R No. 209/7963/113 (hereinafter referred to as “Plot No. K10”). The plaintiff averred that he inherited Plot No. K10 from one, Mrs. Wanja Maina to whom the property was allocated on 3rd May, 1971 by the common defendant. The plaintiff averred that since he was not residing in Nairobi, he had delegated the administration of the property to the interested party. The plaintiff averred that Plot No. K10 had on its frontage a public road reserve. The plaintiff averred that in April, 2012 the defendants unlawfully constructed temporary kiosks on the said frontage of Plot No. K10 thereby completely blocking the plaintiff from accessing Plot No. K10. The plaintiff averred that his plea to the defendants to remove the said kiosks so that the plaintiff could have a meaningful access to Plot No. K10 was not heeded. The plaintiff averred that it was after the defendants refused to clear the frontage of Plot No. K10 so as to create access to the said property that the plaintiff sought the assistance of the common defendant through the Provincial Administration which successfully demolished the said kiosks on 29th August, 2012. The plaintiff averred that the defendants had threatened to reconstruct the demolished kiosks on the access to Plot No. K10 that had been restored. The plaintiff averred that unless the defendants were restrained by the court from obstructing access to

Plot No. K10, the plaintiff stood to suffer irreparable loss and damage. The plaintiff sought judgment against the defendants and the common defendant for:

- (i) A declaration that the frontage of Plot No. K10 is a public road reserve and as such not available for alienation to the defendants.
- (ii) A permanent injunction restraining the defendants from in any way occupying and entering the frontage of Plot No. K10 and/or interfering with the plaintiff's access to the said property.
- (iii) Costs and interest.

The defendants filed a defence to the plaintiff's claim on 25th April, 2019. The defendants averred that they were the owners of a parcel of land known as Plot No. K10/1. The defendants denied that the structures that they had put up on Plot No. K10/1 were illegal. The defendants averred that demolition of their structures on Plot No. K10/1 was illegal. The defendants denied that they were in occupation of a road reserve and that their parcel of land was on an access road to the plaintiff's parcel of land.

In their cross-claim, the defendants averred that they were the joint registered owners, allottees and occupants of a parcel of land known as Plot No. K 10/1, Kiamaiko Infill Huruma ("Plot No. K10/1"). The defendants averred that they had occupied Plot No. K10/1 since 1985 and that the same was officially allocated to them on 29th November, 2008 by the common defendant. The defendants averred that in 2011, the plaintiff and the interested party trespassed on and demolished the structures that had been erected on Plot No. K10/1 and proceeded to erect an illegal fence around the said plot with the consent and authority of the common defendant. The defendants averred that the said acts of trespass were intended to evict the defendants from Plot No. K10/1 and that the defendants had suffered loss and damage as a result thereof. The defendants sought judgment against the plaintiff, the common defendant and the interested party for;

- (i) A permanent injunction restraining the plaintiff from evicting, trespassing on, encroaching or interfering with the defendants' quiet and peaceful occupation and enjoyment of Plot No. K10/1.
- (ii) A declaration that the intended demolition, eviction and encroachment on Plot K10/1 was illegal null and void.
- (iii) A declaration that the defendants are the rightful, legal and lawful allottees and/or owners of Plot No. K10/1.
- (iv) Costs and interest.

The plaintiff and the interested party did not file a defence to the defendants' counter-claim. The common defendant filed separate statements of defence to the plaintiff's claim and the defendants' counter-claim. The common defendant denied both claims in their entirety. With regard to the plaintiff's claim, the common defendant averred that it had no power to remove trespassers from the frontage of Plot No. K10. The common defendant averred that it was the duty of the plaintiff to sue the trespassers and obtain an eviction order against them. With regard to the defendants' claim, the common defendant denied that it had allocated Plot No. K10/1 to the defendants. The common defendant averred that the defendants had not produced any document in support of their ownership claim to Plot No. K10/1. The common defendant averred that the defendants were trespassers on Plot No. K10/1 and as such they had no *locus standi* to sue the common defendant.

At the trial, the plaintiff in the main suit, ELCC No. 571/2012 was the first to give evidence. The plaintiff, Godfrey Maina Mwangi (PW1) produced as exhibits the documents that were attached to his list and supplementary list of documents filed in court on 11th September, 2012 and 28th June, 2016 respectively. He told the court that Plot No. K10 was allocated to his mother, one, Wanja Maina on 3rd May, 1971 and that he inherited the same from his mother upon her death after he was issued with a grant of letters of administration. He stated that Plot No. K10 was situated in Mathare Valley next to a road. He stated that his complaint against the defendants was that they had encroached on a road reserve next to the said road thereby blocking access to Plot No. K10. He stated that the structures put up by the defendants on the said road reserve blocked him from accessing the main road from Plot No. K10. He stated that the defendants had claimed that they were allocated the said road reserve by the common defendant following a resolution that was passed by the common defendant's Town Planning Committee at a meeting held on 27th October, 2006. He stated that the minutes of the common defendant's Town Planning Committee meeting held on 27th October, 2006 did not refer to allocation of plots. He stated that the Beacon Certificate on the strength of which the defendants had claimed the said road reserve did not bear a survey plan number and the common defendant's stamp. He stated that he did not have access to Plot No. K10 and that the defendants had put up shanties in front of Plot No. K10 that they had rented out to tenants. He urged the court to grant the reliefs he had sought in his claim against the defendants.

The 2nd defendant, Ramadhan Njogu Bakari (DW1) gave evidence on behalf of the defendants. He told the court that the 1st defendant and he owned Plot No. K10/1 that was adjacent to Plot No. K10 owned by the plaintiff. He stated that Plot No. K10/1 was next to a road. He stated that Plot No. K10 and Plot No. K10/1 had a frontage to a 9m wide road. He stated that Plot No. K10/1 was not on a road reserve and that the same was not situated on the plaintiff's access to the main road as claimed by the plaintiff. He stated that the plaintiff's access to Plot No. K10 from the main road was through the said 9 m road. He stated that the structures they had put up on Plot No. K10/1 were demolished by the interested party who was the plaintiff's son with the help of the police. He denied that they had encroached on Plot No. K10. He stated that they had occupied Plot No. K10/1 since 1987. He stated that the said plot was allocated to them while they were in occupation thereof. He produced the documents attached to their list of documents dated 24th August, 2018 as exhibits.

The common defendant and the interested party did not give evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed his submissions on 5th February, 2020 while the defendants filed their submissions on 3rd July, 2020.

I have considered the pleadings and the evidence tendered by the parties in support of their respective cases. I have also considered the submissions on record. The following in my view are the issues arising for determination in the consolidated suits;

- (i) Whether Plot No. K10/1 owned by the defendants is on a road reserve in front of Plot No. K10 owned by the plaintiff and as such was not available for allocation to the defendants.
- (ii) Whether Plot No. K10/1 and the structures put up thereon by the defendants had blocked the plaintiff's access to Plot No. K10 from the main road in the area.
- (iii) Whether the demolition of the structures that had been put up by the defendants on Plot No. K10/1 was illegal.
- (iv) Whether the plaintiff is entitled to the reliefs sought in ELCC No. 597/2012.
- (v) Whether the defendants are entitled to the reliefs sought in ELCC No. 571/2012.
- (vi) Who is liable for the costs of the consolidated suit?

Whether Plot No. K10/1 owned by the defendants is on a road reserve in front of Plot No. K10 owned by the plaintiff and as such was not available for allocation to the defendants.

It is not disputed that plaintiff's predecessor in title, Wanja Maina, deceased was allocated Plot No. K10 on 3rd May, 1971 by the common defendant under Mathare Valley Joint Development Project, Zone "K". It is also not disputed that the common defendant subsequently caused the parcels of land under that project to be surveyed in 1972 which exercise resulted in Survey Plan F/R No. 119/42. Following that survey, Plot No. K10 was assigned L.R No. 209/7963/113. It is not disputed that there are two main roads on the South Eastern and South Western part of Plot No. K10. The road on the South Eastern part of Plot No. K10 is 9m wide while that on the South Western part is 12m wide. It is also not disputed that according to the survey plan aforesaid, Plot No. K10 abuts the 9m road while between Plot No. K10 and the 12m road, there is a road reserve. It is clear from the evidence on record that Plot No. K10/1 was created or curved out of the road reserve that existed between Plot No. K10 and the 12m road. The question now before the court is whether Plot No. K10/1 was lawfully created. The plaintiff has contended that the road reserve between Plot No. K10 and the 12m road acted as its access to the said road and as such the same was not available to the common defendant for allocation to the defendants. The defendants on the other hand have contended that the plaintiff had an access to the 12m road through the 9m road and as such did not require the said road reserve on which Plot No. K10/1 now stands to access the 12m road. The common defendant on its part denied allocating Plot No. K10/1 to the defendants.

The defendants produced a number of documents in support of their claim to Plot No. K10/1. The defendants produced a letter of allotment dated 29th November, 2008 pursuant to which the common defendant is said to have allotted Plot No. K10/1 to them. As was pointed out by the plaintiff's advocate while cross-examining DW1, 29th November, 2008 was a Saturday when public offices were normally not open for business. According to the letter, the allotment was pursuant to the common defendant's Town Planning Committee Resolution No. 29 that was passed at a meeting held on 27th October, 2006. The plaintiff produced in evidence the minutes of the meeting of the common defendant's Town Planning Committee held on 27th October, 2006 in particular resolution No. 29. The resolution had nothing to do with land allocation. Plot No. K10/1 could not therefore have been allocated to the defendants pursuant to a resolution passed at that meeting. The said letter of allotment provided that the defendants were to accept the offer and pay Kshs. 35,000/= consisting of stand premium, annual rent and survey fees after which they were to be shown the beacons of Plot No. K10/1. Although the defendants claimed to have been issued with a beacon certificate dated 29th November, 2008 in respect of Plot No. K10/1, there is no evidence that as at that date, the defendants had accepted the offer and paid the requisite charges that were set out in the letter of allotment. According to evidence placed before the court by the defendants, the defendants did not pay the stand premium and the ground rent until 8th May, 2012; that is 3 years after the allotment and issuance of the beacon certificate aforesaid. I wonder how the common defendant could have issued a beacon certificate to the defendants before they had made any payment and particularly the survey fees. There is no evidence that the defendants have paid survey fees to the common defendant. There is also no evidence that the defendants have made any other payment to the common defendant after the Stand Premium of Kshs. 16,000/= and ground rent of Kshs. 4,000/= that were paid on 8th May, 2012; 3 years after they were issued with a letter of allotment that they were supposed to accept within 30 days.

Apart from the shortcomings in the defendants' letter of allotment and the acceptance thereof, there is also no evidence of how Plot No. K10/1 was created from a road reserve. There is no evidence that a part development plan(PDP)was prepared by the common defendant under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) for the alienation of the said road reserve. There is also no evidence that a survey was carried out during the creation of Plot No. K10/1. The Beacon Certificate that was produced by the defendants in evidence does not refer to any P.D.P or Survey Plan. There is also no evidence that the allotment was approved by the common defendant and consented to by the Minister of Local Government in accordance with the Provisions of the Local Government Act, Chapter 265 Laws of Kenya (now repealed).

Due to the foregoing, it is my finding that Plot No. K10/1 was created from a road reserve between Plot No. K10 and the 12 m road in the area. It is also my finding that since the parcel of land between Plot No. K10 and the said 12m road was a road reserve set apart for road expansion, the same was not available for allocation to the defendants. The creation and allocation of Plot No. K10/1 to the defendants was therefore unlawful.

Whether Plot No. K10/1 and the structures put up thereon by the defendants had blocked the plaintiff's access to Plot No. K10 from the said 12 m road in the area.

As I have stated earlier in this judgment, there are two main roads next to Plot No. K10. One is 12m wide while the other is 9m wide. From the evidence tendered by the plaintiff, the plaintiff could not access the 12m road through the road reserve that was allocated to the defendants as Plot No. K10/1 or through the 9m road. The plaintiff led evidence that the 9m road had been blocked by hawkers and as such he could not use the same to access the 12m road. The plaintiff led further evidence that it was more convenient to access Plot No. K10 from the 12m road through the road reserve that was occupied by the defendants. I am of the view that the plaintiff had a right to access Plot No. K10 either through the 9m road or the road reserve next to the 12m road. Since both the 9m road and the said road reserve were blocked, the

plaintiff was unable to access Plot No. K10. It is therefore my finding that the structures that were put up on Plot No. K10/1 that was illegally created and allocated to the defendants blocked the plaintiff's access to Plot No. K10.

Whether the demolition of the structures that had been put up by the defendants on Plot No. K10/1 was illegal.

Having found that the creation of Plot No. K10/1 and allocation of the same to the defendants was illegal, it follows that the defendants had no valid title to the said plot. In the circumstances, the defendants' occupation of Plot No. K10/1 was illegal. That being the case, the structures that were put up by the defendants on Plot No. K10/1 were similarly illegal. The common defendant had power under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) to demolish illegal or unauthorised structures. The defendants did not place any evidence before the court showing that the structures that they had put up on Plot No. K10/1 were approved by the common defendant. The answer to the third issue is therefore in the negative.

Whether the plaintiff is entitled to the reliefs sought in ELCC No. 597/2012.

The plaintiff has proved that he is the lawful owner of Plot No. K10 and that his access to Plot No. K10 was blocked by the defendants through their unlawful occupation of a road reserve. In the circumstances, the plaintiff is entitled to the reliefs sought in ELCC No. 597/2012.

Whether the defendants are entitled to the reliefs sought in ELCC No. 571/2012.

The defendants have failed to prove that Plot No. K10/1 was lawfully created and allocated to them and that they complied with the terms of the allotment. It is my finding therefore that the defendants are not entitled to the reliefs sought in ELC No. 571/2012.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The defendants have failed in their claim against the plaintiff while the plaintiff has succeeded in his claim. Costs as a general rule follow the event. In this case I can see no reason why the plaintiff should be denied the costs of the consolidated suit.

Conclusion:

In conclusion, I hereby make the following orders;

1. ELCC No. 571/2012 is dismissed with each party bearing its own costs.
2. Judgment is entered for the plaintiff against the defendants in ELCC No. 597/2012 in terms of prayers (a) and (b) of the plaint dated 11th September, 2012.
3. The plaintiff in ELCC No. 597/2012 shall have the costs of that suit to be paid by the 1st and 2nd defendants.

Dated and Delivered at Nairobi this 18th day of February 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mugure h/b for Mr. Mworira for the Plaintiffs

Mr. Nyiha h/b for Ms. Nyang for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Ms. C. Nyokabi - Court Assistant