



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 3738 OF 1995

PAUL NGOBITO.....1ST PLAINTIFF

MONICA WAMBUI.....2ND PLAINTIFF

VERSUS

HON. FRANCIS P.L LOTODO.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

J U D G M E N T

At the centre of these proceedings is Government Property Title No. LR. 209/2950 more particularly known as house no. HG/189 situated in Kileleshwa suburbs of Nairobi City.

The first plaintiff, Paul M. Ngobito, by virtue of being a civil servant occupied the said house with his family. The second plaintiff Monica Wambui Ngobito is his wife. On 13th December, 1995, the Government wrote to Mr. Ngobito as follows:

RE: ALLOCATION OF GOVERNMENT QUARTER HG 189 KILELESHWA

Enclosed, please find a copy of allocation of Government Quarters Advice note in respect of Hon I P L Lotodo, EGH, MP, Minister of Home affairs and National Heritage. As you are aware, you have since retired from the Government service with effect from 26th May, 1995 and as such you no longer qualify for occupation of a Government Quarter. It would therefore be appreciated if you arrange to vacate the house on but not later than Monday, the 18th December 1995 for immediate occupation by the Honourable Minister. Please expedite.”

There is evidence that, the first plaintiff had severally, prior to the receipt of the above letter, written to the authorities to be allocated he said house. However, he was not answered and as at the item he was asked to vacate he was still waiting for an answer.

Although he did not mention it in his said letters, the basis upon which the first plaintiff was applying for the said house to be allocated to him was that, other civil servants had been allocated houses in the same locality. This was in addition to his long service to the government and many years of occupation of the said house.

Considering the urgency with which the plaintiffs were required to vacate the said house they deemed it fit to move the court for protective orders. This however was not before they instructed their then lawyers M/s Mohamed & Muigai advocates to reply to the letter of 13th December, 1995, who on 20th

December, 1995 wrote and said:

“In the meantime and as we follow up our client’s standing in regard to the said house, do stand advised that our client requires time to arrange for alternative quarters and any attempt to evict him sooner than 21st January, 1996, would be met with injunctive relief.”

The foregoing notwithstanding, the plaintiffs were thrown out of the said premises on 28th December, 1995 prompting the institution of these proceedings. Going by the plaint filed in court on 29th December, 1995, the plaintiffs averred, inter alia, that the letter dated 13th December, 1995 was irregular and without standing in law. They reiterated that they had made an application to purchase the premises in accordance with the Government policy that preference would be given to the occupants. They also complained of inadequate notice to vacate.

It was also the plaintiffs case that the house had been condemned and therefore inhabitable by a senior Minister who in any case was then occupying a good house near Yaya Centre and should not have been allocated a house occupied by a comparatively junior civil servant.

Based on those pleadings, the plaintiffs sought orders that the first defendant had no right in law to occupy the said property; that the plaintiffs be declared the lawful occupants of the said property; that they be given the first opportunity to purchase the said property in accordance with the government policy; that an injunction do issue to restrain the 1st defendant from occupying the said property and that the property should be allocated to the plaintiff and not any other individual.

As the plaintiffs had been evicted an application for their reinstatement into the said house and injunctory orders was lodged alongside the plaint and orders in favour of the plaintiffs were granted which have held to date.

In answer to the plaintiffs’ pleadings the defendants stated that the first plaintiff as an employee of the government was allocated the suit property for his occupation as such. He retired from the Government with effect from 1st May 1995 and that the terms and conditions governing his employment clearly stated that he would vacate the premises on retirement.

The said premises were properly allocated to the first defendant. The first plaintiff, though retired continued to illegally occupy the said premises and refused to vacate thereby forcing the Government to evict him.

Both sides have tendered evidence in support of their pleadings.

Counsel have made their submissions and cited authorities. I have all that on record. A party to a suit is bound by his pleadings and evidence called in support thereof. It is also an accepted now that he who alleges must prove.

The suit premises belonged and still belongs to the government. The first plaintiff occupied the same by virtue of his employment. He was, on attaining retirement age, given notice of the said fact. On retirement however, the first plaintiff did not vacate the premises. There is nothing on record to show that his holding over had anything to do with his employment as a civil servant before retirement. In effect therefore, any terms and conditions of employment between him and the Government came to an end when the contract of employment was spent. It is significant that the first plaintiff did not contest his retirement. If the provision of accommodation while in office was a component condition attached to his employment contract, once that contract came to an end, such a benefit ceases to attach.

While the plaintiffs were in occupation of the said premises however, it transpired that, several properties in the neighbourhood were allocated to their occupants. The first plaintiff made an application to be allocated his but to no avail. His case is that the government had no reason to deny him that opportunity. Similar things should be adjudged in a similar way and that justice has to be applied equally in the same way. Well sounding though they are, these maxims cannot apply where the law is clear.

When the plaintiffs were in occupation, the government retained ownership of the suit premises. If any alienation were to be effected, The government Lands Act Cap 280 would be applicable. The application of that statute would confer upon this court the jurisdiction to enforce any legal right which can be ascertained. With respect, such a case has not been presented.

The authority and right to occupy the premises by the plaintiffs ceased on 1st May, 1995. This was the retirement date of the first plaintiff. As has been demonstrated, thereafter continued occupation was against the will of the owner the government. Fortunately for the plaintiffs, there was no counterclaim raised in terms of rent and so for the last seven years or so they have occupied the suit premises free and without any claim of right.

I subscribe to the submission by the learned counsel for the Defendants that this court's role is not to allocate land but to enforce an agreement that has been breached. Neither can this court direct the owner of the property on how to use his property. It is true that other civil servants may have been given government property but that is not a legal right upon which the plaintiffs herein can say is justiciable.

At the end of it all I find there is no cause of action that has been disclosed to warrant the granting of any of the orders sought. Having said so, I find that the suit must fail and the same is therefore dismissed. It follows that the injunctory orders granted herein should be and are hereby vacated.

Considering the circumstances of the case, the plaintiffs shall have sixty(60) days to vacate the suit premises failing which the order shall be executed against them.

These proceedings would not have reached this far had the plaintiffs vacated the suit premises in line with the first plaintiffs contract with the government. The plaintiffs shall pay the defendants the costs of this suit.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March, 2003.

MBOGHOLI MSAGHA

JUDGE

Miss Ciugu for Ms. Ongangi for defendant

Dr Khaminwa for the plaintiffs.