



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 494 OF 2012**

**PAULINA WANJIRU NGUGI.....PLAINTIFF**

**VERSUS**

**PETER MBIYU GACHIRI.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendants on 10<sup>th</sup> August, 2012 seeking the following reliefs;

- (i) A permanent injunction restraining the defendants from dealing with all that parcel of land known as Plot No. 3/205 situated at Kayole, Nairobi.
- (ii) A mandatory injunction requiring the 1<sup>st</sup> defendant to forthwith remove the structures he has put up on the said plot.

In her plaint dated 9<sup>th</sup> August, 2012, the plaintiff averred that she was the legal owner of all that parcel of land known as Plot No. 3/205, situated at Kayole, Soweto, Nairobi (hereinafter referred to as “the suit property”. The plaintiff averred that in January, 2012, the 1<sup>st</sup> defendant trespassed on the suit property and erected thereon a stone wall, a temporary structure and a gate.

The 1<sup>st</sup> defendant filed a defence on 14<sup>th</sup> September, 2012 in which he denied the plaintiff’s claim. The 1<sup>st</sup> defendant averred that he was a stranger to the suit property and that his interest was on Plot No. 3/205A Soweto that had been allocated to his deceased mother on 20<sup>th</sup> September, 1990. The 1<sup>st</sup> defendant denied that he trespassed on the suit property in January, 2012 and committed the acts of trespass complained of by the plaintiff.

The 2<sup>nd</sup> defendant filed a defence to the plaintiff’s claim on 7<sup>th</sup> September, 2012. The 2<sup>nd</sup> defendant denied the plaintiff’s claim over the suit property and averred that it was a stranger to the acts of trespass pleaded against the 1<sup>st</sup> defendant. On a without prejudice basis, the 2<sup>nd</sup> defendant averred that it had an internal mechanism for determining disputes such as the one that the plaintiff had with the 1<sup>st</sup> defendant and that the same should have been referred to it before the filing of this suit. The 2<sup>nd</sup> defendant urged the court to dismiss the plaintiff’s suit with costs.

At the trial, the plaintiff told the court how he acquired the suit property and the 1<sup>st</sup> defendants acts of trespass thereon. She produced as exhibits, a letter of allotment dated 20<sup>th</sup> September, 1990 issued to her by the District Officer, Embakasi Division, Nairobi in respect of the suit property, a plot card issued to her by the 2<sup>nd</sup> defendant on 9<sup>th</sup> March, 2012, receipts for the payments that she made to the 2<sup>nd</sup> defendant for the suit property and photographs of the suit property as at the time the 1<sup>st</sup> defendant is alleged to have trespassed on the same.

The 1<sup>st</sup> defendant on his part gave evidence and called two witnesses. The 1<sup>st</sup> defendant told the court that he was not aware of the suit property. He stated that he was only aware of Plot No. 3/205A that was allocated to his deceased mother in early 1990. He stated that this mother who died on 20<sup>th</sup> November, 2000 occupied Plot No. 3/205A soon after allocation. He stated that it was not possible that the plaintiff was allocated the same plot in 1990 since she had never occupied the same. The 1<sup>st</sup> defendant stated that after the death of his mother, he together with his sister one, Margaret Njambi Gachiri sold plot No. 3/205A to one, Paul Gichira Mwangi on 13<sup>th</sup> July, 2012 before this suit was filed. The 1<sup>st</sup> defendant produced in evidence as exhibits among others, a letter of allotment dated 20<sup>th</sup> September, 1990 that was issued to Grace Wanjiru Gachiri in respect of the suit property by the District Officer, Embakasi Division, agreement of sale dated 13<sup>th</sup> July, 2012 between Margaret Njambi Gachiri and the 1<sup>st</sup> defendant on one part and Paul Gichira Mwangi on the other hand, photographs showing the developments on the suit property and a plot card issued to Paul Gichira Mwangi in respect of plot No. 3/205A, Kayole, Soweto. The 1<sup>st</sup> defendant’s first witness was Robert Kihara Muiruri (DW2). He told the court that he was an elder in Muoroto Soweto Resettlement

Scheme. DW2 told the court that the 1<sup>st</sup> defendant and his deceased mother, Grace Wanjiru were known to him and that it was the 1<sup>st</sup> defendant's mother who was allocated the parcel of land in dispute. The 1<sup>st</sup> defendant's second witness was Paul Gichira Mwangi (DW3). DW3 told the court that he was the owner of Plot No. 3/205A having purchased the same from the 1<sup>st</sup> defendant and his sister. He told the court that after purchasing the said plot, the same was transferred to him by the Nairobi City County after which he was issued with a plot card. He told the court that he had put up a permanent house on the suit property. He stated that as at the time the plaintiff brought this suit, he was the owner of the said Plot No. 3/205A.

The 2<sup>nd</sup> defendant did not tender evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed her submissions on 23<sup>rd</sup> June, 2020. The 1<sup>st</sup> defendant filed his submissions on 7<sup>th</sup> August, 2020 while the 2<sup>nd</sup> defendant did not file submissions.

From the pleadings, the evidence tendered by the parties and the submissions of counsels, the following in my view are the issues arising for determination in this suit.

- (i) Whether Plot No. 2/205 and Plot No. 3/205 'A' are one and the same property.
- (ii) Whether the 1<sup>st</sup> defendant trespassed on plot No. 3/205 ("the suit property").
- (iii) Whether the plaintiff is entitled to the reliefs sought in the plaint.
- (iv) Who is liable for the costs of the suit?

Whether Plot No. 2/205 and Plot No. 3/205 'A' are one and the same property.

The plaintiff and the 1<sup>st</sup> defendant placed before the court evidence showing the existence of the parcels of land which each is claiming. Each produced a letter of allotment, receipts evidencing payment for the plots and plot cards. From the evidence before the court, it appears that on paper, the plaintiff and the 1<sup>st</sup> defendant are referring to two different parcels of land. However, on the ground there is only one parcel of land which is being claimed by both the plaintiff and the 1<sup>st</sup> defendant. Although the plaintiff has denied that this is not a case of double allocation, I am convinced that that is the case. The plaintiff has claimed that the letter of allotment that was issued to the 1<sup>st</sup> defendant's mother was a forgery and that the same was fraudulently issued. As rightly submitted by the 1<sup>st</sup> defendant, forgery and fraud were never pleaded by the plaintiff neither were the same proved at the trial. The 2<sup>nd</sup> defendant would have been of assistance to the court in determining this issue. In its defence, the 2<sup>nd</sup> defendant did not come out clearly whether the suit property and Plot No. 3/205A are separate plots. The 2<sup>nd</sup> defendant did not also tender evidence at the trial. Since the 2<sup>nd</sup> defendant is the one which issued the plaintiff and the 1<sup>st</sup> defendant's successor in title with plot cards and had also received payments from both parties, its failure to participate at the trial denied the court crucial evidence that could have assisted the court in ascertaining the truth regarding the claims put forward by the plaintiff and the 1<sup>st</sup> defendant.

On the material before me, it is my finding that the suit property and Plot No. 3/205A are one and the same parcel of land on the ground in respect of which two allotment letters and plot cards were issued.

Whether the 1<sup>st</sup> defendant trespassed on plot No. 3/205 (the suit property).

This issue cannot be decided before a determination is made as to the ownership of the parcel of land referred to as Plot No. 3/205 (the suit property) by the plaintiff and as Plot No. 3/205A by the 1<sup>st</sup> defendant. Neither the plaintiff nor the 1<sup>st</sup> defendant had been issued with a title in respect of the said parcel of land. This means that their respective ownership claims are beneficial in nature. The law is settled that where there are competing equities, the first in time prevails. I am unable to determine from the evidence before me who as between the plaintiff and the 1<sup>st</sup> defendant's mother was allocated the disputed parcel of land first. The letters of allotment placed before the court by both parties bear the same date. This leaves the court with only one way of determining who was the first to be allocated the disputed land and that is possession. The plaintiff did not tell the court whether she took possession of the disputed land and if she did when? The plaintiff claimed that she had constructed a foundation for a building that she intended to put up on the disputed land. No evidence was placed before the court of the said construction. The plaintiff did not also tell the court when the construction commenced and ended. The 1<sup>st</sup> defendant on the other hand led evidence that was corroborated by his witnesses that his mother took possession of the disputed land soon after it was allocated to her in 1990 and that she remained in occupation until her death in 2000. The 1<sup>st</sup> defendant told the court that after the death of his mother, he together with his sister sold the land to Paul Gichira Mwangi (DW2) on 13<sup>th</sup> July, 2012. I am convinced from the evidence tendered by 1<sup>st</sup> defendant that it was his mother who occupied the disputed property first. In the absence of fraud, the 1<sup>st</sup> defendant's mother's letter of allotment coupled with her occupation of the disputed land gave her interest in the property priority to that of the plaintiff who only had a letter of allotment but had not taken possession of the land since 1990; a period of 22 years since it was allegedly allocated to her. Since the 1<sup>st</sup> defendant's mother occupied the disputed land as of right, she was not a trespasser thereon. The 1<sup>st</sup> defendant who derived his interest in the property from his mother could not also be a trespasser on the property. I am not satisfied therefore that the 1<sup>st</sup> defendant trespassed on the parcel of land that the plaintiff referred to as Plot No. 3/205 (the suit property) or the disputed land. In any event, the 1<sup>st</sup> defendant led uncontroverted evidence that the disputed land had been sold by him and his sister to DW2 and that it was DW2 who was in occupation of the same and who was carrying out the construction that the plaintiff was complaining about. It follows therefore that if there was any act of trespass, it could only be by DW2 who was not made a party to this suit even after the 1<sup>st</sup> defendant mentioned his name at the earliest opportunity that he was the one in possession of the property.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

From the findings that I have made above, the plaintiff's suit has not been proved and as such the plaintiff is not entitled to the reliefs sought in her plaint.

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. As a general rule, costs follow the event. The plaintiff has failed in her claim against the defendants. The plaintiff shall bear the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiff's suit. The suit is dismissed with costs to the 1<sup>st</sup> defendant.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of February 2021**

**S. OKONG'O**

**JUDGE**

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

N/A for the Plaintiff

Mr. Muriithi for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Ms. C. Nyokabi-Court Assistant