



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 210 OF 2011

GLADYS NJERI MWANGI.....PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF NAIROBI.....1ST DEFENDANT

GEOFFREY MAJIWA.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 2nd May 2011 and amended on 24th July 2019 the plaintiff seeks judgment against the defendant jointly and severally:-.

(i) A mandatory injunction restraining the defendants, either by themselves, their agents and or servants or any other person acting on instructions from the defendant from trespassing on, plaintiff's quiet possession and occupation of all that parcel of land known as Plot No. 31/6/100 situated in Lucky Summer Area of Nairobi.

(ii) Damages for trespass.

(iii) Costs of this suit and interest thereon at court rates from the date of filing this suit till payment in full.

(iv) Any other relief deemed just and expedient.

2. Upon being served with copies of plaint and summons to enter appearance the 1st defendant entered appearance on 20th May 2011 through the firm of Prof. Ojienda & Co. Advocates. The said firm later on 3rd June 2011 entered appearance for both defendants. The defendants also filed a statement of defence dated 31st May 2011 and filed in court on 3rd June 2011. They denied each and every allegation in the plaint. In paragraph 3 of the statement of defence, they state:-

“The defendants deny the allegations in paragraph 4 of the plaint and put the plaintiff to strict proof of thereof. In further response to the said allegations the defendants aver that the alleged purchase transaction between the plaintiff and one Dominic Gatheca Kinyanjui is a nullity as it is shrouded in fraud and illegality. The plaintiff's continued possession and appropriation of the suit property is unlawful and a manifest perpetuation of the said illegality and fraud.

Particulars of fraud and illegality

i. Purporting to transact the sale of public land not available for alienation;

ii. Obtaining false documentation and approvals ostensibly from the 1st defendant with the sole purpose of perpetuating the unlawful transaction;

iii. Otherwise obtaining the documentations and approvals by false representations;

iv. Holding and continuing to privately hold the suit property albeit with the full knowledge that it is public land.”

3. On the 21st January 2020 when the matter came up for hearing neither the defendants nor their advocates were present in court. The court noted that the date had been taken in the presence of counsel for the defendants directed that the matter proceeds expert at 2.00 pm. At 2.00 pm there was still no representation for the defendants and the plaintiff proceeded to give her testimony.

4. PW1 Gladys Njeri Mwangi the plaintiff in this case adopted her witness statement dated 12th May 2011. She also stated that she was relying on the list of documents dated 12th May 2011. She produced the documents on the list of documents as exhibits in this case.

5. She produced a sale agreement dated 8th April 2010 between herself and Dominic Kinyanjui Gatheca as exhibit p1. Copy of subdivision map for LR No. 31/6/100 (Ruaraka Kasarani) as exhibit P2. Letter of approval of subdivision LR No. B1/1, 3, 5, 6, 17, 18 and 19 dated 24th May 2005 from City Council of Nairobi as exhibit P3. Letters of approval of the same subdivision from the ministry of lands dated 9th January 2009 as exhibit P4. City council rates payment receipt dated 12th October 2009 as exhibit P5. City Council receipt dated 3rd November 2010 for change of user as exhibit p6. Standard newspaper advertisement for change of user for LR No 31/6/100 as exhibit P7. Letter of approval of architectural drawings from the City Council of Nairobi dated 15th December 2010 as exhibit P8. Approved architectural drawings as exhibit P9. Payment receipt from the City Council of Nairobi for infrastructure, building plans fee, construction site board and occupation certificate as exhibit P10. City council receipt for road access fee as exhibit P11. Hoarding/scaffolding license from city council of Nairobi as exhibit P12. Loan agreement dated 5th January 2011 as exhibit p13. Photographs showing destroyed/damaged scaffolding on the suit land as exhibit p14.

6. The plaintiff further told the court that she bought the suit property from Dominic Kinyanjui Gatheca. That when she commenced construction on the defendants claimed it was public land. She told the court that the suit plot was invaded in march 2011. She was informed it was the 1st defendant's officers who had invaded the suit plot. She also told the court the 2nd defendant who was the area councilor and the mayor of the 1st defendant was involved in the demolition. This is because he had asked the people at the site to stop construction. She maintains that the suit plot is not public land and seeks the prayers in the plaint.

7. At the close of her oral testimony the plaintiff tendered written submissions. They are dated 7th September 2020. It is the plaintiff's submissions that upon purchase of the suit plot she commenced development after obtaining all the necessary approvals from the 1st defendant. she had also made all the requisite payments. She further submits that the 2nd defendant invaded the suit plot claiming the suit property was public land meant for public use and not for individuals to develop.

8. The plaintiff visited the 1st defendant's offices to seek clarification. The 2nd defendant did not produce any documents to support the claim that the suit plot was public land. She has put forward the cases of **Linus Nganga Kiongo vs Town Council of Kikuyu Nairobi (Milimani) HCCC No 79 of 2011**.

9. She also submits that she has met all the requirements for grant of injunction. She has put forward the case of **Nguruman Limited vs Bonde Nielsen & 2 Others CA 77 of 2012**. She prays that the prayers be granted as prayed in the plaint.

10. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the plaintiff and the authorities cited. The issues for determination are:-

(i) Whether this suit plot is public or private land.

(ii) Whether the plaintiff is the lawful owner of the suit plot.

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs of the suit?

11. Articles 62 and 64 of the Constitution of Kenya are clear on what is public or private land. The only mention that the suit plot is public land is in paragraph 3 of the statement of defence dated 31st May 2011. Similarly, paragraphs 4 and 5 of the replying affidavit of Oduma J. Owuor the then Acting Director of Legal Affairs of the 1st defendant sworn on 2nd June 2011 refers to the suit plot as public land. The 2nd defendant in his replying affidavit also refers to the suit plot as public land.

12. The issue of whether land is public or private is a matter of evidence. I have gone through the defendant's list of documents which refers to three documents. There is nothing to show that the suit plot is public land. On the other hand the plaintiff has demonstrated how she acquired the suit plot. She sought and was granted the necessary approvals to commence development of the same. The fact that she got all these approvals means that the suit plot is private land. Her evidence has not been challenged.

13. The defendants neglected to attend court to prove their allegations that this was public land. In the case of **Trust Bank Ltd vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC 1243 of 2001**. It was stated thus:-

“it is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statement of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”.

The plaintiff's claim as to the ownership of the suit plot has not been challenged as well. She has demonstrated that she has a legal interest to the suit plot.

14. The defendant's claim that she acquired the suit plot through fraud and misrepresentation is neither here nor there. They did not present any evidence to prove this. They rely on the letter dated 23rd February 2011 addressed to:

“Gladys N Mwangi

c/o Arch. R. O. Gichana (A990)

P. O. Box 49567-00100

NAIROBI

RE: DISAPPROVAL OF BUILDING PLAN REG NO EZ 19 FOR PLOT NO 31/6/00 LUCKY SUMMER OFF BABA DOGO ROAD.

This is to inform you that the above mentioned building plan approved in the technical meeting held on 16th December 2010 has been recommended for disapproval due to misrepresentation of facts during the time of approval.

You are therefore required not to commence any construction as the approval has been revoked.

Signed

P. T. ODONGO

FOR: TOWN CLERK”

The defendant ought to have attended court and presented evidence as to the falsification of documents and misrepresentation of facts that the suit plot was private land.

15. In the absence of such evidence I find that the plaintiff has proved that the suit plot is private land and that she has a legal interest to the same.

16. Which brings me to the third issue as to whether the plaintiff is entitled to the reliefs sought. The plaintiff herein also seeks general damages for trespass. PW1 the plaintiff in her testimony told the court that the suit plot was invaded in March 2011. She further stated that she was informed that it was invaded by the 1st defendant’s officers. She did not state her source of information. She further told the court that the 2nd defendant was involved because he had asked the people constructing to stop construction. That the 2nd defendant was the area councilor and the mayor of the 1st defendant.

17. It is clear that the plaintiff did not see the 2nd defendant in the act of invasion and demolition of her structures. It is trite law that whoever alleges must prove. The plaintiff indeed exhibited photographs of a demolished site office. I am of the view that the plaintiff does not know who the invaders were. She ought to have availed witnesses who saw the demolition and the people responsible for it. In the absence of such evidence it would be wrong for the court to merely believe that it was the 1st defendant’s officers and the 2nd defendant who were responsible for the demolition.

I find that the plaintiff has failed to prove that they are the trespassers. She is not entitled to any damages for trespass.

18. The plaintiff herein seeks a mandatory injunction. In my view she ought to have sought a permanent injunction as the orders she is seeking are to restrain and prohibit. In her testimony she said she was seeking a permanent injunction. I find that she is entitled to the rest of the reliefs sought on the Amended Plaintiff.

19. As the plaintiff has succeeded in her claim she is entitled to costs as per section 27 of the Civil Procedure Act.

20. In conclusion I find that the plaintiff has proved her case on a balance of probabilities as against the defendants.

21. I enter judgment in her favour as against the defendants jointly and severally as follows:-

(a) That a permanent injunction is hereby issued restraining the defendants by themselves, their agents and or servants or any other person acting on instructions from trespassing on, demolishing any buildings and structures on, or in any other way from interfering with the plaintiff’s quiet possession and occupation of all that parcel of land known as Plot Number 21/6/100 situated in Lucky summer Area in Nairobi.

(b) That the plaintiff shall have costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF MARCH 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Karwanda for Mr. Gakaria for the plaintiff

No appearance for the Defendants

Phyllis - Court Assistant