



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 483 OF 2008

SAMUEL MAINA GICHOHI.....PLANTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

CECILIA NGENDO MWANGI.....2ND DEFENDANT

JUDGEMENT

In a Plaintiff dated 3rd October 2008 and filed on 3rd October, 2008, the Plaintiff prays for judgement against the Defendant for:

- a) **An order against the Defendant for injunction restraining the defendant from interfering with the plaintiffs right of quiet enjoyment of his property;**
- b) **General damages**
- c) **Costs of the suit**
- d) **Interest on (b) and (c) at court rates**
- e) **Any further and other orders as the court may deem fit to award.**

The 1st Defendant filed its Statement of Defence dated the 13th February, 2018 on 16th February, 2018 where it contended that the Plaintiff is not the registered proprietor of the suit plot neither was the same bought through a sale agreement for Ksh.80,000. It insisted that the Plaintiff erected illegal buildings without necessary approval from it resulting to issuance of an enforcement notice to demolish the buildings thereon. It confirmed that the suit plot belongs to the 2nd Defendant upon issuance of an allotment letter dated 21st May,1996 hence the Plaintiff should not be issued with any injunction as he illegally erected buildings on the said plot. It reiterated that the Court did not have jurisdiction to hear and determine the suit as the Plaintiff approached court upon lapsing of the duration of filing of an appeal and therefore a clear disregard of the law. It sought for the Plaintiff's claim to be dismissed with costs.

The 2nd Defendant (initially Interested Party) filed a Statement of Defence and Counterclaim on 3rd December,2013, where she sought for the following orders:

- (a) **A mandatory injunction do issue compelling the Plaintiff by himself, his agents and servants to forthwith remove all the illegal developments on the plot No.R8 part of the Land Reference Number 71/5 Kahawa West Nairobi and to allow the interested party access occupation and quite enjoyment for her private property;**
- (b) **A permanent injunction restraining the Plaintiff from trespassing into, sub dividing, transferring, wasting, alienating or otherwise dealing with or parting with possession of the suit property to with Plot. No.R 8 part of the Land Reference Number 71/5 Kahawa West Nairobi;**
- (c) **General and exemplary damages;**
- (d) **Costs of the suit and of the counterclaim be awarded to the interested party;**
- (e) **Interest on (c) and (d) above;**

(f) Such other or further relief as this honorable court may deem fit to grant.

Evidence of the Plaintiff

PW1 Jediel Kithinji Nkaku testified that on 21st September, 2001, he was issued with an allotment letter Ref No.CPD/8196 for the suit plot. It was his testimony that he was issued with a clearance on 14th December, 2002 by the 1st Defendant for payment of dues amounting to Ksh.7,200; Ksh.5,800 and Ksh.1,400 for plot allocation, standard premium and ground rent respectively whose payment was made on 17th December,2002 for the years 2001 and 2002. He confirmed selling the suit plot to the Plaintiff through a registered Power of Attorney for a consideration of Ksh.80,000 and requested the 1st Defendant's Director of City Planning Department to transfer the said plot to the Plaintiff. Further, that the sale of the suit plot was legal as he complied with all necessary payment and approval from the 1st Defendant who approved the transfer. The Plaintiff as PW2 testified that he purchased the suit plot from Jediel Kithinji Nkaku who was allocated the same by the 1st Defendant. Further, he submitted building plans to the 1st Defendant upon payment of the prescribed fee. PW2 stated that on 7th July, 2005, he was served with an enforcement notice by the 1st Defendant's officers notifying him to stop occupation and use of the suit plot, for building a house without approved building plans and occupation certificate. It was his testimony that on 23rd September,2008, officers of the 1st Defendant visited the suit plot and issued him with a backdated enforcement notice dated 19th September,2008 which was to take effect from 19th September,2008 directing him to stop further illegal development on suit plot. PW2 claimed he was arrested by officers of the 1st Defendant and charged vide Criminal Case No. 25 of 2006 for erecting a building structure without approved plans contrary to Section 30(1) of the Physical Planning Act CAP 286 and punishable under Section 30(2) of the Act but was acquitted. PW2 further informed court that despite pursuing the 1st Defendant to obtain a Lease and Certificate of title for the suit plot, the same has not be issued to him. The Plaintiff produced the following documents as exhibits: Bundle of copies (documents) in the original file; allotment, sale agreement; Copies of clearance certificate by the City Council of Nairobi in the bundle of documents; Copy of beacon certificate; Enforcement notice; Plan approval and Power of Attorney.

Evidence of the Defendants

DW1 testified that she was allotted the suit plot on 21st May,1996 and paid Ksh.29,600 for rent and standard premium on 26th August,2004 to the 1st Defendant. She contended that on 13th October, 2004, the 1st Defendant's surveyor took her to the suit plot to identify beacons but was surprised to find a residential building had been constructed thereon. She further testified that she raised the issue of illegal occupation of the suit plot with the 1st Defendant's Director of Physical Planning. She testified that she was served with an enforcement notice on 8th May,2008 as the owner of the land to remove the illegal buildings on the suit plot within seven days from the said date and protested that she did not erect illegal building on it. It was DW1's testimony that lack of access of the suit plot has made her suffer irreparable loss and it was in the best interest of justice that the courts grants her the prayers sought.

DW2 Wilfred Wanyonyi Masinde who was the 1st Defendant's witness confirmed that the 2nd Defendant was issued with an allotment letter on 21st May,1996 for the suit plot, paid Ksh.10,000 for premium on 26th August, 2004 and was issued with a receipt to that effect, by the 1st Defendant. He testified that he received a complaint from the 2nd Defendant that an unknown person had illegally taken possession of the suit plot and constructed premises thereon. This made him inform the Plaintiff through the Chief of Kahawa West Location to order the Plaintiff to produce ownership documents. He testified that upon examination of the Plaintiff's documents relating to the suit plot, it was confirmed that the 2nd Defendant was the original allottee of the suit plot and that houses constructed thereon had been done without approvals including occupation certificate. Further, this resulted in the 1st Defendant issuing an enforcement on 7th July,2005, directing the Plaintiff to stop the illegal occupation on suit plot. It was DW3's testimony that, in 2006, the Plaintiff presented building plan Reg. No. DY74 which was not recommended for approval through a memo Ref. No.CPD/ENF/1618/WWM/bs dated 4/5/2006 on grounds that the Plaintiff had no title to the suit plot. DW2 testified that the Plaintiff was charged in Criminal Cause No. 25 of 2006 for undertaking development without approvals. He informed court that the Plaintiff was issued with an enforcement notice to stop illegal development on the suit plot and remove the building structures within seven days. DW2 testified that to date, the 1st Defendant records indicate it is the 2nd Defendant who is the original allottee of the suit plot as no transfer has been effected.

The Defendants produced the following documents as exhibits: Allotment letter dated 21/5/1996; Authorization for payment dated 25/8/2004; Payment receipt code 891020 dated 26/8/2004; Letter to the occupier dated 30/11/2004; Letter to Cecily Ngendo Mwangi dated 25/1/2005; Enforcement Notice dated 7/7/2005; A Memo dated 4/5/2006; Enforcement Notice dated 19/9/2008; Memo dated. 30/8/2008; and Letter from Cecily Ngendo Mwangi dated 17/6/2009

Submissions

Plaintiff's submission

The Plaintiff submitted that he bought suit plot from Jediel Kithinji Nkaku through a registered power of attorney. Further, that the ownership of the suit plot from the 2nd Defendant was transferred through a Daily Nation advertisement dated 12th July, 2002. He further submitted that Jediel Kithi Nkaku furnished him with a clearance letter to enable him make payment for plot allocation dues, standard premium and ground rent to the 1st Defendant Further, upon fulfilling conditions in the sale agreement, he paid survey fees and was issued with a beacons certificate for the suit plot after which he started making payments for ground rent and submitted building plans to the 1st Defendant. The Plaintiff further submitted that in February,2005 officers of the 1st Defendant visited the suit plot and informed him that he had constructed a dwelling house thereon without building plans. Further, on 15th January,2006, he was charged before the City Magistrates Court in Cause No. 25 of 2006 for constructing a massionette without approved plans but was acquitted of the said charges. It was his submission that he instituted court proceedings on 3rd October, 2008 seeking orders to restrain the 1st Defendant from interfering with the possession of the suit plot. He insisted that the 1st Defendant's witness Wilfred Wanyonyi Masinde had no written authorization from it, which was filed in court confirming he had authority to testify. He contended that the 1st Defendant's witness disowned his statement as to

whether the 2nd Defendant was the legitimate owner of the suit plot and that it is only the Land's Department that can confirm this position. Further, that in making reference to master handbook of minutes in 1st Defendant's possession, the same was never filed nor provided for perusal or examination. He reiterated that the 1st Defendant never lodged an appeal against his acquittal. He reaffirmed that the issues of the dwelling house being built without necessary approval is res judicata as he was charged in Cause No. 25 of 2006 for building a dwelling house without approved building plans including architectural drawings but was acquitted by court under Section 215 of the Criminal Procedure Code. To buttress his averments, he relied on the decisions of **Joshua Ngatu –vs- Jane Mpinda & 3 Others (2019)eKLR** in reference to **Herderson vs Herderson (1843) 67 ER 313** and **Mary Igandu Kigotho v Michael Wang'ombe Gititu(2015) eKLR**, where the court made pronouncement in reference to **Edwin Thou v Attorney General and Another Petition No. 212 of 2012**. He submitted that the 1st Defendant's case in respect to validity of minutes approving the building plans had been dealt with in Cause No. 24 of 2006 making the issue res judicata. Further the 1st Defendant is bound by his pleadings. To support these arguments, he relied on the case of Court in **Independent Electoral and Boundaries Commission & Another v Stephne Mutinda Mule & 3 Others (2014)eKLR** in reference to **Adetoun Oladeji(NIG) LTF vs Nigerian Breweries PLC SC 91/2002**.

The Plaintiff insisted he was issued with an allotment letter for the suit plot and clearance by the 1st Defendat's Town Clerk department to pay plot allocation, standard premium as well as ground rent. He reiterated that he purchased the suit plot from Jediel Kithinji Nkaku, who was allotted the same in 2001. He reaffirmed that failure by the 2nd Defendant to pay standard premium and annual rent within 30 days of receiving the letter of allotment extinguished the said allotment. To buttress this averment, he referred to the case of **Joseph Kagunya v Boniface K. Muli**.

1st Defendant's Submissions

It submitted that it is empowered with planning functions and allocation or issuance of plots within its jurisdiction. It confirmed issuing the 2nd Defendant an allotment letter for the suit plot on 21st May, 1996, upon payment of premium amounting to Ksh. 10,000 in 2004. Further, the said allotment letter was never revoked. It contended that it notified the Plaintiff to provide proof of ownership of the suit plot upon receipt of complaint from the 2nd Defendant that unknown persons had taken possession and constructed dwelling houses on it. Further, upon verification, it was noted the Plaintiff's documents relating to ownership of the suit plot were questionable. It disputed the Plaintiff's approval ref No.CPD/ENF/1618/WWM/BS dated 4th May, 2006 on grounds of lack of ownership. He reiterated that the plaintiff had been arrested and charged for undertaking construction on the suit plot without approval. To support its averments, it relied on the case of **Denis Noel Mukhulo Ochwada & another V Elizabeth Murungari & another (2018) eKLR**. It further submitted that the Plaintiff is not the actual and bonafide owner of the suit plot, and undertook construction without any valid title. Further even though the Plaintiff testified that he was issued with an allotment letter from 1st Defendant's physical planning department, upon verification, the department discovered that the Plaintiff was not the legitimate owner of the suit plot. It confirmed declining to issue approval to the Plaintiff upon discovering that he did not have legitimate ownership documents and further issued him with enforcement notices. To support these arguments, it relied on the case of **Mary Njoki Mburu & another v Josphat Kamande Kiarie & another; Stephen Harrison Ndungu & another(interested party) (2019) eKLR**. It further relied on section 107 and 108 of the Evidence Act and insisted the burden of proof was upon the Plaintiff to demonstrate that the acquisition of the suit plot was legal.

It reiterated that the Plaintiff did not adhere to the due process in erecting a construction on the suit plot and referred to Section 30 of the Physical Planning Act CAP 286. Further, that the Plaintiff despite not having a legitimate title only sought for approval after he had constructed on the suit plot but the same was declined. On the issue of whether the court could legally issue permanent injunction against it, to stop it from enforcing its mandate under the Physical Planning Act, it submitted that the Plaintiff undertook construction on the suit plot without necessary approvals as stipulated in Section 38 of Physical Planning Act resulting in its issuance of an enforcement notice in compliance with the said Act. To support this argument, it relied on the case of **Ephantus Mwangi Ruguru & 12 Others v The Director of City Planning Department (City Council of Nairobi) (2012) eKLR**. It averred that if the Plaintiff was dissatisfied with the enforcement notice it issued, he should have filed an appeal as stipulated in Section 38(4), (5) and (6) of the Physical Planning Act. To support this argument, it relied on the case of **Republic v PMS Innovateus Limited & another Ex PARTE PZ Cussons Limited (2019) eKLR**. Further, that the Plaintiff's claim that this suit is res judicate as it was determined in Criminal Cause No. 25 of 2010 was a flimsy argument.

2nd Defendant's submissions

She submitted that she was allotted the suit plot on 21st May,1996 by the 1st Defendant and paid Ksh.25,000 for stand premium, ground rent and survey fees to it, on 1st September,2004. She contended that she went to the suit plot with the 1st Defendant's Land Surveyor to be shown the beacons and discovered that the Plaintiff had trespassed thereon by constructing a residential house for which he was in occupation. Further, this culminated in her lodging a complaint with the 1st Defendant to take appropriate action. She submitted that on 8th May, 2008, the 1st Defendant served her with an enforcement notice directing her to demolish the illegal buildings on the suit plot but upon protest, the 1st Defendant issued an enforcement notice to the Plaintiff culminating in his instituting this suit. She referred to the valuation report by Messrs Wamae Mureithi & Associates Valuers which was produced as an exhibit confirming she was the proprietor of the suit plot that was now valued at Kshs. 2,100,000. She reiterated that her right of access, development and enjoyment of the suit plot had been infringed upon by the Plaintiff. She challenged the testimony of the Plaintiff's witness Jediel Kithinji Nkaku who failed to produce the original Letter of Allotment to the suit plot nor documents to prove the said plot had been repossessed from her. Further, that the Plaintiff failed to documents relating to his claim making the process of sale of the suit plot questionable on grounds on fraud. She stated that the Plaintiff admitted that he never undertook due diligence before purchasing the suit plot and if he did, he could have discovered she owns it. To support her arguments, she relied on Article 40(6) of the Constitution and the cases of **Joshua Akeyo Ogendo vs David Rowland Matende & City Council of Nairobi (2017)eKLR** and **Peterson Ndengwa Wachira vs Chrristopher N.Kiboi,Emmanuel Kazungu,Nairobi City Council & Peter Kimaru Muguku(2013) eKLR**.

In conclusion she insisted the Plaintiff's case is null and void as he did not obtain a good title to the suit plot as the same had already be been allotted to her as its legitimate owner. Further, that if the court should find that the Plaintiff was in occupation legally and in the interest of justice, she should be awarded compensation of Ksh. 2,100,000 being the market value of the suit plot.

Analysis and Determination

Upon consideration of the Plaintiff, Statement of Defence, Witnesses' Testimonies, exhibits and rivalling submissions the following are the issues for determination:

- Whether the Plaintiff is the bonafide and registered proprietor of plot No. R8 part of the Land Reference Number 71/5 Kahawa West Nairobi.
- Whether the Plaintiff is entitled to the Orders sought in the Plaintiff?
- Whether the 2nd Defendant is entitled to the Orders Sought in the Counterclaim
- Who should bear the costs of the suit

As to whether the Plaintiff is the bona fide and registered proprietor of plot No. R8 part of the Land Reference Number 71/5 Kahawa West Nairobi and if he is entitled to the orders sought in the Plaintiff. The Plaintiff contended that he is the registered proprietor of plot No. R.8 in L.R No. 71/5 situated at Kahawa West Nairobi hereinafter referred to as the 'suit plot', having bought the same for Ksh.80,000 from Jediel Kithinji Nkaku who had a Special Power of Attorney dated 8th January, 2003 to transact include selling, leasing, charging, alienating, transferring or disposing of it. The Plaintiff claimed he caused to be drawn building plans for construction of residential property in the suit plot which were submitted to the 1st Defendant upon payment of the prescribed fees. Further, that he paid all outstanding rates and plan submission fee for building approval, dated 25th September, 2007 to the 1st Defendant relating to the suit plot and immediately built a dwelling home for his family which is now complete. It was the Plaintiff's testimony that the 1st Defendant issued him with an enforcement order directing him to stop illegal development as well as occupation on the suit plot and remove any structures therefrom. He stated that he was charged with undertaking construction without approval but was acquitted. He submitted that the 2nd Defendant's claim herein was hence res judicata as the said issues had been dealt with in the aforementioned criminal case. DW1 testified that she is the registered proprietor of the suit plot which she was allocated by the 1st Defendant on 21st May, 1996 that issued her with a clearance note on 24th August, 2004 upon payment of all monies due to it. She contended that after paying Ksh.25,000 for stand premium and survey fees for the suit plot, she proceeded with the 1st Defendant's Land Surveyor and was shocked to find illegal construction thereon. Further, despite the Plaintiff having been issued with a notice by the 1st Defendant, he has refused to vacate the suit plot hence resulting to her incurring financial losses as she is unable to access it. The 2nd Defendant explained that upon complaining of the illegal construction on her plot, the 1st Defendant issued her with an enforcement notice No.4288 for demolition of illegal structures thereon which she protested as she had not erected any buildings thereon. Upon protest, the 1st Defendant, issued enforcement Notice No.4927 to the Plaintiff to stop further illegal development thereon and vacate the suit plot.

From the testimony of the witness from the 1st Defendant, he confirmed that they never approved the Plaintiff's building plans as his ownership documents were questionable. He even produced minutes which confirmed that the said plans were not approved. From the testimony of Jediel Kithinji Nkaku who purportedly sold the suit plot to the Plaintiff, he never produced an initial letter of allotment to that effect. He even confirmed he was selling the plot through a special power of attorney. In respect to the exhibits produced by the Plaintiff, I note the Special Power of Attorney from Jediel Kithinji Nkaku to Samuel Maina Gichohi is dated 8th January, 2003. Further, Jediel Kithinji Nkaku wrote a letter dated 19th December, 2002 to transfer ownership of the suit plot to Samuel Maina Gichohi but Samuel Maina Gichohi already had an alleged Letter of Allotment of the said Plot dated the 21st September, 2001 purportedly issued by the 1st Defendant. The Plaintiff contended that the 2nd Defendant's Letter of Allotment was revoked as she failed to adhere to the conditions therein but did not provide proof to that effect. I opine that the burden of proof shifted to him to confirm that the said Letter of Allotment had been revoked after which he was issued with a new one. The 1st Defendant's witness confirmed that the suit plot belonged to the 2nd Defendant and there were no records to prove the allotment letter had been revoked. I note the Plaintiff despite being served with an enforcement notice and the chief of Kahawa West summoning him to provide ownership documents, continued to build thereon. In the case of **Peterson Ndegwa Wachira vs Christopher N.Kiboi, Emmamuel Kazungu, Nairobi City Council & Peter Kimaru Muguku(2013) eKLR, it was held that:**

“without any evidence that the suit property was repossessed, I find that the original allottee of the said suit property was James Maina Karinga who passed it on to Samuel Mbatia Mwaniki who in turn sold it to the plaintiff. The alleged allotment which was given to the first and second defendant was not valid because a plot which had been allotted to someone could not again be available for allotment to another in a subsequent allocation. Even if the allotment to the first defendant and second defendant would have been valid, the first in time takes precedence. In fact the allotment which the first and second defendant claims to have is predicated on repossession from the previous owner. There was no repossession and as such we cannot call this a case of double allocation. It is a case of an invalid allocation which cannot stand. The suit property having not been repossessed from its previous owners and the plaintiff having purchased the same from Samuel Mbatia Mwaniki, the plaintiff is the lawful owner of the suit property.”

Further, in case of **Benja Properties Limited V Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR, the Court of Appeal in dealing with an issue of Allotment held thus: ‘ In arriving at our decision, we note an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.’**

Based on the facts as presented while associating myself with the decisions cited above, insofar as the Plaintiff claims to have constructed on the suit plot which he acquired from Jediel Kithinji Nkaku, noting that the root of his title is challenged as the initial allottee's letter of allotment had not been cancelled, I find that the said Jediel Kithinji Nkaku, sold him the suit plot which he did not have any legal rights over. Further, that he did not lawfully acquire the suit plot which still belonged to the 2nd Defendant. In the circumstances, I find that he is not the bonafide and registered proprietor of plot No. R8 part of the Land Reference Number 71/5 Kahawa West Nairobi. I note he has sought for

injunctive orders against the Defendants, general damages and costs. Having found that he is not the registered proprietor of the suit plot, and continued to build thereon by defying the 1st Defendant's Enforcement Notice and never adhered to the proper legal process as per the Physical Planning Act to appeal against the said notice to the National Liaison Committee while associating myself with the case of **Ephantus Mwangi Ruguru & 12 Others v The Director of City Planning Department (City Council of Nairobi) (2012) eKLR** where the court stated that :' **The enforcement notices in question comply with section 38(1) and (2). These notices specify the illegal development which is the development on a road reserve or link road and specify that the developer stop any further development and remove the said structures within seven days. This notices also provide that where a person is aggrieved by the notices then appeal to the liaison Committee as the case may be**",

I find that he is not entitled to the orders sought in the Plaintiff as against the Defendants.

As to whether the 2nd Defendant is entitled to the Orders Sought in the Counterclaim.

The 2nd Defendant sought for orders of mandatory including permanent injunction as against the Plaintiff in respect to the suit plot, general and exemplary damages as well as costs. It was her testimony that she was allocated the suit plot by the 1st Defendant. The 1st Defendant's witness confirmed the 2nd Defendant was owner of the suit plot and that the Plaintiff did not have ownership documents over the same. The Plaintiff did not dispute having built on the suit plot. From the evidence, it is clear the Plaintiff despite having knowledge that the suit plot belonged to the 2nd Defendant continued to build thereon and denied her access to it. The 2nd Defendant produced a Valuation Report which confirmed the value of the suit plot is Kshs. 2.1 million and she had paid Ksh. 20,500 being the fees to the valuer. The 2nd Defendant in her submissions has in the alternative sought for compensation of the value of the plot. In the circumstances, I find that the 2nd Defendant is indeed entitled to some of the orders sought in the Counterclaim.

Costs

Since the Defendants are the inconvenienced parties, I will award them costs of the suit.

It is against the foregoing that I find that the Plaintiff has not proved his case on a balance of probability and will dismiss it and enter judgement for the 2nd Defendant in the Counterclaim in the following terms:

- i) A mandatory injunction be and is hereby issued compelling the Plaintiff by himself, his against and servants to remove after ninety (90) days from the date hereof, all the illegal developments on the plot No.R8 part of the Land Reference Number 71/5 Kahawa West Nairobi and to allow the 2nd Defendant to access occupation and quite enjoyment for her private property;
- ii) A permanent injunction be and is hereby issued restraining the Plaintiff from trespassing into, sub dividing, transferring, wasting, alienating or otherwise dealing with or parting with possession of Plot. No. R 8part of the Land Reference Number 71/5 Kahawa West Nairobi
- iii) The 1st Defendant be and is hereby awarded special damages amounting to Kshs. 20,500
- iv) Costs of the suit and of the counterclaim be and is hereby awarded to Defendants.

Dated Signed and Delivered Virtually at Kajiado this 15th Day of March, 2021

CHRISTINE OCHIENG

JUDGE