



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 1316 OF 2015**

**PENINAH NJERI GITHATHIA & PETER MBARI GITHATHIA**

**(Suing as the Legal Representatives of the Estate of**

**HEZRON GITHATHIA (Deceased).....PLAINTIFFS**

**VERSUS**

**NAIROBI CITY COUNTY.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs' claim in this suit is that the Defendant allocated the late Hezron Githathia Mwangi (the late Hezron Mwangi) Plot number 1/270 in Nairobi ("the Suit Property") vide the letter of allotment dated 1/12/1988 which required him to pay Kshs 90,000 for the plot. The Plaintiff claimed that the late Hezron Mwangi paid that sum and was issued a lease dated 4/6/1999 by the Defendant. The Plaintiffs also claimed that the late Hezron Mwangi constructed a block of apartments on the Suit Property with the approval of the Defendant's predecessor, the City Council of Nairobi.

2. According to the Plaintiffs, the building was completed in 1992 and the late Hezron Mwangi let out the apartments to various tenants. Sometime in February 2015, the Plaintiffs claimed that the Defendant's employees or agents acting at the Defendant's behest went to the Suit Property and forcefully evicted the tenants from the apartments without any legal justification. Further, that on 14/10/2015 the Defendant's agents or servants vandalised the Suit Property and destroyed the building by removing the roof, windows, doors and other fittings. The Plaintiffs claimed that by reason of the Defendant's illegal acts, the late Hezron Mwangi suffered loss in the sum of Kshs. 75,560,500/= being the value of the building, assessor's valuation costs and the structural assessment costs.

3. Through the Amended Plaint dated 12/11/2018, the Plaintiffs sought a permanent injunction to restrain the Defendant from trespassing into, destroying, vandalising or otherwise interfering with the ownership and use of the Suit Property. The Plaintiffs also sought special damages of Kshs. 75,560,500/=, general damages, exemplary damages, costs of the suit plus interest.

4. The Defendant filed a Defence and Counterclaim on 1/2/ 2016 denying the Plaintiffs' claim. It averred that the Suit Property was trust land under the exclusive administration of the County Government of Nairobi. It conceded that in 1998 the City Council of Nairobi alienated plot number 1/270 to Hezron Mwangi pursuant to Section 3 of the Land Adjudication Act and Section 116 of the Constitution. It added that the allocation did not fully go through the requisite stages of alienation pursuant to Section 116 of the old Constitution and averred that the Plaintiffs had no title to this land. It averred that the County Government of Nairobi now seeks to reclaim the Suit Property pursuant to Article 62 (2) of the Constitution of Kenya, 2010. The Defendant denied that it was a trespasser and dismissed the Plaintiffs' claim as being unfounded while reserving its right to apply for cancellation of the letter of allotment and any resultant title.

5. The Defendant counterclaimed for a declaration that it had the exclusive duty under Article 62 (2) of the Constitution to hold the Suit Property in trust for the residents of Nairobi County and sought damages for trespass and mesne profits, a permanent injunction to restrain the Plaintiffs from encroaching or remaining on the Suit Property and costs of the suit together with interest.

6. The original Plaintiff in the suit, Hezron Mwangi, died while this suit was pending in court and was substituted by his administrators following an application they made on 24/1/2018. The hearing of this suit proceeded on 8/10/2020. Mr. Omire Advocate informed the court on that day that he was not ready to proceed with the hearing because the Defendant had not complied with Order 11 of the Civil Procedure Rules. The court directed that this being an old suit filed in 2015 the hearing would proceed on that day.

7. Peter Mbari Githathia gave evidence. He produced a copy of the letter of allotment issued to Hezron Githathia Mwangi on 1/12/1988 which required him to pay Kshs. 90,000 for the plot. He produced a copy of the receipt dated 26/9/1988 which showed that the late Hezron Mwangi paid the sum of Kshs 90,000/= to the Defendant. He also produced a copy of a letter dated 12/4/1989 from the Chief Land Surveyor stating that Hezron Mwangi the owner of plot number MN1-270 Mathare N had signed the beacon certificate and was to be allowed to set out the building. The words "regular without wayleave 14.8m x 250m" were inserted in that letter by hand. The witness produced an

agreement for lease dated 4/6/1999 between the City Council of Nairobi and Hezron Githathia Mwangi. The lease produced was incomplete and did not have the execution page even though the first page bore stamps from the Collector of Stamp Duty and the Department of Land depicting that it was registered. The witness also produced some building plans signed by the Housing Development Department dated 20/12/1995. It was inserted by hand on the plan that it was submitted as partly built and was adopted subject to verifications on site; structural details; precautions for security against damage to existing service lines; precautions for security against fire; and payment of fees to be determined.

8. The witness also produced an inspection sheet issued by the Defendant in respect of Mathare Valley North Side and Service Scheme which indicated the date for setting out as 29/5/1989, excavation of the foundation on 30/5/1989 and damp proof course for 19/6/1989. The inspection sheet refers to a bar, butchery and shop plus stores. The witness also produced a copy of the letter dated 4/1/1999 addressed to Hezron Mwangi in relation to the corner shop plot which confirmed that he had paid the account in full including rates and ground rent for 1999. He produced a copy of a demand letter from the Housing Development Department for rates and ground rent of Kshs. 10674/= dated 19/10/2010 and a receipt dated 17/3/2014 for payment of Kshs. 5760/= for plot number 1-270 "C".

9. On cross-examination, he conceded that the receipt issued for the payment fees for the allotment was for payment of Kshs. 105,000 yet the letter of allotment required payment of Kshs. 90,000/=. That is the amount reflected in the lease agreement as the consideration. He conceded that the lease was not executed and was not witnessed. He stated that he started paying rates in 2014 and had been paying rates. On re-examination he explained that the difference in the sum paid between Kshs. 90,000/= stated in the letter of allotment and the Kshs. 105,000 actually paid was because of stamp duty and other expenses.

10. Peter Maina Njenga gave evidence in support of the Plaintiffs' case. He stated that he was employed as a caretaker of the Suit Property in 2008 where the late Hezron Mwangi had built a 3 storeyed block of apartments. He lived on the ground floor of the apartment. He stated that at the beginning of 2015, the Defendant's officials kept going to the apartments threatening the tenants with demolition of the apartments on basis that it was an illegal development. He claimed that he reported the threats to the late Hezron Mwangi. He stated that on 14/10/2015 the Defendant's officials went to the Suit Property with a bulldozer and destroyed a substantial part of the building after which it was vandalised. He added that they went back to the premises on 14/11/2015 with more bulldozers and completely destroyed the block of apartments without giving any notice condemning the building. He maintained that prior to the demolition the building was in good condition and fully occupied with tenants. He was of the opinion that the building was destroyed purely out of malice and individual self-interest. On cross-examination, he stated that County officials kept threatening to demolish the building without giving any notice and that they went there four times.

11. James Kimani Horeria, a property valuer also gave evidence for the Plaintiffs. He produced a copy of the valuation report dated 23/10/2015 which gave the value of the Suit Property as Kshs. 75,500,000/=. He attached a copy of the lease dated 4/6/1999 which the court noted had the execution page signed by Hezron Mwangi, and the Mayor and Town Clerk on behalf of the Defendant. On cross-examination he stated that Hezron Mwangi instructed him to carry out the valuation of the Suit Property in October 2015 and that he inspected the property when it was in the course of damage and had been demolished. He stated that he based the value of the building on the way it was before the demolition. He clarified that the value he gave was based on the construction cost approach and that that approach looked at what was the likely replacement cost at that particular time.

12. Even though the Plaintiff's fourth witness was in court to produce the structural engineer's report on the Suit Property, the report was produced by consent of both parties. After the Plaintiffs had closed their case, the Defendant's advocate, Mr. Omire applied for an adjournment citing the reason that the Nairobi County Legal Department did not have legal officers following the enactment of the County Attorney Act 2020 that came into effect on 27/7/2020. Mr. Omire explained that they had sought instructions from the County Government and would require two months within which time they hoped that the office of the County Attorney would be properly constituted.

13. The court declined to allow the adjournment while noting that the suit had come up on various dates when the Defendant was given time to file its documents and witness statements but failed to do so. The court dismissed the Defendant's counterclaim and directed parties to file submissions which were to be highlighted on 17/11/2020. The Defendant had to be given more time to file submissions.

14. The Plaintiffs submitted that the late Hezron Mwangi held a good title to the Suit Property and relied on the letter of allotment and the receipt for payment issued by the Defendant to the late Hezron Mwangi. They contended that the Defendant had not produced any evidence casting doubt as to the authenticity of their letter of allotment. They also relied on the lease dated 4/6/1999 and blamed the Defendant for its bureaucracy in preparing the lease almost ten years after the allotment. The Plaintiffs submitted that the stamps on the lease was proof that stamp duty was paid and that the lease was received by the Central Registry, Department of Lands. They also relied on the rates payment made to the Defendant and the statement of account prepared by the Defendant for the Suit property.

15. The Plaintiffs submitted that the President did not issue a grant over the Suit Property because the Suit Property had not been surveyed. They also contended that the Defendant had not obtained the mother title from the national government. They submitted that the Defendant approved the building plans in accordance with the terms of the lease. They contended that they were given possession by the Defendant. They urged that the evidence the witnesses adduced was uncontroverted.

16. The Plaintiffs submitted that the Defendant destroyed the apartment erected on the Suit Property on different dates between 14/10/2015 and 14/11/2015 using bulldozers and that the property was also vandalized. They relied on the structural engineer's report which indicated that the structure developed on the Suit property was structurally sound. They maintained that due process should have been followed if the development on the Suit Property were illegal. They denied that the Suit Property formed part of trust land and contended that the Defendant had breached their right to property protected by Article 40 of the Constitution. They urged the court to award them damages of Kshs. 75,500,000/= which was based on the approximate value of the damage caused by the destruction to the apartment, and which was also based on the current open market value indicated in the valuation report. They prayed for general damages of Kshs. 10,000,000/= for suffering, mental stress and anguish caused to the late Hezron Mwangi; and Kshs. 5,000,000/= as exemplary damages. They also sought interest on the damages.

17. The Defendant submitted that it conducted a probe on the occupancy of the Suit Property in 2015 and found a trespasser on its land who it later learned was the Plaintiff. It submitted that it issued a notice to vacate the land. The Defendant denied that the Plaintiff obtained a

lawful allotment over the Suit Property. It submitted that the process for allocation of land was not followed in the manner in which the late Hezron Mwangi claimed to have obtained the letter of allotment over the suit land. It emphasised that the payment of the stand premium could not possibly have preceded issuance of the letter of allotment. It added that the letter of allotment did not bear its stamp and had no reference. It denied that it held a meeting at which a recommendation was made for the late Hezron Mwangi to be offered the Suit Property. The Defendant also took issue with the sum the Plaintiff paid on the allocation of the Suit Property while pointing out that the letter of allotment dated 1/12/1988 required payment of Kshs. 90,000/= while the Plaintiffs claimed that the late Hezron Mwangi paid Kshs. 105,000/= on 26/9/1988. The Defendant discredited the explanation that the Plaintiffs' witness' gave for the difference in the stand premium for the allocation of the land as including stamp duty while pointing out that the Defendant does not collect stamp duty which is payable directly to the Kenya Revenue Authority. The Defendant submitted that the irregularities in the manner in which the late Hezron Mwangi purports to have acquired the Suit property posed a challenge for the Plaintiffs in fulfilling the conditions in the letter of allotment. Further, the Defendant submitted that where the conditions set out in the letter of allotment were not met then the letter of allotment lost its legal significance. The Defendant maintained that it did not allot the Suit property to the late Hezron Mwangi and urged the court to disregard the documents submitted by the Plaintiffs which it termed as irregular and forgeries.

18. The Defendant also pointed out the fact that the lease that the Plaintiffs relied on does not have a term. It added that the Plaintiffs did not have a title to the Suit Property and that the late Hezron Mwangi could not have registered a legitimate interest in property which was not allotted to him in the first place. The Defendant submitted that it was only after adhering to the conditions in the letter of allotment and being registered and issued with a title that one would acquire an absolute and indefeasible proprietary interest in land. (See the case of **Ravji Karsan Sanghani v Peter Gakunu [2019] eKLR**). The Defendant contended that the document which the Plaintiffs presented in court did not meet the requirements of Section 44 of the Land registration Act, in that it was not executed by the Defendant. It urged that the Plaintiffs only had one receipt for the payment of rates which did not show the land for which the rates were being paid.

19. The Defendant submitted that it held the Suit Property in trust for the people resident in Nairobi and that the Plaintiffs were trespassers on the Suit Property. Further, that the claim for damages could not stand and if anything, the Plaintiffs ought to compensate the Defendant because trespass was actionable *per se*. The Defendant concluded that the court had an obligation to ensure that public land was maintained for the benefit of the people of Kenya and urged the court to dismiss the Plaintiffs' claim.

20. Having dismissed the Defendant's counterclaim, the issue for determination is whether the court should grant the orders sought in the Amended Plaintiff. Looking at the documents the Plaintiffs relied on, there is no evidence that the late Hezron Mwangi applied for allocation of the Suit Property. The documents produced by the Plaintiffs' witnesses show that he paid Kshs. 105,000/= on 26/9/1988 which from the receipt issued by the Nairobi City Commission was for plot quotation deposit. The letter of allotment issued by the Nairobi City Commission on 1/12/1988 refers to a recommendation for Hezron Mwangi to be offered plot number 1.270 at a sale price of Kshs. 90,000/= and mentioned that the recommendation was made at the Commission's meeting held on 5/10/1988. The letter refers to a corner shop plot. One would have expected that if the late Hezron Mwangi paid more money as a deposit than the price for the plot that he was later allocated then the Commission would have refunded the difference to him.

21. The Plaintiff's produced a copy of a beacon certificate dated 12/4/89 stamped by the Chief Land Surveyor of the Defendant's Housing Development Department. If the land was surveyed in 1989 as the beacon certificate suggests, then the lease ought to have reflected the correct registration number given for the plot after the survey. The court notes however that the lease dated 4/6/1999 which the Plaintiffs produced still referred to plot no. 1.270 Mathare North. The second page of the lease is blank on the part describing the registration details of the plot at the lands office. The term of the lease was not filled in the lease but instead read that it was to be part of a term to be granted by the Government of Kenya to the Council less the last three days of that lease. The lease curiously states that the President was unable to issue a grant to the Council in the form prescribed by law as the piece of land had not been surveyed. That clause in the lease contradicted the beacon certificate issued to Hezron Mwangi ten years earlier on 12/4/89.

22. The clauses in the lease indirectly referred to a head lease that the Council was to be granted by the Government. It is not the norm to grant a sub-lessee a sub-lease over premises that have not been legally leased to a lessee by the head lessor for ordinarily the head lease would dictate the terms upon which the lessee can grant a sub-lease to a third party including the condition whether the head lessor must give its consent for the lessee to sublet the demised premises.

23. The lease provided at page 3 that the plot would be used strictly for the purpose of a house in accordance with the Council's requirements and by-laws. The Plaintiffs did not lead any evidence to show that the apartment whose value they seek to recover in this suit was in conformity with the terms of the lease they relied on. The apartment described in the valuation report had many units on three floors which may not fit the description of "a house" permitted under the lease. The court also notes that the plans which the Plaintiffs claim were approved by the Defendant are dated 20/12/95 which would have preceded the lease dated 4/6/1999. The plans showed that the ground floor was to have shops which does not tally with what is shown in the valuation report.

24. The Plaintiffs' witness also produced an inspection sheet bearing the dates 29/5/89, 30/5/89 and 18/6/89 which showed that what was being constructed was BHR, butchery and shop plus stores. The letter from the Council to the late Hezron Mwangi confirmed that he had paid the full amount for the corner shop plot in Mathare North. It asked him to note that ground rent and rates were to be paid annually. The Plaintiffs' witness produced only one receipt dated 17/3/014 for the payment of rates and ground rent. There is no evidence that the late Hezron Mwangi paid rent and rates for the other years.

25. The burden of proving that the late Hezron Mwangi was lawfully allocated the Suit Property by the Defendant and that it approved his development of a block of apartments on the Suit Property lay on the Plaintiffs. The Plaintiffs have not proved on a balance of probabilities that the Defendant granted a lease over the Suit Property to the late Hezron Mwangi. However, the court is persuaded that the Defendant's agents demolished the Plaintiffs' structure on the Suit Property without giving notice. In the court's view damages of Kshs. 10,000,000/= would adequately compensate the Plaintiffs' for the demolition of their development on the Suit Property by the Defendant without notice.

26. The court declines to grant the orders sought in the Amended Plaintiff dated 12/11/2018 but awards the Plaintiffs general damages of Kshs. 10,000,000/= against the Defendant together with the costs of the suit plus interest.

**DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MARCH 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Wambui Wahome for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendant