



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

ELC CASE NO. 525 OF 2017

ROBINS NYANGAU MOSONGO.....1ST PLAINTIFF

TABITHA MBUTE LAVI.....2ND PLAINTIFF

VERSUS

NGOITOI LEIYAN.....1ST DEFENDANT

KAJIADO COUNTY GOVERNMENT

(Successor to County Council of Olkejuado).....2ND DEFENDANT

JUDGEMENT

By an Amended Plaint dated the 25th November, 2015, the 1st and 2nd Plaintiffs' pray for judgement against the 1st and 2nd Defendants for:

- a) A permanent injunction restraining the 1st Defendant, his agents, servants and employees from entering, possessing, alienating, wasting or in any way dealing with the 1st Plaintiff's property known as 522/RESIDENTIAL-BUBUL T. CENTRE.
- b) Damages for trespass and wastage of the plot.
- c) Damages against the 1st Defendant for damaging the 1st and 2nd Plaintiffs' property and for psychological distress.
- d) Full compensation at the current market value of the 2nd Plaintiffs fencing materials being iron sheets and wooden poles.
- e) Full compensation of all the iron sheets and construction materials the Defendant took that belonged to the 2nd Plaintiff.
- f) Full compensation at the current market value of the 1st Plaintiff's 12 wooden post seized by the Defendant OR IN THE ALTERNATIVE
- g) A return of the 1st Plaintiff's 12 wooden posts in the condition they were in as at the 28th of March 2015.
 - (i) Proper and legal allocation of plot 522/Residential/Bulbul/T. Centre to the 1st Plaintiff forthwith by the 2nd Defendant; or in alternative
 - (ii) Proper and legal reallocation of a property of the same status as 522/RESIDENTIAL-BUBUL T. CENTRE to the 1st Plaintiff by the 2nd Defendant; or in the alternative
 - (iii) Full compensation of the purchase price paid by the 1st Plaintiff to the 2nd Plaintiff with interest from the date of completion until determination of this suit.
 - (iv) Interest on the suit as against the 1st and 2nd Defendants from the date of filing of the suit until determination of the suit at a rate to be determined by the court.
- h) Costs of the suit.

i) Any other relief the court may deem fit.

The 1st Defendant opposed the suit and filed his statement of Defence including a Counterclaim where he denied the averments in the Plaintiff. He contended that he is the legal purchaser of plot No. 56/ Residential – Bulbul Trading Centre wrongly indicated as 522/Residential – Bulbul Trading Centre. Further, that he had duly paid all the statutory payments demanded by the Kajiado County Council (now County Government of Kajiado) including land rates and legally acquired title to the said plot. He insists it is the 1st Plaintiff who has trespassed on his plot, demolished iron sheet structures with the help of two handy men without his permission. He contends that at the time he purchased his plot, it was vacant and he was the one who commenced putting up structures thereon. He explains that the Plaintiffs' acknowledge the Chief Land Surveyor's findings that the plot described as 522/ residential / Bulbul/ T. Centre which the 2nd Plaintiff allegedly sold to the 1st Plaintiff is nonexistent and therefore it is indeed the 1st Plaintiff who was trespassing and demolishing structures on the 1st Defendant's plot known as 56/ Residential – Bulbul T. Centre. He also seeks to be compensated for damages as against the Plaintiff. In the Counterclaim, he prayed for judgement against the Plaintiff/Tenant herein for:

i. The Plaintiff's suit against the 1st Defendant be dismissed with costs.

ii. The Honourable Court be and is hereby pleased to issue a permanent injunction to restrain the Plaintiffs from trespassing into the 1st Defendant's plot no. 56/RESIDENTIAL BULBUL TRADING, demolishing and destroying his iron sheet structures on the said plot.

iii. Costs of the Counter Claim.

iv. Any other relief that the court may deem fit.

The matter proceeded for hearing where the Plaintiff called witnesses while the Defendants failed to participate in the hearing although they were duly served.

Evidence of the Plaintiff

The 1st Plaintiff purchased plot 522/residential/Bulbul. T. Centre hereinafter referred to as the 'suit plot' from the 2nd Plaintiff, who had been allotted the same by the 2nd Defendant. On or about March, 2015, the 2nd Plaintiff commenced demolishing structures on the suit plot with the intention of giving vacant possession to the 1st Plaintiff. On 21st March, 2015, the 1st Defendant proceeded to the suit plot and claimed ownership of the same. Between 21st – 28th March, 2015, the 1st Defendant removed the perimeter fence that had been constructed by the 2nd Plaintiff and took away the fencing iron sheets including wooden poles to an unknown destination. Further, the 1st Defendant proceeded to demolish the single unit belonging to the 2nd Plaintiff and carted away the materials from suit plot. On 28th March, 2015, the 1st Defendant proceeded to attack the 1st Plaintiff and his handymen who were attempting to put up certain structures on the suit plot, culminating in the 1st Plaintiff reporting the matter to the Ngong Police Station vide OB NGONG 30/ 28.3 2015. The Plaintiffs produced various documents as exhibits including: Deed of Acknowledgment of receipt dated 12/2/2015; Remittance application form dated 12/2/2015; Request for lease of title dated 12/2/2015; Transfer form dated 19/7/2013 original; Transfer form dated 19/7/2013 copy; Agreement for sale dated 5/12/2014; Deed of Acknowledgement of receipts dated 5/12/2014; Cash sale receipt dated 28/3/2015; Photographs (17 photos); Photographs; Transfer form dated 19/7/2013; Rates payment request dated 16/2/2015; Receipt of rate payment dated 7/5/2015; Certificate of official search dated 7/5/2015; Certificate of official search dated 7/5/2015; Copy of Identity Card of Francis Mangoka; Burial permit Serial No. 0189050 and Burial permit Serial No. 575943.

The Plaintiffs' thereafter closed their case and filed submissions which I have considered.

Analysis and Determination

Upon consideration of the pleadings filed herein including the testimony of the witnesses, exhibits and submissions, the following are the issues for determination;

- What is the exact description of the suit plot.
- Whether the 1st Defendant has trespassed on the suit plot.
- Whether the Plaintiffs are entitled to the orders sought in the Plaintiff.
- Who should bear the costs of this suit.

I will deal with all the aforementioned issues jointly.

The 1st Plaintiff claimed to be the owner of plot number 522/Residential – Bulbul Centre while the 1st Defendant in his Defence indicated the suit plot is 56 Residential/Bulbul T. Centre. In their testimony the Plaintiffs' produced letter of transfer issued by the 2nd Defendant as an exhibit. From the Court records in 2015 I note the late Justice Onguto referred the parties herein to the Chief County Surveyor to ascertain the position of the Plaintiff and the 1st Defendant's plots. In a report dated the 6th October, 2015 filed in Court by the County Surveyor on 30th November, 2015 pursuant to the Order of the Court issued in September, 2015, the said Surveyor stated as follows: ' **that the site claimed by the Plaintiff as 522 Res is abutting plot No. 56, is partly on a road reserve supposed to measure 18 m, reducing the road**

to 12 m and encroaching onto plot no. 56 by 3 m. ‘

The Plaintiffs in their submissions contended that the 1st Defendant who is an allottee of Plot 56 Residential Bulbul T. Centre did not have a legal right to evict the 1st Plaintiff from Plot 522/ Residential / Bulbul T. Centre. To buttress their averments, they relied on Article 10 of the Constitution and Section 152 of the Land Laws Amendment Act 2016. Further, they relied on the case of **NAIROBI CIVIL APPEAL NUMBER 363 OF 2014; MOI EDUCATION CENTER CO. LTD –VS- WILLIAM MUSEMBI & 15 OTHERS**. They further submitted that the 1st Defendant’s Defence and Counterclaim and all supporting documents thereto cannot stand in the eyes of the law. To support their arguments, they relied on section 107 of the Evidence Act and the case of **MOMBASA CIVIL APPEAL NO. 88 OF 2009; D.T. DOBIE & COMPANY (K) LTD –VS- WANYONYI WAFULA CHEBUKATI**.

As per the court records, I note the 1st Defendant though duly served for hearing scheduled on 19th February, 2018 failed to appear in court culminating in the hearing of the case proceeding ex parte to its logical conclusion. Further, the 2nd Defendant despite having been duly served failed to enter appearance nor file a defence to controvert the Plaintiffs’ averments. In the case of *Shaneebal Limited...Vs...County Government of Machakos (2018) eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano.... Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007*, the Court held that: -

“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations.... Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”

In the circumstance, while associating myself with the decisions cited above, I find that the 1st Defendant’s statements in the Defence and Counterclaim remain mere allegations and hence the Plaintiffs’ averments are deemed uncontroverted. However, it is the duty of the court to interrogate the evidence presented by the Plaintiffs so as to make a proper determination of the dispute herein.

In the Plaintiffs’ witnesses’ testimonies, they produced evidence confirming how 1st plaintiff purchased the suit plot from 2nd plaintiff and contended that they had all the relevant documents after purchase. They confirmed taking possession and explained that the 1st Defendant thereafter destroyed their fencing, took away the poles and trespassed thereon. They contended that the 2nd Defendant backdated the Letter of Allotment in respect to the suit plot without their knowledge and further proceeded to indicate that the 2nd Plaintiff had been allotted plot 522A Residential / Bulbul T. Centre on 17th November, 2011. From the evidence tendered in court, it is evident that the original allotment letter dated 17th November, 2011 was issued and the property therein described as 522/Residential Bulbul Trading Centre while the Transfer of Plot No. 522/Residential-Bulbul T. Centre dated 19th July, 2013 Serial Number 18311. Further, from the backdated transfer, the 2nd Defendant transferred the suit plot to the 2nd Plaintiff on 19th July, 2013. even before the 1st and 2nd Plaintiff transacted. This is a clear indication that the transfer was backdated by the 2nd Defendant for reasons that are not clear to the 1st and 2nd Plaintiffs. In their submissions the Plaintiffs averred that the 2nd Defendant’s action of backdating the 1st Plaintiff’s transfer of allotment is illegal and un procedural.

I note the Plaintiffs’ however failed to produce any map to confirm the position of plots 522, 522A and 56. From the excerpt of the County surveyor’s report which I quoted above, there is a clear indication that plot 522 abuts 56 and is also partly on a road reserve. Based on the evidence before me, I find that the 1st Defendant’s plot and the Plaintiff’s plot are indeed distinct. In reference to the excerpt above, I further find that the 1st Defendant did not encroach on the Plaintiff’s plot as claimed. However, since the 2nd Plaintiff had already been in possession of the suit plot and had structures thereon, the 1st Defendant should not have resorted to take the law into his hands and proceed to destroy the structures on the Plaintiffs’ plot and scuttle away the iron sheets and wooden poles. It is my considered view that he should have subjected the reclaiming of his alleged plot through the due legal process. I note the 2nd Defendant that is the allotting authority failed to file a Defence to controvert the Plaintiffs’ averments nor intervene to correct the anomaly in respect to the two plots. Of significance is that the 2nd Defendant proceeded to even change the reference number to the Plaintiffs’ plot from 522 to read 522 A as evident in the Search Results produced as an exhibit. To my mind, it seems this was a case of double allocation and upon the 2nd Defendant realizing this irregularity; they randomly and without following any known procedure in law, changed the 1st Plaintiff’s land reference number from 522 to 522A.

I note the 2nd Defendant in its surveyor’s report dated 6th October 2015 and filed in court on 30th November 2015 indicated that plot 522 was a road reserve. Further, the 2nd Defendant proceeded to reallocate the said Plot 522/ Residential/ Bulbul T. Centre to African Inland Church on 17th May, 2012, which I opine was illegal, non-procedural considering the same had been previously allocated to the 2nd Plaintiff on 17th November, 2011. It is trite that once land has been allocated, the same cannot be reallocated unless the first allocation is validly and lawfully cancelled. I find that once on 17th November 2011 the 2nd Defendant allocated the 2nd Plaintiff the suit plot 522/Residential Bulbul T. Centre, with the 2nd Plaintiff having complied with all the legal requirements; it lost its powers to alienate and allocate the said plot to a third party. Further, it is trite law that where there are two competing equitable interest; the first in time will prevail in the absence of fraud.

The Court in **Peterson Ndegwa Wachira vs Christopher N. Kiboi, Emmanuel Kazungu, Nairobi City Council & Peter Kimaru Muguku (2013) eKLR**, 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.”

I find that the 2nd Plaintiff's letter of allotment being not only a proper allotment but also a superior allotment to Africa Inland Church supersedes all other subsequent allotments. I note as per the search dated the 7th May, 2015, the 1st Plaintiff's plot is now known as 522 A RES BUL BUL Trading Centre. Further, in 2015, the Plaintiffs had even been made to pay rates to the 2nd Defendant for plot No. 522A. What is puzzling is that Plot 522 Res Bul Bul is now allocated to a different entity, yet the transfer form dated the 19th July, 2013 in the name of the 2nd Plaintiff indicated the plot as 522/ Residential Bul Bul Trading Centre. I hold that the 2nd Defendant's action of reallocating a formerly allocated parcel of land to another is both unlawful and unjustifiable.

Further, to my mind, it seems the 2nd Defendant while allocating the 2nd Plaintiff the suit plot on 17th November, 2011 was well aware of the anomaly that it was partially on a road reserve but still proceeded to do so. They even continued to receive land rates for a plot purported to be on a road reserve. The Plaintiffs in their submissions insist the information was not available to the 2nd Plaintiff who innocently proceeded to procure the said plot. The Plaintiffs contend that they are hence entitled to compensation and relied on the case of **NAIROBI ENVIRONMENT AND LAND COURT ELC NO. 747 OF 2007 PAUL MUIRA, RUTH WANGUI MUIRA –VS- JANE KENDI IKINYUA, NAIROBI CITY COUNCIL AND CHIEF LAND REGISTRAR** to buttress their averments. Based on the facts at hand, while associating myself with the decisions cited above, I find that it is actually the 2nd Defendant who was responsible for the dispute herein and continued to cause more confusion by allocating the Plaintiffs' a different plot. I opine that the 2nd Defendant is hence responsible for the mistakes of its officials and also entitled to compensate the Plaintiffs'. The Plaintiffs submitted that the 1st Defendant was liable to compensate them for damage to the suit plot as well as General Damages. They explained that at the institution of the suit, the suit plot sold at Kshs. 2, 500,000. Further, the suit plot had been fenced with iron sheets and wooden posts which the 1st Defendant brought down and used the said materials to construct his own iron sheets structures as well as used the wooden posts as firewood. The Plaintiffs submitted that a sum of Kshs. 30,000,000 would suffice as general damages payable by the 1st Defendant to them.

I note the Plaintiffs never furnished court on how they arrived at the figure of Kshs. 30 million as general damages. Further, from their evidence, they had admitted that they had removed certain posts and iron sheets from the suit plot before the 1st Defendant interfered with their occupation thereon and took away the rest. In the case of *Peter Ndungu...Vs...Ann Waihera Ndungu & 2 Others*, the Court stated that; **'the issue that then follows for determination is on the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in Halsbury's Laws of England (supra) at Pg. 389 Para 616 on the measure of damages. The authors state -615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss. 616. Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.**

It is trite that General Damages have to be proved. In this instance, there was intrusion in the Plaintiffs occupation of the suit plot and removal of iron sheets as well as wooden poles. Further, there was also wastage of the plot. The Plaintiffs have sought for general damages amounting to Kshs. 30 million which I find exorbitant, I will proceed to award them Kshs. 1, 000,000 as general damages which should be apportioned as follows: Kshs. 200,000/= to be paid by the 1st Defendant and Kshs. 800, 000/= to be borne by 2nd Defendant.

Costs

Costs generally follow the event, and in this instant case, since the Plaintiffs have been inconvenienced with the acts of the Defendants, I find that they are entitled to costs and will award them the same.

In the circumstances, I will proceed to dismiss the counterclaim and enter judgement for the Plaintiffs in the following terms: -

- (a) The 1st Defendant his agents, servants and employees be and is hereby permanently restrained from entering, possessing, alienating, wasting or in any way dealing with the 1st Plaintiff's property known as 522 /RESIDENTIAL-BUBUL T. CENTRE.
- (b) The 1st Defendant be and is hereby directed to pay to the Plaintiffs Kshs. 200,000/= as General Damages.
- (c) The 2nd Defendant be and is hereby directed to pay to the Plaintiffs' the sum of Kshs. 800,000/= as general damages.
- (d) The 2nd Defendant be and is hereby directed to provide proper and legal allocation of plot 522 /Residential/Bulbul/T. Centre to the 1st Plaintiff within 90 days from the date hereof or reallocate them to a different plot.
- (e) The costs of the suit are awarded to the Plaintiffs to be borne by the Defendants.
- (f) Interest is awarded on (b), (c), and (e) from this date until payment in full

Dated signed and delivered virtually at Kajiado this 1st Day of March, 2021.

CHRISTINE OCHIENG

JUDGE