



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 211 OF 2015

MARGARET WAIGWAPLAINTIFF

VERSUS

SEVENTH DAY ADVERTIST CHURCH

EAST AFRICA UNION.....DEFENDANT

JUDGMENT

1. The initial suit was filed as **NBI HCCC No. 387 of 2005** vide a Complaint dated 30.3.2005 in which the Plaintiff was claiming ownership of the suit Plot No. A4-470 Kayole site and service in which the Defendant had constructed a Church house. A statement of defence was filed on 8.7.2005 in which the Defendant denied Plaintiff's claim averring that they were the *bonafide* allottee of the suit plot.
2. After a 13 years sojourn in the court corridors the matter briefly took off on 20.9.2018 when the Plaintiff gave her testimony. However, during cross-examination, she was stood down for two reasons: That the parties desired to pursue mediation and the Plaintiff desired to file an amended plead.
3. The mediation failed. The court directed that an amended plead be filed within 14 days of which the said pleading was filed on 4.10.2018 in which the following orders have been sought:
 - a) *Eviction from Plot No. A4 Kayole Service and Scheme.*
 - b) *Injunction restraining the Defendant from constructing any building in the Plot.*
 - c) *Order for demolishing all buildings and structures in the said premises.*
 - d) *Mesne profits as may be assessed by this honourable court from 1st July 2002.*
 - e) *In the alternative to prayers a-d above, compensation in lieu of the Plot, commensurate with the current commercial value of the property.*
 - f) *Costs of the suit and interest on costs.*
 - g) *any other relief as this court may deem just.*
4. No further pleadings were filed thereafter.
5. The case was to start all over again before me on 5.10.2021. The Defendants had been served but failed to turn up hence the matter proceeded *ex-parte*.

6. PW1, the Plaintiff adopted her statement recorded on 16.3.2015 as her evidence. she also produced the 13 documents in her trial bundle running from page 8 to 46 as her exhibits 1-13.

7. It is her case that she applied for the suit plot in 1992 in order to put up a nursery school of which she was issued with an allotment letter dated 20.7.1992. she paid the necessary charges amounting to Kshs 38,500/-

8. She contends that the Defendant unlawfully occupied the suit plot as from 1.7.2000 and had constructed a semi-permanent building used as a church, as well as a permanent building housing a nursery school by the name Kayole Day Nursery School.

9. PW1 further avers that Defendant's letter of allotment is dated 22.11.1993 which was not backed by any minutes hence the same was fraudulent.

10. She further avers that previously, she was seeking orders of demolition but considering that the Plot is built up, she is now seeking compensation. She avers that during mediation period, she was claiming Kshs 25 Million from Defendants but that her person had pegged the value at Kshs. 30 million.

11. In her submission, the Plaintiff reiterated the averments set out in her recorded statement adding that she duly complied with the terms of the allotment letter. She relied on the case of **Republic v. City Council of Nairobi & 3 others 2014 eKLR** where it was held that;

“once allotment letter is issued and allottee meets the conditions therein, the land in question is no longer available for allotment....”

Reference was also made to the case of **Eunice Cynthia Njeri v Adrew T. Kiptanui & Another (2018)eKLR** where it was held that;

“ The suit property was not available for allocation to the Plaintiff unless the allotment of the same property to the 1st Defendant was cancelled....”

12. The Plaintiff claims mesne profits as from 1.7.2002 as well as compensation in lieu of the Plot averring that the suit plot was Kshs. 25,000,000 as at 2018.

Determination

13. I have considered all the material presented before me. The issues for determination are whether the Plaintiff has proved that she is the owner of the suit plot, and what is the appropriate relief.

Ownership

14. The document on page 21 of Plaintiffs bundle is an allotment letter dated 29.7.1992 showing that Plaintiff was allotted the plot in order to put up a nursery school.

15. On the other hand, vide a letter dated 2.4.1996, (page 29 of Plaintiffs bundle) Defendants were seeking to be allotted the suit plot for purposes of having a nursery school and a church but claimed to have been on the land since 1989. The letter of allotment to Defendant is on page 32 bearing an incomplete dated of 22.11.1999, but looking at defence document, the date is 22.11.1993.

16. None of the rival parties has a title to the suit plot which means that the fall back is the allotment letter. It is quit apparent that Plaintiff's allotment came earlier than that of the Defendant.

17. In the case of **Gitwany Investment Ltd. V. Tajmal Ltd & 3 others (2006) eKLR**, it was held that the;

“the first in time prevails”

18. I am also in agreement with Plaintiff's submissions that having been allotted the suit plot and there being no cancellation of the said allotment, then the suit plot was not available for allocation to the Defendant. I therefore concludes that the suit plot belongs to the Plaintiff.

Relief

19. The Plaintiff is seeking *mesne* profits as well as compensation thereof. On *mesne* profits, the Plaintiff avers that she has been denied the use of the land since July 2000.

20. The suit plot was apparently allocated to Plaintiff in 1992 to build a nurse school. She doesn't state as to what prevented her from building for the period of close to 10 years. When she found the Defendant on the land, in year 2002, the buildings were already there. The Plaintiff filed an application dated 14.12.2005 to restrain the Defendant from dealing with the suit plot. However, that application was withdrawn two years later on 20.3.2007. This is a situation which depicts the Defendants as the one who has been in occupation of the suit property all along. The Plaintiff has not demonstrated that she embarked on utilizing the property at any given time from 1992. The claim for *mesne* profits must fail.

21. On compensation, Plaintiff avers that her plot is worth Kshs 25,000,000. She is seeking this alternative prayer because the plot is fully built up where there is a church and a nursery school. The Plaintiff has however not given a basis of her claim of Kshs 25 Million. No valuation report was tabled before this court to guide the court in terms of assessment of compensation. In that regard, the court will exercise its discretion and peg the value of land at Kshs 20,000,000.

22. In conclusion, I hereby enter judgment for the Plaintiff against the Defendant in which the Defendant is ordered to compensate the Plaintiff for the suit plot at Kshs 20,000,000, within a period of 6(six) months failure to which interest is to start accruing at court rates.

23. Each party is condemned to pay their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

MOMANYI FOR THE DEFENDANT

M/S CHERUIYOT FOR THE PLAINTIFF

COURT ASSISTANT: EDDEL BARASA