



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1380 OF 2016

1. DORCAS WAMAITHA MUNUHE

2. PETER KIARIE KAMAU

3. MICHAEL MWANGI KIRUBI

4. GEORGE MWANGI BEDARD KAGGIAH.....PLAINTIFFS

VERSUS

1. KAGUNDA KAIRU

2. NAIROBI CITY COUNTY.....DEFENDANTS

JUDGMENT

At all material times the plaintiffs were the owners of all those parcels of land known as Kayole Commercial Zone Block 13 Plot Nos. CP-01, CP-02, CP-03 and CP-04 (hereinafter referred to as “the suit properties”). The plaintiffs developed the suit properties with commercial buildings. The suit properties could only be accessed from the rear. In the area plan for the suit properties, the said rear access was designated as parking. The plaintiffs used the rear side of the suit properties for over 20 years without any interference. The plaintiffs secured the said parking area with a fence.

The plaintiffs brought this suit seeking; an injunction restraining the defendants from trespassing on, disposing, dispossessing, alienating, reclaiming, titling, claiming, curving out, excising, constructing on, developing or taking any action that would be adverse to the plaintiffs’ interests in the suit properties; an order revoking any allotment of the parking areas for the suit properties to the 1st defendant or any other person and costs of the suit.

The plaintiffs have averred that on or about 25th October, 2016, the 1st defendant started removing the fence that the plaintiffs had erected to secure the said parking area claiming that the area belonged to him. The plaintiffs have averred that when the 1st defendant was challenged to produce his title for the said parking area, he failed to do so.

The plaintiffs have averred that on 26th October, 2016, the 2nd defendant acting in collusion with the 1st defendant purported to issue the plaintiffs with an enforcement notice requiring them to remove the fence that they had erected around the said parking area. The plaintiffs have averred that on 4th November, 2016, the 1st defendant came to the premises with a group of people and started digging trenches with a view to fencing the said parking area and commencing construction thereon.

The defendants were served with summons to enter appearance. The 1st defendant did not enter appearance. The 2nd defendant entered appearance and filed a defence dated 8th February, 2017 on 28th March, 2017. The 2nd defendant denied the plaintiffs’ claim in its entirety.

At the trial, the defendants did not appear in court even the 2nd defendant which had filed a defence. The 1st plaintiff gave evidence on her own behalf and on behalf of the other plaintiffs. The 1st plaintiff adopted her witness statement dated 7th November, 2016 as her evidence in chief and produced the documents attached to the plaintiffs’ list of documents dated 7th November, 2016 as exhibits. In her witness statement, the 1st plaintiff reiterated the contents of the plaint that I have highlighted earlier in the judgment. In her brief oral testimony, the 1st plaintiff told the court that they brought this suit to stop continuous harassment by the defendants. She stated that when they put up a fence to secure the parking area for the suit properties, the 2nd defendant served them with an enforcement notice. She stated that the said enforcement notice was illegal since the area that they fenced belonged to them. She stated that they had used that parking area for over 20 years. The 1st plaintiff stated that the area was reserved as parking in the Beacon Certificates that were issued to them. The 1st plaintiff stated that the suit properties have a road at the front and parking spaces at the rear. The 1st plaintiff urged the court to grant the reliefs sought in the plaint.

After the close of the plaintiffs' evidence, the plaintiffs' advocate told the court that the plaintiffs wished to rely entirely on the evidence on record. I have considered the plaintiffs' claim and the evidence that has been tendered in proof thereof. The plaintiffs have accused the 1st defendant of trespass on the land reserved for parking for the suit properties. For the 2nd defendant, the plaintiffs have claimed that it served them with an illegal enforcement notice with a view to aiding the 1st defendant to illegally acquire the said parking area. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause.

What I need to determine is whether the plaintiffs have proved that they own the suit properties and that the 1st defendant entered on the parking area reserved for the suit properties and took possession thereof without any justifiable cause. The other issue for determination is whether the enforcement notice that was served upon the plaintiffs by the 2nd defendant was illegal. The plaintiffs have demonstrated that they are the owners of the suit properties. The suit properties were allocated to the plaintiffs by 2nd defendant's predecessor, the City Council of Nairobi (hereinafter referred to as "the council"). The plaintiffs have produced in evidence letters of allotment that were issued to them by council in respect of the properties. The plaintiffs have also proved through the Beacon Certificates that were issued to them by the council that the portion of land in dispute was reserved as parking for the owners of the suit properties and as such the same was not available for allocation by the council for any other use. The plaintiffs have also proved that the 2nd defendant served them with an enforcement notice on 28th October, 2016 requiring them to remove a wall that they were alleged to have erected around the disputed parcel of land.

This suit was not defended by the defendants. The evidence that was tendered by the plaintiffs was not controverted. The defendants did not dispute that the plaintiffs are the owners of the suit properties and that the disputed portion of land was reserved as parking space for the owners of the suit properties. The defendants did not also dispute that the 1st defendant had entered the said parking space and attempted to carry out construction thereon. It was also not contested that when the plaintiffs resisted attempts by the 1st defendant to take possession of the said parking space for the suit properties, the 2nd defendant served them with an enforcement notice.

The plaintiffs having proved that the portion of land in dispute was reserved for parking and as such was not available for allocation to the 1st defendant or any other person and that the 1st defendant entered the said portion of land and attempted to take possession thereof, the burden shifted to the 1st defendant to justify his entry onto the said property. The 2nd defendant also had the burden of establishing that its enforcement notice to the plaintiffs was justified. In the absence of any evidence from the defendants, the only conclusion the court can make is that the 1st defendant's entry into the disputed portion of land was illegal and as such unjustified and that the enforcement notice served upon the plaintiffs had no legal basis.

For the foregoing reasons, I am satisfied that the plaintiffs have proved their case against the defendants. I therefore enter judgment for the plaintiffs against the defendants on the following terms;

1. I grant a permanent injunction restraining the defendants by themselves or through their servants, employees or agents from allocating, leasing, selling, charging, entering, using, occupying, erecting structures on or otherwise howsoever interfering with all that parcel of land at the rear or back side of all those parcels of land known as Kayole Commercial Zone Block 13 Plot Nos. CP-01, CP-02, CP-03 and CP-04 (the suit properties) that was reserved as parking and rear access to the suit properties.
2. Any allotment by the 2nd defendant to the 1st defendant of the said parking and rear access to the suit properties is cancelled.
3. The plaintiffs shall have the costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kirimi for the Plaintiffs

N/A for the Defendants

Ms. C. Nyokabi - Court Assistant