



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 15 OF 2014

MORRIS GITAU KIHUGA.....1ST PLAINTIFF

TESSY MUHATIA SHILOYA.....2ND PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT

JUDGMENT

By a plaint dated 20th January 2014 and amended on 4th December 2019, the plaintiffs herein sued the defendant seeking for the following orders:

- a) A declaration that the defendant's conduct in failing to deal with the plaintiffs' application for approval of a plan for the construction of a perimeter wall is unjust and unfair.*
- b) A declaration that the defendant has no legal basis or right to remove construction materials from land reference number Eldoret Municipality Block 13/335*
- c) Demolition of structures put up by the defendant on the suit land and eviction*
- d) Any other relief the court deem fit and just to award.*
- e) Costs of the suit*

The plaintiffs filed an application for injunction contemporaneously with the plaint whereby the parties compromised the application with a status quo order pending the hearing and determination of the suit.

PLAINTIFFS' CASE

PW1 gave evidence and stated that they are the registered owners of a leasehold interest over land reference Eldoret Municipality Block 13/335 which they acquired through purchase from one Stephen Gacii Gathongo who had in turn acquired the same from Geoffrey Kiptanui Singoei.

PW1 further testified that upon taking possession of the land, they submitted a perimeter wall construction plan for approval to the defendant but the defendant failed and or neglected to approve the construction plan without giving reasons for the failure to approve the plan.

PW1 stated that the defendant's conduct is unfair and unjust and there is absolutely no legal basis for the failure to approve the perimeter wall construction plan. PW1 produced the original certificate of lease, official search certificates dated 29th August 2013 and 31st December 2019 and photographs showing the status of the plot to prove ownership of the land.

PW1 therefore urged the court to grant the orders as prayed in the plaint with costs.

On cross-examination by Mr. Mitei for the defendant stated that he bought the land from one Mr. Stephen Gacie Gathongo and that the said Mr. Gathongo did not inform him he had tried to change user but he had been informed that the same is for public utility.

The defendant filed a defense but never tendered any evidence in respect of the case. The suit

PLAINTIFFS' SUBMISSIONS

Counsel for the plaintiffs filed submissions and stated that the plaintiffs must demonstrate

- a) The failure to approve or refuse to approve the development plan is untenable.***
- b) They are the owners of the parcel of land.***
- c) The defendant has no right to be thereon.***

Mr. Momanyi submitted that the defendant is under a legal duty to either approve or refuse to approve the proposed development plan and if the plan is not approved then they are under a duty to give reason for such decision.

Counsel further submitted that under section 31 -34 of the repealed Physical Planning Act 1996 the defendant was duty bound to take a decision of the submitted development plan either to approve or reject but with reasons on why it had been rejected. Counsel therefore submitted that the defendant did not comply as no approval was granted and no reasons were given for not approving the development plan.

On the issue of ownership counsel submitted that the plaintiffs have proved that they are the legal and absolute owners of the suit land having produced a certificate of lease which was not rebutted by the defendant. The plaintiffs explained the root of the title which they stated that they purchased from Stephen Gacii. Counsel therefore urged the court to find that the plaintiffs have proved that they are the registered owners of the suit parcel of land hence entitled to the orders sought.

ANALYSIS AND DETERMINATION

The issues for determination are whether the plaintiffs are entitled to the orders sought in the plaint. The plaintiff gave evidence and produces two certificates of official search before and after purchase of the suit land. He explained that he bought the suit land from one Stephen Gacii and was issued with a certificate of lease.

Section 26 (1) of the Land Registration Act provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

There was no evidence to controvert or rebut the plaintiffs title and ownership of the suit land. It is unfortunate that the defendant was given several opportunities to record witness statements and file documents but they squandered this chance. They did not call any evidence to rebut the plaintiffs evidence.

The oral and documentary evidence shows that the plaintiffs acquired the suit land legally and were subsequently registered as owners.

In the case of **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997**, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

Similarly, in the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** Justice Makau had this to say when dealing with a similar matter,

“It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.”

The defendant was under a duty to either approve or reject approval but give reasons for the rejection of the approval for the plaintiffs to take other steps. This was not done. The court gave an order of status quo to be maintained which the defendant disobeyed by putting up some structures contrary to the court order.

In the case of **Republic v Clerk Municipal Council of Kisii & 6 others Ex-Parte J. A. S. Kumenda & 2 others [2016] eKLR** the court held that:

“Accordingly subject only to the qualification that the applicants development plans on the suit property must be approved under the provisions of the Physical Planning Act, Cap 286 Laws of Kenya which has its own mechanisms as relates to approvals of any development plans on the suit property, I grant the orders sought in the Notice of Motion dated 11th March 2013 in terms of prayers 1, 2 and 3. The costs of the application are awarded to the applicants and the same shall be borne by the interested party (Kisii County Government).”

Similarly, in the case of **Wilson Masila Muema v County Government of Machakos [2020] eKLR** the court held that:

“For the reasons I have given above, I allow the Plaintiff’s suit as follows:

a. An order of mandatory injunction be and is hereby issued compelling the Defendant to grant to the Plaintiff approvals to develop land parcel number Machakos Municipality Block 1/756 in line with the existing laws and regulations on development within 30 days from the date of service of the Decree.”

It is unfortunate that this matter took so long to be determined. I have considered the pleadings, the evidence, documents produced and the submission by counsel and find that the plaintiffs have proved their case against the defendant on a balance of probabilities with costs. I therefore issue the following specific orders:

- a) A declaration that the defendant’s conduct in failing to deal with the plaintiffs’ application for approval of a plan for the construction of a perimeter wall is unjust and unfair.*
- b) A declaration that the defendant has no legal basis or right to remove construction materials from land reference number Eldoret Municipality Block 13/335*
- c) Demolition of structures put up by the defendant on the suit land and eviction*
- d) The defendant to approve the plan for construction of a perimeter wall in line with the existing laws and regulations on development within 30 days from the date of service of the Decree.*
- e) Costs to the plaintiffs.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF NOVEMBER, 2021.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.