



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.498 OF 2009

CONSOLIDATED WITH ELC NO. 579 OF 2009

DAVID MUCHIRI GIKONYO.....1ST PLAINTIFF

JOSEPH GATONYE.....2ND PLAINTIFF

VERSUS

JENNIFER WANGARI KAMAU.....1ST DEFENDANT

THE CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGEMENT

1. Jennifer Wangari Kamau sued the City Council of Nairobi, David Muchiri Gikonyo and Joseph Gatonye in Environment and Land Court (**ELC**) **Suit No. 498 of 2009** seeking to have the Defendants restrained from trespassing or otherwise dealing with the land known as plot Number B-01 Komarock II Shopping Center together with general and special damages of Kshs. 100,000/= per month. Further, she sought a declaration that the Nairobi City Council acted unreasonably in demolishing her property and should compensate her. Jennifer Wangari Kamau further sought an order for cancellation of the title over Nairobi/Block 133/292 issued in the name of Joseph Gatonye in the Amended Plaint dated 27/4/2018.

2. David Muchiri Gikonyo filed **ELC Suit No. 579 of 2009** against Jennifer Wangari Kamau and the City Council of Nairobi seeking a declaration that he is the lawful owner of plot number C9 Komarock Phase II (HFCK) Shopping Center, (Nairobi Block 133/292). He also sought a mandatory injunction directing Jennifer Wangari Kamau to vacate and deliver up plot number C9 Komarock Phase II (HFCK) Shopping Center, (Nairobi Block 133/292) together with a permanent injunction to restrain Jennifer Wangari Kamau from dealing with this parcel of land.

3. Jennifer Wangari Kamau filed a defence and counterclaim in **ELC Suit No. 579 of 2009** denying Joseph Gatonye's claim and counterclaimed reliefs identical to those she seeks in **ELC No. 498 of 2009**. **ELC Suit No. 498 of 2009** and **ELC No. 579 of 2009** were consolidated and for ease of reference, the court directed that Jennifer Wangari Kamau would be referred to as the 1st Defendant, the City Council of Nairobi referred to as the 2nd Defendant while David Muchiri Gikonyo and Joseph Gatonye will be referred to as Plaintiffs in the proceedings and in this judgement.

4. The hearing of this case started before Lady Justice Gitumbi on 23/6/2017 when the evidence of Joseph Gatonye was taken. The 1st Plaintiff stated that he saw an advertisement for the plot on 22/10/1994. A letter of allotment was issued to him on 22/11/1992 in respect of Commercial Plot C9- Komarock Phase II Shopping Center upon making an application to the City Council of Nairobi. He stated that he paid the allotment fees together with rates in the sum of Kshs. 18,180/= to the Council. He stated that he went to City Hall in October 1994 and was given a surveyor who showed him the beacons of the plot allocated to him. He claimed that he obtained the beacon certificate in 2008 and fenced the land using barbed wire. When he returned to the land after about a month he found the fence had been removed and met the 1st Defendant who he considered to be a trespasser on the land. The 1st Defendant warned him not to step on the land. Both Plaintiffs and the 1st Defendant went to seek clarification on the allocation of the suit land at City Hall. The 2nd Plaintiff had been allocated plot number C10 which was next to the 1st Plaintiff's plot.

5. The 1st Plaintiff stated that he wrote a letter to the 2nd Defendant on 10/12/2008 seeking the assistance of the City Council in removing the 1st Defendant from the suit land following which the 2nd Defendant issued an enforcement notice. The 1st Plaintiff stated that he was assured by officials at the City Council of Nairobi that the plot was under his name. He had been advised to follow up the matter with the police but when he did he never got help from the police at Kayole Police Station where he went to record statement. The Plaintiffs instructed an

advocate to write a demand letter to the 1st Defendant.

6. While this suit was pending, the 1st Plaintiff decided to pursue the registration of the Suit Property. The registry index map (RIM) for Nairobi Block 133 was duly amended by the Ministry of Lands and a title was processed in the 1st Plaintiff's name on 4/9/2013. The 1st Plaintiff stated that the 1st Defendant has continued to put up illegal structures on his land besides renting shops and conducting vehicle assembly from the suit land. The 1st Plaintiff stated that it had proved difficult to obtain physical possession of the suit land.

7. He produced a copy of the letter of allotment dated 22/10/1992 vide which he was allocated commercial plot number C9- Komarock (HFCK) Phase II shopping Centre, and which required him to accept the offer and pay stand premium and other costs within 30 days in the sum of Kshs. 18,180/=. He produced a copy of the receipt showing he made payment of this sum on 22/10/1994. He also produced a copy of the receipt issued by the Nairobi City Council on 23/4/2008 for payment of Kshs. 15,000/= being survey fees for plot number C9. He also paid ground rent of Kshs 45,000/= on 23/4/2008. The beacon certificate dated 30/4/2008 that he produced in evidence shows the plot diagram and dimensions for parcel number C9. The area is shown as 0.0317 hectare. He produced copies of the demand letters sent to the Town Clerk challenging the 1st Defendant's construction on his land. The 1st Defendant's advocate responded by beseeching the 1st Plaintiff to desist from dealing with the land claiming it belonged to the 1st Defendant.

8. The 1st Plaintiff stated that he has been paying land rent for the plot to City Council for more than 23 years. He stated that the City Council issued an enforcement notice to the 1st Defendant and that it was the City Council which demolished the 1st Defendant's building on the land. He stated that after the demolition, the 1st Defendant put up two buildings on her plot. He urged the court to stop the 1st Defendant from interfering with his quiet possession of his plot known as Nairobi Block 133/292. He stated that his plot became Nairobi Block No. 133/292 after he was shown the land by the surveyor and the City Council assisted him to get certificate of lease over this parcel of land. He stated that the 1st Defendant was getting Kshs. 200,000/= from the suit plot every month.

9. The 2nd Plaintiff gave evidence. He stated that he got a letter of allotment dated 12/8/1992 from the City Council of Nairobi in respect of Commercial Plot number C10 – Komarock Phase II Shopping Center. He stated that he accepted the offer and paid the requisite fees through banker's cheque number 155900 for which receipt number 043010 was issued to him. He wrote to the Town Clerk on 4/5/1994 confirming his acceptance of the offer of allocation of the plot and forwarded a copy of the banker's cheque together with the receipt that was issued to him when he paid for the plot. He stated that he paid the survey fees in installments and produced a copy of the letter of allotment dated 12/8/1992 and receipt dated 29/4/1993 for part payment of the survey fees. He also produced a copy of the beacon certificate in respect of the land known as C10 in -Komarock Phase II dated 17/12/1992.

10. He produced a handwritten letter dated 17/3/1998 informing him that his plot number was L.R. No. 133/291, that is, Block 133 parcel number 291 together with a copy of the letter dated 12/7/2001 from the Nairobi City Council's surveyor requesting the Director of Surveys to amend the RIM for Nairobi Block 133. He also produced a copy of the letter from the Town Clerk's Department, City Council of Nairobi dated 13/2/2006 forwarding the lease documents to the Chief Land Registrar for registration in respect of five leases. The first name on that list is David Muchiri Gikonyo and the particulars are given as Nairobi Block 133/291 Komarock. He also produced a copy of the lease registered in respect of this piece of land on 23/2/2006 together with the certificate of lease issued on the same date. The lease states that it is for a term of 99 years from 1/1/1994 and gives the approximate area of the land as 0.0317 ha. The lessor is indicated as the Nairobi City Council. He also produced a copy of a search dated 22/5/2006 which showed that he was the registered lessee of Nairobi Block 133/291.

11. He produced copies of orders made in **Milimani Chief Magistrate Court Civil Suit Number 7209 of 2004** in which he had sued the 1st Defendant alongside John Kamau. He produced copies of the RIM showing the location of his plot. He stated that the Magistrates Court gave orders directing the 1st Defendant to move out of his plot. He denied going to the 1st Defendants land with bulldozers in 2009 and maintained that the demolition of the 1st Defendant's structures was undertaken by the City Council.

12. He maintained that the 1st Defendant was claiming plot number B1 yet his plot was different and was previously known as plot number C10 Komarock which later changed to Block 133/291. He confirmed that the beacon certificate and letter of allotment showed the plot number as C10 while the title that was issued to him is in respect of Block 133/291. He maintained that he had followed the proper procedure in obtaining his title after being given a lease by the Nairobi City Council in respect of Block 133/291. He urged the court to move the 1st Defendant out of his plot while stating that the 1st Defendant collected monthly rent ranging between Kshs. 400,000/= and 500,000/= from the plot.

13. The 1st Defendant gave evidence. She stated that she was the proprietor of plot number B-01 Komarock II Shopping Center pursuant to the letter of allotment dated 18/1/1994. She produced a copy of the letter of allotment dated 18/1/1994 and a copy of the beacon certificate dated 25/1/1994. She produced a copy of the letter written to the Director of Housing Development in August 2001 seeking confirmation of plot ownership. She produced copies of the minutes for the meeting of the Nairobi City Council held on 29/11/1996 together with the resolutions made in respect of some allocations of plots. She also produced a copy of the lease issued by the City Council in respect of plot number B-01 which stated that a grant could not be issued since the parcel of land had not been surveyed. She produced copies of receipts for various payments she made to the Nairobi City Council in respect of plot number B-01 Komarock II Shopping Center 'B'.

14. She also produced a copy of the letter dated 4/10/2011 which the City Council of Nairobi wrote to the Provincial CID headquarters confirming that plot number B-01 Komarock II Shopping Center B was allocated to her in 1994 and that her building plans had been approved on 20/1/1995. The letter acknowledged that there were some physical planning contradictions between the two plans prepared by the City Planning Department and the Housing Development Department. The letter stated that the contradictions were resolved by the minutes of the Town Planning Committee held on 15/11/1996 which resolved that the plan drawn by the Housing Development Department would be approved.

15. The 1st Defendant also produced a copy of Nairobi City Council's letter dated 27/1/2010 confirming that she was up to date with the

payments with respect to plot number B-01 Komarock Shopping Center up to 31/12/2010. She produced a copy of an incomplete ruling made in **Milimani CMCC No. 7209 of 2004** together with an order given on 16/6/2005 restraining the 1st Plaintiff from interfering with the plot known as Komarock Phase II Shopping Center B-01. She also produced a copy of the letter from the City Council of Nairobi dated 16/3/2010 confirming that she was the owner of plot number B-01 Komarock II Shopping Center B.

16. The 1st Defendant stated that she was given the plot in 1992 and that she had a map to show where her plot was. She maintained that plot numbers C9 and C10 which were allocated to 1st and 2nd Plaintiffs were different from her plot known as B-01. She contended that it was the Plaintiffs who demolished her building and not the City Council and relied on the photographs to show the demolition. The black and white photographs are not clear. She stated that there were people renting the buildings on her plot and that they were paying her Kshs 50,000/= every month for all the shops. She stated that she paid Kshs. 16,000/= on allotment and further paid Kshs. 2,400 and 14,400 in 1992. She produced a copy of the receipt issued by the Nairobi city Council on 20/11/2009 on account of survey, legal and search fees for plot number B-01 Komarock II S.C B. On cross-examination, she stated that she paid for the allotment on 20/11/2009 and that she was shown the plot by the City Council of Nairobi. She produced her plot card issued by the Nairobi City Council on 18/3/2010 in respect of plot number B-01 Komarock II Shopping Center B.

17. She stated that she was not aware that there was double allocation of her plot and that she had stayed on her plot and raised her children on it. She added that she had constructed on the land which was shown to her by the surveyor and that she had been staying on the land following the order issued in the Chief Magistrates Court.

18. The 2nd Defendant does not seem to have filed a defence in ELC Suit No. 498 of 2009 where it was sued as the 1st Defendant. It filed a defence in ELC No. 579 of 2009 on 11/3/2010 and denied the averments made by the Plaintiffs. The 2nd Defendant did not give evidence yet it is the body that allocated the land in dispute.

19. Save for the 2nd Defendant, all the parties filed submissions which the court has considered. The substantive issue for determination in this suit is who between the Plaintiffs and the 1st Defendant has a superior claim to the suit land. The Plaintiffs contended that the 2nd Defendant's defence was a mere denial and did not raise any triable issues. They submitted that they were allocated commercial plot numbers C9 and C10 Komarock (HFCK) Phase II shopping Centre respectively vide letters of allotment dated 22/10/1992 and 12/8/1992 by the Nairobi City Council. The 1st Plaintiff claimed that he got his beacon certificate on 30/4/2008 and was issued a certificate of lease in respect of his plot Nairobi Block 133/292 on 4/9/2013. The 2nd Plaintiff claimed that he paid the requisite fees and was issued a beacon certificate in respect of his plot on 3/9/1996. His lease was registered and he was given a certificate of lease in respect of Nairobi Block 133/291 on 23/2/2006. The Plaintiffs challenged the 1st Defendant's lack of a title to her land. They urged that by the time the 1st Defendant claims to have been allocated plot number B-01 Komarock II Shopping Center on 18/1/1994, the plot was not available for allocation.

20. The Plaintiffs further submitted that they have a superior title to their two plots by virtue of the fact that they hold registered leases over Nairobi Block 133/291 and 292 whilst the 1st Defendant only holds a letter of allotment which they contended is not a title to property but that it is merely an offer to take property. They relied on the case **Stephen Mburu and 4 others v Comat Merchants Limited and another [2012] eKLR**. They relied on Section 23 of the repealed Registration of Titles Act and Section 26 of the Land Registration Act on the legal position that the courts have to take as conclusive evidence the fact that the person named as proprietor of the land was the absolute and indefeasible owner and that such title cannot be challenged except on grounds of fraud or misrepresentation which the proprietor is proved to have been a party to the fraud or misrepresentation. They urged the court to protect and uphold their ownership of the suit land.

21. In determining who is the lawful owner of the plot, they argued that the 1st Defendant claims she was allocated plot number B-01 Komarock II Shopping Center but that she had failed to show its physical location. They also took issue with the 1st Defendant's averment that she had had tenants in a two storeyed building on her plot since 1992 yet she claims to have been allocated the plot in 1994. The Plaintiffs submitted that the plot was vacant in July 1994. They further submitted that the 1st Defendant has been illegally occupying their land through threats to their lives and colluding with the police to harass the Plaintiffs.

22. On whether plot number B-01 Komarock II Shopping Centre refers to Nairobi Block 133/291 and 292, the Plaintiffs submitted that the 1st Defendant occupies what is a combination of the Plaintiff's two parcels of land being Nairobi Block 133/291 and 292. They maintained that plot number B-01 which was allocated to the 1st Defendant is not where she is currently occupying and that where she is belongs to the Plaintiffs. They added that plot number B-01 does not appear in the official maps for the area. They pointed out that the 1st Defendant claims that her plot measured 0.150 ha which appears on the lease she produced while the Plaintiffs plots each measure 0.0317 ha which would become 0.0834 ha when combined hence this cannot be the same plot.

23. On the role played by the City Council of Nairobi in the allocation of the land, the Plaintiffs stated that the Council confirmed through its letter of 16/11/2009 that the 1st Plaintiff was the registered owner of plot number C9 Komarock Phase II Shopping Center. Further that the 2nd Defendant had by its conduct affirmed that the Plaintiffs were the *bona fide* owners of the suit land when they issued the enforcement notice dated 24/2/2009 and demolished the 1st Defendant's structures on the land. Further, that this was buttressed by the fact that the 2nd Defendant processed the documents including the survey of the plots and liaising with the Ministry of Lands in processing of the titles issued to the Plaintiffs. They urged that they were entitled to general damages having been deprived the opportunity to develop their plots by the 1st Defendant who has been enjoying proceeds from the development she illegally put up on their property. They urged the court to award them general damages.

24. The 1st Defendant submitted that she was allocated the suit land in 1992 and secured it through the letter of allotment dated 18/1/1994. She stated that she got a beacon certificate on 25/1/1994 and a lease agreement dated 3/8/2009. She submitted that the Plaintiffs invaded her plot which is number B-02 and not plot numbers C9 and C10 which the Plaintiffs lay claim to. She contended that the titles in respect of Nairobi Block 133/291 and Nairobi Block 133/292 were illegally issued to the Plaintiffs and should be revoked for they relate to land which belongs to her. She relied on the 2nd Defendant's statement of defence dated 10/3/2010 in which the 2nd Defendant denied issuing letters of

allotment to the Plaintiffs. She also relied on the letters confirming her ownership of the plot written by the 2nd Defendant on 27/1/2010 and 4/10/2011.

25. She relied on the case of **Wreck Motor Enterprises v the Commissioner of Land and 3 other Civil Appeal No. 71 of 1997** where it was held that once an allotment letter is issued and the allottee meets the conditions set out in the letter, the land in question was no longer available for allotment since the letter of allotment conferred a right of ownership unless it was cancelled by the allocating authority or it was acquired through fraud, mistake, misrepresentation, illegally or against public interest. The 1st Defendant also relied on court decisions stating that where land has been allocated the same land cannot be reallocated unless the first allocation is lawfully cancelled. She urged the court to find that she is the lawful owner of plot number B-01 Komarock II Shopping Center.

26. The 1st Defendant sought general damages of Kshs. 5,000,000/= as compensation for the illegal trespass and demolition of her property. She relied on the court order issued in **Milimani CMCCC No. 7209 of 2004** restraining the Plaintiffs from interfering with her Suit Property. She sought a permanent injunction to restrain the Plaintiffs from interfering with plot number B-01 Komarock II Shopping Center in line with the ruling given in **Milimani CMCC No. 7209 of 2004**. She maintained that the Plaintiffs obtained their titles illegally, unprocedurally or through corrupt scheme contrary to Section 26 of the Land Registration Act and urged the court to cancel the Plaintiffs' titles.

27. The letter of allotment produced by the 1st Defendant is dated 8/1/1994 and demanded payment of Kshs. 18,400/= and acceptance of the offer within 30 days. The receipt produced by the 1st Defendant for this sum is dated 12/8/2009, which means the 1st Defendant paid for the plot fifteen years after it was offered for allocation to her. The receipt issued by the 2nd Defendant on account of occupation and clearance is dated 20/11/2009. The plot card the 1st Defendant produced is dated 18/3/2010. No evidence was led to show when the 1st Defendant moved onto the suit land. The court notes from the ruling of Mrs. R.N. Kimingi, Principal Magistrate dated 16/6/2005, that the court restrained the Plaintiffs from dealing with the plot known as Komarock Phase II Shopping Centre B-01. It may well be that the 1st Defendant moved to the suit land when she obtained the orders of injunction from court. The receipt for payment of survey and legal fees adduced by the 1st Defendant is dated 20/11/2009. She did not give evidence of what came after the surveying of her plot which ought to have led to the issuance of a title to her. The lease agreement she produced for plot number B01 II Shopping Centre is dated 3/8/2009 and does not give the size of the plot. Ordinarily, a plot is first surveyed before a lease is issued in respect of that plot. The 1st Defendant did not adduce any evidence to show that the Plaintiffs demolished the structures she had put up on the suit land. She did not call a witness from the 2nd Defendant, which was the allocating authority, to confirm the plot which the Council allocated to her and its physical location.

28. The 1st Defendant maintained that her plot was Komarock Phase II Shopping Centre B-01 measuring 0.15 hectares. This plot ceased to exist once the land in that area was surveyed and given parcel numbers in Nairobi Block 133. The suit land belonged to the City Council of Nairobi, which allocated it to various persons. The fact that the City Council of Nairobi surveyed the disputed land and then went ahead to process and issue leases to the Plaintiffs and at some point issued an enforcement notice to the 1st Defendant goes to show that the Council recognised that the Plaintiffs were entitled to the suit land. The variation in size of the plots also tends to support the Plaintiffs' claims since their plot dimensions are similar to those reflected in the amended Registry Index Map for Nairobi Block 133. The sizes in the letters of allotment issued to the Plaintiffs are closely similar to those in their certificates of lease and in any event a combination of the Plaintiffs' two plots does not give you the size of the plot which the 1st Defendant lays claims to.

29. Weighing the evidence of the Plaintiffs against that of the 1st Defendant, the court finds that the Plaintiffs have proved on a balance of probabilities that they are the owners of the suit land. The 1st Defendant failed to prove her claim to the suit land on a balance of probabilities.

30. The court grants prayers (i), (ii), (iii) and (iv) of the Plaintiffs filed by Joseph Gatonye on 17/11/2009 in ELC Suit No. 579 of 2009. Joseph Gatonye is awarded general damages in the sum of Kshs. 2 Million against Jennifer Wangari Kamau. The City Council of Nairobi will pay the costs in respect of ELC Suit No. 579 of 2009 to both Joseph Gatonye and Jennifer Wangari Kamau.

31. The court grants prayers (c) and (d) of the counterclaim dated 13/6/2018 filed by Joseph Gatonye and David Muchiri Gikonyo in ELC Suit No. 498 of 2009. The costs of the counterclaim will be borne by the City Council of Nairobi.

32. The court dismisses the claim by Jennifer Wangari Kamau. The City Council of Nairobi will pay costs of the suit in ELC No. 498 of 2009 to Jennifer Wangari Kamau, David Muchiri Gikonyo and Joseph Gatonye.

Dated and delivered at Nairobi this 1st day of October 2019

K.BOR

JUDGE

In the presence of: -

Mr. P. Saende for the Plaintiffs

Ms. Brigid Chepkoech holding brief for Mr. Mutai for the 1st Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Defendant