



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO 81 OF 2007

RICHARD NKINYANGI KUBAL.....PLAINTIFF

VS

MERU COUNTY GOVERNMENT.....1ST DEFENDANT

FRANCIS GATOBU ALIAS FRANCIS

M'MWENDA M'MAUTA.....2ND DEFENDANT

JUDGEMENT

BACKGROUND

The plaintiff had initially sued the County Council of Nyambene before the promulgation of the new constitution and the creation of the County Government units. The plaintiff later amended the plaint to replace the defunct County Council of Nyambene with the Meru County Government. The plaintiff's claim is not clear since the last pages of the plaint are missing from the court file. From the reading of the first page of the plaint, and the chamber summons application which was filed simultaneously with this suit, the plaintiff is complaining that by a letter Ref. No. NCC/TC/LRE/2/2/3/37 dated 18/7/2007 the defendant unilaterally and without hearing unlawfully purported to cancel his allocation and withdrew the allocation. The plaintiff in paragraph 4 of the plaint, stated that the county council of Nyambene had allocated him the suit property on 29th November, 2000 during their town planning and markets committee meeting as reflected in minute No. TP&M(26/11/2000 C(D) 11 of the same date. At paragraph 5 thereof the plaintiff averred that upon allocation of the said plot, he developed the same by constructing an hotel worth one million and has been paying the defendant their annual rent and licence fees as required.

The plaintiff therefore prays that the defendant be compelled to withdraw the letter purporting to withdraw the letter dated 18/7/2007. The plaintiff is also seeking orders of injunction restraining the defendant, its servants agents and/or employees from depriving the plaintiff of his plot No. 46 situated at Kaelo market from interfering with his ownership of the said plot. The plaintiff is also seeking costs of this suit. When that application was placed before the duty court, the same was certified urgent to be heard in the absence of the defendant/respondent. The court also granted temporary injunction orders restraining one Francis Atobu alias Francis Gatobu M'Mwenda M'Mauta, his servants and employees from constructing on plot No. 46 Kaelo market pending the hearing of this suit.

When this case came up for hearing, the plaintiff stated on oath that he applied for allocation of a plot to the 1st defendant who allocated him vide minute No. TPM 26/11/2000 C (D) 11 dated 12th January, 2007. He said the meeting was held on 29/11/2000. He produced the extract of the minute as P Exhibit No. 1. He said he was allocated plot No. 46 Kaelo market. Upon allocation, he built a butchery.

He stated that his plot is measuring "20x100". He built a butchery on a portion measuring "20x60". He also stated that on the other side of the plot were three kiosks. One belonging to his father-in-law, the second defendant Francis Gatobu and Kirimi Mutua. He allowed them to use the remaining portion measuring "20x40". In 2007 a lady called Nchororo who was a nominated councillor came to his butchery, ate food and requested to see him. She told him that she had heard he was in PNU. The lady told him to support Maore in KANU. He told her that he was not going to leave his party of choice. After four(4) days, the lady came back again with the 2nd defendant. They ate food after which they called him. The nominated councillor asked him whether she had told him before?. She told him to support Maore. Thereafter they left. After about two(2) days, he heard the 2nd defendant and the nominated councillor were at Nyambene County Council.

On 2nd July, 2007 he received a hand written letter by the clerk to the Council saying that the disputed site would be visited on 4/7/2007 and that he was required to be on site. He waited on 4/7/2007 but nobody came. He produced the hand written letter as P. Exhibit No. 2. on 18th July, 2007 he received another letter saying following complaints, the allocation had been withdrawn. He was then summoned to Njuri Ncheke. The 2nd defendant was asked to remove his kiosk. He removed but then started constructing on his plot. He instructed his lawyers who filed this case. He said that his business is closed since 2008 to date. He produced copies of licences he was issued by the 1st defendant. He produced as P. Exhibit No. 4. the plaintiffs stated that he was not accorded a hearing before purporting to cancel this allocation. He prayed for a declaration be issued that plot No. 46 Kaelo market belongs to him. He also sought a permanent injunction

restraining the defendants from interfering with the ownership of his plot No. 46 Kaelo market.

The plaintiff is also asking general damages for loss of business from the damage his business was closed to date with costs of this suit. The plaintiff called one witness who is also his wife Jane Richard who gave sworn testimony and stated that she operates a butchery on plot No. 46 Kaelo market. The plot was given to her husband who is the plaintiff in this case by the then county council of Nyambene. They started building semi-permanent building which they used as a butchery. She recalled that in 2007, they were given a letter by the then County Council of Nyambene saying that her husband was not given the plot lawfully. In 2008, the 2nd defendant ordered them to vacate the plot. Her husband then filed this case. The defendant did not tender any evidence in defence. I have carefully considered the sworn testimony by the plaintiff and his witness.

I have also perused at the documents tendered in evidence. The plaintiff produced an extract of minutes of town planning and market committee meeting held on 29/11/2000 where it is indicated that the plaintiff's application No. 3003 for permission for a general trade at Kaelo market was approved. The plaintiff also produced a second letter dated 2/7/2007 addressed to him from the defunct County Council of Nyambene purporting that there was a complaint against him and others who had constructed market stalls. The nature of the complaint is not disclosed. In the subsequent letter dated 18/7/2007, the then County Council of Nyambene purported to withdraw the contract signed which had allocated him the suit plot until proper investigations are completed. The actions by the then County Council of Nyambene were being done without giving the plaintiff the benefit of a hearing. It is against the rules of Natural Justice to condemn a person without a hearing. The then County Council of Nyambene confirmed having approved allocating the plaintiff a plot at Kaelo market. They even allowed him to construct a building which he started operating business. The County Council of Nyambene also issued the plaintiff licence to operate that business. The 1st defendant cannot therefore unilaterally purport to cancel such a contract without giving reasons for doing so. The defendants have not tendered any evidence in their defence. I therefore find that in the absence of any evidence to the contrary, the plaintiff's testimony on oath and the documents produced remain unchallenged. In the case of Linus Ng'ang'a Kiongo Vs Town Council of Kikuyu(2012) eKLR Odunga J. held as follows:

“What are the consequences of a party failing to adduce evidence? In the case of MOTE KNITWEAR LIMITED VS GOPITEX KNITWEAR LIMITED(MILIMANI) HCCC No 384 of 2002 Justice Lesiit citing the case of AUTHA SINGH BAHRA AND ANOTHER Vs RAJU GOVINDJU HCCC. No 548 of 1998 stated;

“Although the defendant has denied liability in an amended defence and counter claim no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claim made by the defendant in his defence and counter claim must fail.”

I fully associated myself with the reasoning and wisdom of my learned colleague. In the upshot, I find that the plaintiff has proved his case against the defendants on the required standard. I therefore enter judgment for the plaintiff against the defendants jointly and secondly in the following terms:

1. A declaration that the plaintiff is the rightful allottee of plot No. 46 situated at Kaelo market as approved by the defunct County Council of Nyambene pursuant to their minute extract dated 12/1/2007.
2. The 1st defendant's letter issued by the then defunct County Council of Nyambene dated 18/7/2007 is hereby declared null and void.
3. Each party to bear his own costs of this suit.

Read, delivered and signed in the open court this 6th day of July, 2018.

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MR E. C. CHERONO

ELC JUDGE

In the presence of

1. M/S Mbijiwe holding brief B.G.Kariuki for plaintiff
2. Defendant/Advocate(absent)
3. Court clerk: Galgalo/Janet -present