



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO.685 OF 2017

NANCY WACHERA NDIRITU.....PLAINTIFF

VERSUS

GEOFFERY MUNAGI NGANGA.....1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 27th July 2017, the Plaintiff sought for Judgement against the Defendants jointly and severally for orders that:-

- a. A permanent injunction restraining the 1st Defendant by himself , his agents , servants and or any other persons whomsoever from encroaching upon, trespassing onto. Constructing on or remaining on or in any way howsoever interfering with all that plot known as Plot Number Kamiti Outspan
- b. A permanent mandatory injunction compelling the 1st Defendant by himself , servants , agents to demolish and remove all the illegal construction within the Plaintiffs plot Number 47 Kamiti Outspan and to demolish all that building and illegal erections interfering with the activities of the Plaintiff.
- c. A Permanent injunction restraining the 2nd Defendant from approving any development plans by the 1st Defendant on Plot Number 47 Kamiti , Outspan Kiambu County.
- d. A Permanent injunction against the 1st Defendant restraining them not to interfere with the Plaintiff's parcel of land.
- e. General Damages for trespass and loss of user
- f. Costs of this suit
- g. Interest on (e) and (f) above at Court rates
- h. Any other Relief that this Honourable Court may deem just to grant.

The Plaintiff averred that she is the lawful owner of the suit property measuring 50 by 80 square feet, having purchased it from the original allottee Peter Mwangi Kimani, on 28th February 2011. That the 1st Defendant has never at any one time been the registered owner of the suit property, and or owned the same. Further, that the Plaintiff purchased the suit property, vide a sale agreement dated 28th January 2011, for Kshs.350,000/= and though she has not transferred the ownership documents under her name, she has been in possession of the same since the purchase . That having bought the suit property, the Plaintiff assumed all rights and benefits pertaining to the said plot to the exclusion of any other person.

Further, that on diverse dates in the month of March 2017 , the 1st Defendant illegally and without any rights trespassed onto the Plaintiff's plot and started fencing the same using the mabati and digging trenches and bringing other construction materials on the suit property. That the 1st Defendant's actions are malicious and unlawful. The Plaintiff particularized malice and illegality by the 1st Defendant as; trespassing onto the suit property without any justifiable cause, instructing his servants to dig trenches and start construction without any reason and interfere with her ownership in order to harass and embarrass her and frustrating her ownership of the suit property .

That the Plaintiff lodged a complaint with the 2nd Defendant who instructed their surveyor to confirm the exact position of the suit property, after which the 1st Defendant was reprimanded verbally for constructing on **Plot 47**, but no action was taken and the 1st Defendant continued with the construction. That unless restrained, the 1st Defendant would continue with trespassing onto the suit property.

The suit is contested and the 1st Defendant filed a statement of Defence dated **23rd March 2018**, and denied all the allegations made in the Plaintiff. He averred that he was allocated the land in **1977** by the **County Council of Kiambu**, and the plot was pointed out to him by the then Country Surveyor and he has been utilizing the suit property for 40 years and paying land rates. That on **14th October 2011**, he visited the 2nd Defendant's offices and a land Surveyor by the name **Teresiah Waithera Ngigi**, visited the land and placed beacons and pointed out **Plot No. 62** to him. That the plot is adjacent to **Plot 36**, which has already been developed. That he was then issued with a receipt for the beacon certificate upon payment.

That during the site visit, he inquired as to the irregularity on the size of the plot and he was informed that some land was excised and earmarked as a road reserve leaving the plot size to be **40 by 80-ft**. That the Plaintiff has no document to support ownership and the only document she has is a sale agreement which is not a title document. Further, that the Plaintiff has produced documents of **Plot No. 81** and linked them to **Plot No. 47** and if **Plot No. 47** existed, the same ought to have appeared on the Daily Nation when County Council of Kiambu published a list of plots and their owners. That he has always owned and utilized the suit property. There was no meeting on the conclusive ownership of the property and the assertion that he has constructed on **Plots No. 47 and 62**, are baseless as the same is based on the sketch map she has produced and not based on evidence or survey records from the official sources.

The 2nd Defendant filed its statement of Defence dated **11th June 2019**, and denied all the allegations made in the Plaintiff. That its offices did not issue the letter of allocation dated **26th October 1993**, by the alleged vendor from whom the Plaintiff purchased the suit land. That it denies reprimanding the 1st Defendant on constructing on the suit property. That the letter of allocation presented by the Plaintiff was not signed by the person authorized to issue letters of allotment letter and the Plaintiff has failed to avail evidence that her alleged Vendor had complied with all the conditions as set out in the allotment letter. That the Court does not have jurisdiction as the Plaintiff has failed to exhaust dispute resolution mechanisms as provided for under the Physical Planning Act and the Court cannot issue a prohibitory order against the 2nd Defendant to stop it from carrying out its duties.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for herself and closed her case and the Defendant called two Witnesses.

PLAINTIFF'S CASE

PW1 Nancy Wacera Nderitu adopted her witness statement dated **25th July 2017**, as her evidence in Court. She further produced the list of documents dated **27th July 2017**, exhibit 1 and further testified that she purchased the suit property and she is being denied possession of the same. That she bought the suit property from **Peter Kimani** as he was allotted the plot on **26th October 1995**. Further that she has submitted her Application for transfer and that she has all the documents and **Peter Kimani** is still the registered owner of the Plot being **Kamiti Outspan No. 4** as that is what is written in the allotment letter. That the allotment letter indicates **1993**. That what she has indicates **1995**. Further that the surveyor pointed out the suit property to her, but she was not given a **beacon certificate**, but she has been to the ground and it is easy to pick the plot. Further that the plan is an official document, but not registered with Survey of Kenya, as it is registered at Kiambu Lands Office. That the sketch plan is authentic as it is given before the plots are officially registered. That she was talking of **Plot No. 47** and not **81**. She paid the land rent of **Kshs.46,252/=** that cleared the land arrears at the time. That the annual rate was **Kshs. 3000/=** and the payment was made on **14th December 2015**. That as at **1995**, the plot was available. Further that the 1st Defendant is occupying **Plot No. 62** and he took possession in **2017**, and that is the property that she claims. That when he purchased the suit property, the plot was vacant and he started to construct in the suit property in 2017.

Further that as per the allotment letter, the rate payable was **Kshs.1000/=** and the Plot she is shown is the one occupied by **Peter Kimani**, as the 2nd Defendant gave her documents to show that the plot she purchased was the one occupied by the 1st Defendant. That she is claiming **Plot No. 81**.

That the letter of allocation is for the person she bought the suit property from. That her sale agreement is dated **25th January 2011**, and she did not confirm if he had complied with **Condition No 9**, of the Letter of allotment. That the payment receipt is dated **14th December 2015** for **Kshs.49,252/=** for the payments of the rates arrears. That, she had the allotment letter to get an invoice from the **County Government of Kiambu**. Further, that she did a her due diligence, and she was not aware that the **County Council of Kiambu** had repossessed the Land and that the 1st Defendant he was in arrears of three months. That she was given a letter dated **8th December 2015**, confirming the existence of the plot. That she did not verify the minutes of the allotment as they were not available. That the County Council of Kiambu accepted the documents as presented. And the letter produced in the bundle of document is the one dated **26th October 1993**, and the payments made were accumulated penalties.

DEFENCE CASE

DW1 Geoffrey Mungai Nganga, adopted his witness statement dated **23rd March 2018**, as his evidence in Court. He further produced his list of documents as Exhibits in Court. That he was allocated **Plot No. 62 Kamiti Outspan** by Kiambu County Council in **1977**, and he has since been paying for the said plot since then. That when he was allocated the plot, he was shown the same Physically by the County Council Surveyor and the same was pointed out to him. That he was given a beacon Certificate in **2011**, and when he wanted to develop the plot he went back with the Surveyor who surveyed the Plot, and put Beacons. He fenced the said plot and dumped building materials.

That he was later informed by the County Council Official that someone else was claiming the land and at that time, he had already taken possession and had started developing the property. He urged the Court to confirm his ownership as he had met the conditions for

allocation of the suit property

That the size of the allocated land was **50 ft by 120 ft** and the plot he has built on measures **40ft by 80 ft**. That it is the same plot, but with different measures. That the beacon certificate is not stamped, but there is a receipt that is stamped. That he started the actual construction in **2011**, and then he learnt that someone else was claiming the land. That together with the Plaintiff, they took their documents to the **County Council of Kiambu**, and he was never invited for another meeting. That the houses on the suit property were completed in **2016** and that he was informed that the plot measured differently and that was because of accommodating the infrastructure. He stated that the suit property has never been resurveyed.

DW2 Henry Muhora Chege adopted his witness statement dated **3rd March 2018**, as part of his evidence and further testified that he is the Chairman of **nyumba kumi**, and the plot in dispute belongs to the 1st Defendant as he used to go and check on the said plot. That the 1st Defendant brought the Surveyor in **2011**, and he assisted them to dig the holes for the Beacons. Further, that in **December 2011**, the 1st Defendant fenced the plot and developed it and that he has met him on the plot severally. That there are anomalies on the size of the plot on the ground and the allotment letter.

Before fencing of the plot, the same plot had not been developed. That he developed the plots using the allotment letter and he used a Surveyor to identify the plot. That he did not attend the meeting called by then County Government of Kiambu and that **Waithera** is the County Surveyor. That he knows the plaintiff who lives in the area, but he never went to check on the plot nor talked to him about the plot. Further, the sketch map was used by **Waithera**, which was not officially from the Director of Survey.

Thereafter, the Court directed the parties to file Written Submissions which the Court has carefully read and considered together with the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

1. **Who is the bonafide owner of the suit property**
2. **Whether the Plaintiff is entitled to the orders sought**
3. **Who should bear the costs of the suit**

1. Who is the bonafide owner of the suit property

The Plaintiff and the 1st Defendant both lay claim to the suit property. When a person title to land is challenged and/or called into that question, person is required to show the root of their his/her title. Though the parties lay claim to the physical location of the suit property, the Plot numbers that they base their claim on are totally different. The Plaintiff herein lay claim to **Plot No. 47**, having bought the same from one **Peter Mwangi** vide a sale agreement dated **28th January 2011**. That she then took over statutory obligations such as paying of land rates but hit a snag when the 2nd Defendant refused to transfer the suit property to her. To support her claim, the Plaintiff produced in evidence a sale agreement, a copy of a letter of allocation issued to **Peter Mwangi**, on **26th October 1993**, an alleged survey plan that only showed a sketch, but the same was neither stamped nor authenticated and copy of receipts of payment of rates for **2015 to 2016**. From the documentation produced in Court as exhibits and without any evidence to Controvert the same, the Court is satisfied that the Plaintiff is the owner of **Plot No. 47**.

On the other hand the 1st Defendant lay claim to **Plot No. 62**. In order to support his case, he produced as exhibits a letter of allocation of **Plot No. 62**, rent payments receipts, beacon Certificate, Beacon Certificate payment receipt, Public Notice of land rates, defaulters and photographs of the constructed **Plot No. 62**. In the absence of any evidence to the contrary and the 1st Defendant having produced a letter of allocation dated **4th July 1977**, the Court is thus satisfied that he is the owner of the **Plot No. 62**.

As both parties lay claim to the physical location of the suit property, for this Court to be able to determine who is the bonafide owner, it must determine who has been able to place their plot Number in the suit property. Though the Plaintiff claims that the County Surveyor has visited the suit property and declared that the suit property is hers to wit **Plot No. 47**, she has not produced any evidence to prove the said claims. **"It is trite that he who alleges must prove"**. The Plaintiff has failed to prove the same and therefore the Court finds and holds that she has failed to prove that the suit property is Plot No. 47.

On the other hand, the 1st Defendant called DW2 who confirmed that the 1st Defendant has always been in possession of the suit property. To support his claim, the 1st Defendant produced in evidence a beacon Certificate which is a **document anchored in the Survey Act, declaring that the surveyor has placed beacons**. That he has full knowledge of the positions of the said beacons and that he is satisfied that such define the boundaries of the parcel in question. Possession of a Beacon Certificate could only mean that the Surveyor visited the physical land and placed the beacons. Thus the Court finds that the available evidence supports the 1st Defendant's claim that the suit property is his and it is indeed **Plot No. 62**. Though the Plaintiff produced a sketch Plan, the same has not been authenticated and it is impossible to tell how the same was procured or if it shows that the suit property is **Plot No. 47**. This Court arrives at a finding that the 1st Defendant has been able to prove that the suit property is **Plot No. 62**, by the production of the **Beacon Certificate** and corroboration of DW2.

Consequently the Court finds and holds that the 1st Defendant is the bonafide owner of the suit property.

2. Whether the Plaintiff is entitled to the orders sought

In her Plaint, the Plaintiff had sought for several orders being an Order of Permanent and mandatory injunction as against the Defendants,

That the 1st Defendant be restrained from interfering with the **Plot No. 47**, and for demolishing of all the structures therein. A Permanent Injunction restraining the 2nd Defendant from approving any development plans and to cancel any development plan already issued.

The Court has found and held that the suit property herein is **Plot No. 62**, and further held that the same belongs to the 1st Defendant herein. Hence, the 1st Defendant is the bonafide owner of the suit property. The 1st Defendant should be allowed to enjoy all the rights and privileges that appertain a proprietor of any property and including a right to peaceful and quiet possession of the suit property. Consequently, the Court further finds and holds that the Plaintiff is not entitled to the Orders sought.

3. Who should bear the costs of the suit

It is trite that costs usually follow the event unless special circumstances present themselves. However, Section 27 of the Civil Procedure Act gives court discretion to grant or not to grant costs of the suit. This Court finds no reasons to depart from the holding that cost follow the event.

Having carefully read and considered the Pleadings by the parties herein, the evidence adduced, the written submission and the provisions of law, the Court finds and holds that the Plaintiff has failed to prove her claim against the Defendant herein on the required standard of balance of probabilities. For the above reasons, the Court finds that the Plaintiff's claim as contained in the Plaint dated **27th July 2017** is **not merited** and the said claim is dismissed entirely with costs to the 1st Defendant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy