



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 546 OF 2017

ANNE OMUTERE ESILIBA.....PLAINTIFF

=VERSUS=

JOHN NJOROGE NDUNGU.....1ST DEFENDANT

THE NAIROBI CITY COUNTY.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 17th August 2017 the Plaintiff seeks judgment against the Defendants jointly and severally for:-

(a) An order directed at the 1st Defendant, to vacate the Plaintiff's suit property known as Plot No.25029 DANDORA AREA 2 & 3 INFILLS, with immediate effect and to hand over vacant possession of the said property to the Plaintiff.

(b) A permanent injunction against the 1st Defendant, his servants, tenant and /or agents and /or any other person or body of persons from entering upon, occupying, trespassing and/or otherwise meddling in the Plaintiff's suit property known as Plot No.25029 DANDORA AREA 2 & 3 INFILLS.

(c) An order of mandatory injunction directing the 1st Defendant to demolish the building erected on the Plaintiff's land and /or an order directing the Plaintiff in conjunction with the 2nd Defendant to demolish the building at the 1st Defendant's cost.

(d) Damages against the Defendants jointly and severally for trespass.

(e) Costs of and incidental to the suit.

(f) Such other or further relief or order which this Honourable Court may deem fit to grant.

The Plaintiff's Case

2. It is her case that she was allocated Plot No 25029 Dandora Area 2 and 3 Infills. She paid the requisite charges as prescribed in the letter of allotment and the Town Clerk instructed the Director, Housing Department to show her the plot. She was accompanied by a surveyor from the 2nd Defendant's office who showed her the plot as well as the beacons. She was issued with a beacon certificate which she produced as exhibit. She left for the United Kingdom for treatment but when she came back in 2015, she found a foundation on her plot. The developer was summoned but refused to appear before the 2nd Defendant. She went back to the United Kingdom and when she came back in 2017 found the construction complete.

The 1st Defendant's Case

3. Vide the amended defence dated 17th November 2017, the 1st Defendant contended that by an allotment letter dated 18th January 1994, the 2nd Defendant allotted to one Lawis Chyrus Wandugo all that parcel of land known as **plot No.B5025-Dandora Infil** upon payment of the requisite fees and fulfillment of the conditions set thereof.

4. He stated that by dint of a lease agreement entered into between the 2nd Defendant and the allottee- Lawis Chyrus Wandugo, on the 22nd day of May 2001, the allotment was crystallized and the 1st Defendant became proprietor vide a power of attorney donated to him by the

allottee and lessee Lawis Chyrus Wandugo on 19th February 2011 and registered on 18th March 2011 and a sale agreement dated 19th February 2011. He also stated that the Plaintiff's claim is over **Plot No.25029 DANDORA AREA 2 & 3 INFILLS**, while he is in possession of his premises on the parcel of land known as **plot No.B5025-Dandora Infil**.

The 2nd Defendant's case

5. Vide the amended statement of defence dated 17th November 2017 and amended on 23rd February 2018, the 2nd Defendant contended that the disputed plots **No.25029 DANDORA AREA 2 & 3 INFILLS** as claimed by the Plaintiff and **plot No.B5025-Dandora Infil** as claimed by the 1st Defendant refer to different parcels of land.

The Plaintiff's evidence.

6. PW1, Anne Omutere Elisaba, the Plaintiff told the court that she was allocated a property in Dandora phase II infill on 18th January 1994 vide an allotment letter signed by the Town Clerk then, one Zipporah Wandera. She added that the director would then confirm availability of the plot and authorized allocation.

7. She stated that she was then issued with a beacon certificate showing plots 25014, 25013, and a mosque as the neighbouring plots. She further stated that she has been paying ground rent from 1994 to date.

8. She told the court that she travelled to the United Kingdom for cancer treatment and in 2015, she was able to travel back to Kenya and since she wanted to develop the suit property, she applied for Physical Development Plan from the 2nd Defendant. She went to the suit property accompanied by the 2nd Defendant's officers, but found an ongoing construction thus the 2nd Defendant could not proceed with her approvals.

9. She stated that when she went to confirm from the Chief officer about the developments, it was confirmed that somebody was constructing on the ground but when summons were served, the developer did not appear but sent his caretaker thus a warrant of arrest was issued against the developer.

10. She added that she came back in 2017 only to find the construction complete with people occupying the building which has many units.

11. She stated that she was conversant with the Town Clerk's signature and the signature appearing on the 1st Defendant's allotment letter dated 18th January 1994 purporting to be hers were not hers.

12. She also stated that she pays her rates yearly. She prayed that her Plot be given back to her and the 1st Defendant's structures be demolished. She also prayed for mesne profits and interest. She also prayed that the rent collected from the property be deposited in court until this case is finalized. She adopted the documents in page 1-18 of the Plaintiffs bundle of documents as exhibits in this case.

13. When cross-examined-she stated that though she was allocated the suit property in 1994, she did not develop it as she was sickly. She admitted that in 2015, she did not meet the person who was constructing on the suit property but she later got his name from the records at the Nairobi City County.

14. She referred to the Enforcement Notice dated 24th February 2015, and summons issued by the city inspectorate department. When cross examined on the question of the of the Town Clerks signature; she stated that she is not a document examiner but she was familiar with the Town Clerk's signature as they had interacted for a long time. The enforcement notice was addressed to the owner/developer of L.R No. 25029.

15. PW2, Chief Inspector, Daniel Gutu told the court that he is a forensic document examiner and that he examined AOE1, AOE2, AEO3 which are known signatures of Zipporah Wandera against "LCW1" which is the questioned document and the Letter of allotment dated 18th January 1994 produced by the 1st Defendant and concluded that 'LCW1' was not signed by Mrs. Zipporah Wandera and therefore her signature was forged.

The 1st Defendant's Evidence

16. DW1, Inspector Gilbert Kipngeno Tanui a Forensic Document Examiner attached to Directorate of Criminal Investigations produced the report on behalf of Chief Inspector Miriam Kemunto. He stated that he had worked with Chief Inspector Miriam for over seven (7) years. He told the court that Chief Inspector Miriam examined the known signatures of Zipporah Wandera (Town Clerk) marked AOE1, 2, 3 against the disputed one marked LCW1 and found that they were made by the same author. He stated that the Report was prepared and signed on 14th June 2018. He produced it as exhibit D11. When cross examined by the Plaintiff's counsel he admitted that the documents had been examined by Chief Inspector Gutu before and had prepared a report.

17. DW2 John Njoroge Ndungu, the 1st Defendant testified on 7th October 2020. He adopted his witness statement dated 17th November 2017 as part of his evidence in this case. He also relied on the bundle of documents dated 17th November 2017 and the supplementary list dated 6th July 2018. The documents in the two bundles were produced as exhibit D1 to D13 respectively. He told the court that his plot is B5025 Dandora Infill while the Plaintiff claims 25029 Dandora. He further stated that these are two different parcels. He denied that he was issued with any Enforcement Notice neither has he been summoned to appear bear any court

18. He told the court that he is in possession of the suit property and has developed it. He prays that the Plaintiff's suit be dismissed. When cross examined by the Plaintiff's counsel he admitted that the letter of allotment and the beacon certificate were given to him by Lawis Wandugo. He admitted that there were two beacon certificates dated 10th March 1994 and 27th May 2011. He also admitted that the beacon certificate by Joshua Komen shows that the neighbouring plots are 25013 and 25014. The same ones neighbouring the Plaintiff's plot. When cross examined by Miss Omolo for the 2nd Defendant, he admitted that the lease to Lawis Wandugo had alterations but he does not know who did the alterations.

The 2nd Defendant's Evidence

19. The 2nd Defendant who was represented by Ms Omolo intimated to the court that it would be availing one witness. She sought an adjournment. The said adjournment was granted and the matter was fixed for further defence hearing on 2nd February 2021.

20. On the 2nd February 2021, Ms Omolo for the 2nd Defendant once again sought an adjournment in order to file a witness statement and avail a witness. Despite objections by the Plaintiff's counsel, the court having in mind that the evidence by the 2nd Defendant was crucial as it was the allocating authority, of the suit property granted the 2nd Defendant the final adjournment. The 2nd Defendant was directed to file a witness statement within 21 days. The matter was fixed for a further hearing on 21st April 2021.

21. On the 21st April 2021, there was no appearance by Ms Omolo for the 2nd Defendant. No witness statement had been filed. The court noted that it had been given the final adjournment. The 2nd Defendant's case was then closed and parties granted time to put in final submissions. A mention to confirm filing of submissions was slated for 27th July 2021. On 27th July 2021, there was still no appearance for the 2nd Defendant and a date for judgment was reserved. As at the time of writing this judgment, there are no submissions by the two Defendants.

The Plaintiff's submissions.

22. They are dated 23rd June 2021. Counsel for the Plaintiff submitted that **Plot Number 25029 Dandora Area 2 and 3 infills and plot No.B5025 Dandora Infills** refer to the suit property for reasons that the beacon certificate issued to the Plaintiff and the beacon certificate produced by the 1st Defendant had a sketch of the same plots neighbouring it.

23. He also submitted that the Plaintiff's letter of allotment dated 18th January 1994 was conditional to the Plaintiff paying charges of kshs.14,400/= within 30 days but the Plaintiff approached the 2nd Defendant who indulged her and enlarged the payment period to 10th January 1995.

24. He submitted further that that the 1st Defendant was unable to prove that the conditions of his conditional letter of allotment were met and whether he had sought any enlargement of time thus his claim on the allotment letter issued on and dated 18th January 1994 lapsed on 18th February 1994. He relied on the case of **Suleiman Murunga v Nilestar Holdings Limited and Another; Kisumu HCCA No. 9 of 2004** as reported in **Eunice Cynthia Njeri v Andrew T. Kiptanui & Another [2018] e KLR**.

25. On the issue of possession, counsel submitted that though the Plaintiff craved the opportunity to exercise her right to vacant possession, she was stuck in the United Kingdom undergoing intense cancer treatment and she was only able to travel in 2015 to find that the 1st Defendant had constructed a multi-dwelling house on her property. He relied on the case of **Lazarus Estate Limited v Beasley 919560 1 ALL ER 314 at 193** and quoted in **Aster Holdings Limited v City Council of Nairobi & 4 Others [2017] e KLR** to plead with the court not to allow the 1st Defendant to keep an advantage which he has acquired by fraud.

26. He also submitted that the Plaintiff had reason to believe that the signature of Mrs. Zipporah H. Wandera appearing on the letter of allotment produced by the 1st Defendant was forged and her opinion was corroborated by CI Daniel Gutu, a forensics document examiner.

27. He faulted the forensic report produced by the 1st Defendant who remarked that; "in my opinion, the signatures were made by the same author" while referring to the competing allotment letters, for going beyond his proper limits as stated in the case of **Samson Tela Akute v Republic [2016] e KLR**. He submitted further that during cross-examination, DW2 was unable to describe and /or direct the court to the similarities that led to his findings. He also submitted that the Plaintiff has produced receipts dating as far back as 1995 proving that she is up-to-date with the rates payable over her plot. He added that the 1st Defendant failed to call Lawis Chyrus Wandugo, who was issued with the allotment letter produced by the 1st Defendant.

28. I have considered the pleadings and the evidence on record. I have also considered the submissions on record and the authorities cited. The issues for determination are:-

(i) Whether the Plaintiff is the legal and or beneficial owner of Plot No 25029 Dandora Area 2 and 3 Infills.

(ii) Whether Lawis Chyrus Wandugo's Letter of Allotment and subsequent lease were acquired legally, and/or procedurally.

(iii) Whether the 1st Defendant acquired the suit plot lawfully.

(iv) Whether Plot No 25029 Dandora Area 2 and 3 Infills and Plot No B5025 Dandora Area are one and the same plot.

(v) Is the Plaintiff entitled to the reliefs sought?

(vi) Who should bear costs of this suit?

29. The Plaintiff's claim is based on the Letter of Allotment dated 18th January 1994. From the Letter of Allotment the plot she was allocated is Plot No 25029 Dandora Area 2 and 3 Infills. The said Letter of Allotment was signed by Zipprah Wandera who was the Town Clerk then. The Director of Housing Department confirmed the availability of the plot. She was shown the plot on the ground and a beacon certificate issued to her. She confirmed that the neighbouring plots to her plot were Nos 25013 and 25014. The payments made by the Plaintiffs were confirmed by the receipts Nos 514880 and 341346. They were produced as exhibits in this case. The Plaintiff further stated that she has been paying rates from 1994 to date. She produced the documents in relation to this case as exhibits P1 to P18 respectively.

30. It was further the Plaintiff's case that as per the Letter of Allotment date 18th January 1994 she was required to pay the charges within 30 days from that date. She approached the 2nd Defendant who indulged her and enlarged the time within which to pay to 10th January 1995. She then paid Kshs.14,400/- as shown on the receipts produced. She told the court that she did not develop the plot immediately as she became sickly and had to travel to the United Kingdom for treatment. She came back in 2015. She sought approvals to develop the plot but when she and the officers from the 2nd Defendant went to the plot, they found someone constructing as there was a foundation. An enforcement notice was issued to stop construction was issued to the developer. She later got the name of the 1st Defendant from the records held by the 2nd Defendant. Up to this point I am satisfied that the Plaintiff is the legal owner of Plot No 29029 Dandora Area 2 and 3 Infills.

31. The 1st Defendant told the court that he bought Plot No B5025 from Lawis C. Wandugo who had a Letter of Allotment. The Letter of Allotment is dated 18th January 1994, the same date as the Plaintiff's. There is a lease agreement between the said Lawis C. Wandugo and the 2nd Defendant dated 22nd May 2001. The 1st Defendant stated that he acquired the plot from Lawis Wandugo vide a sale agreement dated 19th February 2011. He also exhibited a Special Power of Attorney donated to him by the said Lawis C. Wandugo dated 19th February 2011.

32. There is no evidence to confirm that the said Lawis C. Wandugo complied with the conditions on the Letter of Allotment within 30 days. It is not clear from the receipts produced by the Defendant whether Lawis C. Wandugo paid the requisite charges within 30 days of the date of the letter of allotment or by 18th February 1994.

There is no evidence to show that he was granted enlargement of time with which to pay, by the 2nd Defendant.

33. I have gone through the lease between the Lawis C. Wandugo and the 2nd Defendant. There is alteration on the year it was executed. The same is dated 22nd May 1991 but there is alteration to read 2001. The 1st Defendant admitted there was alteration but stated that he did not know who had done the alteration. The said Lawis Wandugo was not called as a witness in this case.

34. PW2, Chief Inspector Gutu a document examiner examined the signatures of Zippora Wandera in the Plaintiff's letter of allotment and other known signatures as against the signature in the letter of allotment in the name of Lawis C. Wandugo. He formed the opinion that the two letters of allotment were not made by the same author. He stated that the signature in the letter of allotment in the name of Lawis C. Wandugo was not made by Zipprah Wandera the Town Clerk then. This report is dated 13th March 2018.

35. There is another report by Inspector Gilbert Kipngeno Tanui, also a document examiner. It was prepared by Chief Inspector Miriam Kemunto. The report is dated 14th June 2018 about three (3) months after Chief Inspector Gutu had examined the said documents. The Report by Chief Inspector Miriam Kemunto was produced as exhibit D11. It states that the two letters of allotment were signed by the same author, Zipprah Wandera. DW1 tried to discredit the report by Chief Inspector Gutu (Exhibit P5) that it was not approved by a Senior Document Examiner and that it was not supervised. I find that this allegation is not supported by any evidence as he was not present when Chief Inspector Gutu conducted his examination.

36. DW1 also claimed the procedure for submitting a request to Chief Inspector Gutu was not followed but this was not supported by any evidence. He even doubted Chief Inspector Gutu's stamp and signature and yet PW2 testified and was cross examined. The Document Examiners work independently and there would not need for supervision. DW1 admitted that he did not prepare the report that he produced on behalf of Chief Inspector Kemunto. This leaves the court to make the conclusion that the Report by Chief Inspector Gutu is the genuine one. The conclusion would be the Letter of Allotment issued to Lawis C. Wandugo was not signed by Zipprah Wandera the then Town Clerk.

37. I find that DW1 went beyond his scope by discrediting the Report of another document examiner who had more years of experience than him. In the case of **Samson Tela Akute vs Republic [2006] eKLR**; Lesiit J and Makhandia J held:-

“We would agree with the learned counsel for the Appellant that the proper role of a handwriting expert was correctly succinctly set out in the following passage in the case of Hassan Salum vs Republic (1964) EA at page 128.

“.....in saying that he (the expert) had no doubt that the forged signature had been written by the Appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in Bishop of Lincoln Case (1921) 90 LJPC 174 that it is not possible to say definitely that anybody wrote a particular thing. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side. However, the most he could say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand.....”.

38. From the foregoing, the conclusion would be that the letter of allotment in which the 1st Defendant's bases his claim on the suit plot was

not signed by Zipporah Wandera. His failure to call Lawis C. Wandugo as a witness to explain the root of the title leaves a lot to be desired.

39. I find that the 1st Defendant did not acquire the suit plot lawfully as it had been allocated to the Plaintiff. The beacon certificate issued to the Plaintiff and verified on 24th June 1997 shows that the Plaintiff's Plot 25029 has its neighbouring plots as 25013 and 25014.

40. The beacon certificate issued to Lawis C. Wandugo dated 10th March 1994 shows that the neighbouring plots to B5025 are all marked B5014, B4914 B4913 and B5013. The second beacon certificate issued to Lawis C. Wandugo dated 27th May 2011 now shows his plot as 25025 and the neighbouring plots are 25013 and 25014. This second map is a complete replica of the Plaintiff's as attached to the beacon certificate dated 24th June 1997 except now the plot No 25029 has changed to No 25025. The part marked playground is what was contained in the Plaintiff's beacon certificate as massive plot. It is possible that the plot that was allocated to Lawis Wandugo was different but where the 1st Defendant has currently constructed is on the Plaintiff's Plot No 25029 going by the neighbouring plots.

41. I find that the Plot No 5025 and No 25029 are one and the same plot. The beacon certificate to the Plaintiff is the genuine one. There is something about the documents issued to Lawis Wandugo that do not add up. The 2nd Defendant failed to avail the witness to shed light on these issues. This could have been intentional or not. I find that Plot No 25029 being claimed by the Plaintiff is the same one B5025 which the 1st Defendant has constructed on. I find that the Plaintiff has proved on a balance of probabilities that the plot she was allocated is the same one the 1st Defendant is claiming and has developed it. The Plaintiff has explained that due to ill health she went out of the country for treatment and that she was not able to develop her plot in good time. Later on she found the 1st Defendant had developed it. I find that she is entitled to the reliefs sought.

42. From the foregoing findings, it is clear that the 1st Defendant trespassed on the Plaintiff's plot and constructed thereon a multi dwelling building. The Plaintiff's attempts to have him keep off the property have been fruitless. In the case of **Aste Holdings Ltd vs City Council of Nairobi & 4 Others [2017] eKLR** it was held that **"no court in this land will allow a person to keep an advantage which he has obtained by fraud"**

43. The 1st Defendant ought to deliver vacant possession to the Plaintiff.

44. The 1st Defendant trespassed onto the Plaintiff's plot by constructing thereon. In **Clerk & Lindsell on Tort (17th Edition) paragraph 17-01**

Trespass is defined thus:-

"An unjustifiable entry by one person upon the land in possession of another....."

The tort of trespass is actionable without proof of any damage. In the case of **Philip Aluchio vs Chrispinus Ayaya [2014] eKLR J. E. Obaga** held as follows:-

".....The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiffs property immediately after the trespass or the costs of restoration whichever is less....."

I award Kshs.500,000/- as damages for trespass which I think is reasonable.

45. I find that the Plaintiff has proved her case against the Defendants on a balance of probabilities.

46. Accordingly, Judgment is entered in favour of the Plaintiff as against the Defendants jointly and severally for:-

(a) That the 1st Defendant is hereby directed to vacate the Plaintiff's suit property known as Plot No 25029 Dandora Area 2 and 3 Infills within sixty (60) days and to hand over vacant possession of the said property to the Plaintiff.

(b) That a permanent injunction is hereby issued against the 1st Defendant, his servants, tenants and/or agents and/or any other person or body of persons from entering upon, occupying, trespassing and/or otherwise meddling in the Plaintiff's suit property known as Plot No. 29029 Dandora Area 2 and 3 Infills.

(c) That an order of mandatory injunction is hereby issued directing the 1st Defendant to demolish the buildings erected on the Plaintiff's Plot No 29029 Dandora Area 2 and 3 Infills within sixty (60) days from the date of this ruling. IN THE ALTERNATIVE, the Plaintiff in conjunction with the 2nd Defendant do demolish the building at the 1st Defendant's costs.

(d) General damages for trespass Kshs.500,000/-.

(e) Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 25TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Njeru for the 1st Defendant

No appearance for the 2nd Defendant

Steve - Court Assistant