



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1111 OF 2013**

**TABITHA WANJIRU.....PLAINTIFF**

**=VERSUS =**

**JOSEPH THEURI WAIGWA.....1<sup>ST</sup> DEFENDANT**

**SAMWUEL MUCHEMI WANDIA.....2<sup>ND</sup> DEFENDANT**

**SIMON GITAHU WAHOME.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. The plaintiff filed the subject suit vide an amended plaint dated 25<sup>th</sup> of August 2020 and in respect of which she seeks the following reliefs;

*a) A declaration that the plaintiff is the legal owner of plot No 41, subsequently allocated plot No C42 by the city council of Nairobi and issued with plot formalisation card No. 8007, located in Komarock phase 3 developed by Embakasi/Njiru united Self Help Group.*

*b) An injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants whether by themselves, their employees, servants or agents or otherwise howsoever from trespassing into or interfering with the occupation and ownership of parcel of land known as Plot No 41, subsequently allocated Plot No C 42 by the city council of Nairobi and issued with the plot formalisation No 8007, comprised in a certificate No 1257 issued by Embakasi/Njiru United Self Help group to the plaintiff and located in the Komarock Phase 3 scheme developed by Embakasi/Njiru United Self Help Group.*

*c) A injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant to remove forthwith any structure illegally elected on parcel of land known as plot No 41, subsequently allocated Plot No C 42 by the city council of Nairobi and issued with Plot formalisation No 8007, comprised in a Certificate No 1257 issued by Embakasi/Njiru United Self-help Group to the plaintiff and located in the Komarock Phase 3 Scheme developed by Embakasi/Njiru United Self Help Group or in default thereof, the plaintiff do proceed and remove such structures at the cost of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.*

*d) Cost of this suit*

*e) Any further or other order as this honourable court may deem fit.*

2. Following the filing of the subject suit, the defendants herein entered appearance and filed statements of defence in respect of which the defendants disputed the claim by the plaintiff.

3. Subsequently, the said matter was fixed for hearing and it proceeded on **28<sup>th</sup> and 29<sup>th</sup> September 2021.**

**B. Plaintiff's Case**

4. The Plaintiff herein testified as PW1. She informed the court that she purchased plot No 41 situate in Komarock Phase 3 Extension which has been developed by Embakasi/Njiru Self Help Group. According to her, the plot was purchased from one **Francis Mutuku Munyao.**

5. It was her testimony that the said purchase was duly registered by Embakasi/Njiru United Self-Help Group and she was subsequently issued with certificate No 1257 and a beacon Certificate 721.
6. It was her testimony that the plot number of the suit premises was changed from Plot No 41 to plot C42 by Nairobi City Council and was issued with a formalisation card No. of 8007.
7. It was her further testimony that sometime in February 2013, the defendants trespassed on to and excavated the suit premises.
8. In support of her case, the plaintiff also adopted her witness statement dated 17<sup>th</sup> September 2013 and bundle of documents that was filed and produced as part of her evidence.

### **C. Defendants' Case**

9. Four witnesses testified on behalf of the defence, Joseph Theuri Waigwa testified as DW1, he adopted his witness statement dated 23<sup>rd</sup> of October 2020 and further stated that one **Peterson Murimi Waweru** was the immediate previous owner of the suit property having been issued with certificate of Ownership of the said plot No 42 by Embakasi Komarock Self Help Group and the said certificate of ownership being No 290.
10. It was his testimony that he acted as an agent of the third defendant and he made payment of Plot No. 42 on behalf of the 3<sup>rd</sup> Defendant. He denied ever trespassing onto the Plaintiff's land.
11. The 2<sup>nd</sup> defendant Samuel Muchemi Mundia also testified as DW2. He adopted his witness statement in support of the defence case. He stated that he was aware that the 3<sup>rd</sup> Defendant was the registered owner of the suit property.
12. It was his testimony that he was just acting on behalf of the 3<sup>rd</sup> Defendant who was residing abroad at the time of the transaction. His role in the transaction was only to connect the previous owner Peterson Murimi Waweru with the buyer who was the 3<sup>rd</sup> Defendant. He further stated that according to his knowledge, plot No 42 was the same as Plot No. 41 and he had never trespassed on to the Plaintiff's property.
13. Peterson Murimi Waweru was DW3. He stated that he was the previous owner of Plot No. 42 and that he sold the said plot to the 3<sup>rd</sup> Defendant vide a sale agreement dated 7<sup>th</sup> March 2011 and he handed over vacant possession to him. The plot was later allocated No. C41 and that according to him the official records of Nairobi City County also indicate that the 3<sup>rd</sup> Defendant was the current owner of the Plot.
14. The 3<sup>rd</sup> defendant testified as DW4. It was his testimony that he bought the land from Peterson Murimi Waweru who was the initial owner of Plot No. 42 located at Komarock Phase 3 Extension. It was his further testimony that the said plot was allocated Plot No. 41 from the initial No. 42 by the Housing Department of the Nairobi City Council. He also adopted his witness statement dated 2<sup>nd</sup> of October 2020 and urged the court to consider the same as part of his evidence.

### **D. Plaintiff's Submissions**

15. Plaintiff filed her submissions where she identified 5 issues for determination which included the following;

- a) *Where the suit premises Plot No. 41 (Plot No C42) is the same as Plot No 42.*
- b) *Who is the legal owner of the suit premises plot No 41 (Plot No C42).*
- c) *Who holds authentic document evidencing title for the suit property in the absence of a certificate of title.*
- d) *Whether an order of permanent injunction should be granted to the Plaintiff.*
- e) *Whether the Defendants actions to the suit premises amounted to trespass.*

16. On her first issue, it was her submission that plot No C42 was not the same as the 3<sup>rd</sup> Defendants Plot No 42. She submitted that her plot was purchased from one Francis Mutuku Munyao on 5<sup>th</sup> of December 2002. The sale was registered and legitimised by Embakasi/Njiru united Self Help Group and she was issued with a certificate of ownership No 1257 and Beacon Certificate No 721 dated 18<sup>th</sup> of January 2003 and was also formalised by city Council of Nairobi by issuance of Card No 8007.

17. It was the Plaintiff's further submission that the Defendant's property plot No 42 was facilitated by Embakasi /Komarock Self Help Group which was a different entity from Embakasi/Njiru United Self-help Group.

18. On the second issue, it was submitted that she was the legitimate owner of plot No C42. She based her claim on the root of title and referred to the case of ***Avid Developers Ltd vs Blue Horizon Properties Ltd and 2 others (2021) eKLR***.

19. On the third issue, the Plaintiff's submitted that the 3<sup>rd</sup> Defendant had not provided any evidence showing any relation between Embakasi/Njiru Self Help Group and Embakasi/ Komarock Self Help Group. According to her submissions, the defendants' documents were not genuine as they did not refer to the suit premises. In support of this claim, refence was made to the case of ***Hubert L. Martin and 2 others Vs Margaret J. Kamar and 5 others [2016]*** and ***Philomen L Wambia vs Gaitano Lusitsa Mukofu and 2 others [2019] eKLR***

20. On the fourth issue, it was her submission that the defendants have no right to occupy the suit property and as such a permanent injunction should be issued against them.

21. She concluded her submissions by submitting that the defendants' actions on her property amounted to trespass and as a result of which she has been unable to make good use of it. She relied on the case of **Stephen Abu Mukhobi vs Daniel Oria Odhiambo [2021]** and prayed for the court to grant her prayers as sought in the plaint.

#### **E. Defendants' Submissions**

22. Defendants' submissions were dated 5<sup>th</sup> November 2021. It delimited four issues for considerations. These were;

- a) *Who between the Plaintiff and the Defendant is the lawful owner of Plot No 41 also known as Plot No C 42.*
- b) *Whether the Defendants herein acting jointly or severally trespassed onto the Plaintiff's property as alleged by the Plaintiff.*
- c) *Whether the relief's sought by the Plaintiff should be granted.*
- d) *Who bears the cost of this suit.*

23. On the first issue, it was the Defendants submissions that Plot No. C42 and Plot No 42 were distinct and different plots. The Defendant further submitted that according to them, there was no dispute as to ownership since both plots are different.

24. The Defendants further submitted that they had not trespassed into the Plaintiff's land, since according to them they were constructing rightfully on the 3<sup>rd</sup> Defendant's property with his authority.

25. Additionally, it was submitted that the Plaintiff was not entitled to any relief since she had not proved her case as required. She had also failed to show any course of action as against the Defendant and as such the suit ought to be dismissed with costs awarded to the Defendants.

#### **F. Issues and determinations**

26. The Court having considered the pleadings of the parties, evidence tendered and submissions, is of the view that the following issues are for determination;

- i) *Whether plot No 41 (C42) is the same as Plot No 42.*
- ii) *Who is the legitimate owner of Plot No 41 (C42).*
- iii) *Whether the Defendants' trespassed onto the Plaintiff's property.*
- iv) *Whether the Plaintiff is entitled to the reliefs sought.*
- v) *Who should pay the costs of the suit.*

#### **Issue No 1 - Whether plot No 41 (C42) is the same as Plot No 42**

27. According to the plaintiff, the genesis of the acquisition of her plot No 41 is attributed to an allotment by City Council of Nairobi that was issued to Embakasi/ Njiru Self Help Group having been excised from **LR No. 11344/R** vide a letter of Allotment dated 15<sup>th</sup> of June 1998. She subsequently purchased from one Francis Mutuku Munyao on 5<sup>th</sup> of December 2002 and she produced a sales agreement to that effect. She was letter issued with a certificate of ownership No 1257 and a Beacon Certificate No. 721 dated 18<sup>th</sup> of January 2003 and was also formalised by city Council of Nairobi by issuance of Card No 8007.

28. On the other hand, the 3<sup>rd</sup> Defendant testified to have purchased Plot No. 42 from one Peterson Murimi Waweru who was allocated the plot from Embakasi/ Komarock Self Help Group. Both parties in their evidence and written submissions held the position that Plot Nos C42 and Plot No 42 were distinct and totally different despite being located at Komarock phase III Scheme. The Plaintiff while being cross examined and equally in re-examination maintained her position that both plots are indeed separate. This was also the testimony of the Defendants' witness.

29. The Court noted that the Nairobi City Council had on separate dates and on separate correspondences confirmed that Plot No. C42 was registered in the names of the Plaintiff as per their records vide their letter dated 29<sup>th</sup> October 2013 while Plot No 42 was owned by the 3<sup>rd</sup> defendant as per their letter dated 28<sup>th</sup> October 2013. In view of this and upon considering the evidence placed on record, the Court finds that Plot No C42 and Plot No 42 are indeed two distinct plots.

#### **Issue No 2 - Who is the legitimate owner of Plot No 41 (C42)**

30. Having established that Plot No 41(C42) is different from Plot No 42, it is evident from the oral and documentary evidence that was tendered before this court that it indeed belongs to the Plaintiff. The Defendants equally never contested the ownership of the said plot by the

Plaintiff, in fact, it was the Defendants' submission that the issue of ownership of plot No C42 by the plaintiff was not an issue for consideration since their Plot was Plot No 42. The Plaintiff has a certificate of ownership for Plot No. C42 and she also produced the Letter from City Council of Nairobi together with the evidence of payment of land rates in respect to the said plot. As such the court finds that the Plaintiff is no doubt the legitimate owner of Plot No C42.

### **Issue no 3 -Whether the Defendants trespassed to the Plaintiff's property**

31. **Section 3 (1)** of the *Trespass Act, Cap 294* provides that:

*"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."*

32. In the case of **Entick vs Carrington (1765)** as quoted in the case of **Maina Kabuchwa v Gachuma Gacheru [2018] eKLR**, Lord Camden CJ had this to say: -

*"Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave".*

33. In the case of **Maina Kabuchwa v Gachuma Gacheru (Supra)**, the Learned Judge defined trespass *"as the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant."*

34. Prior to the commencement of this suit, it was the Defendants contention that they were undertaking construction activities on the 3<sup>rd</sup> defendant's property pursuant to the 3<sup>rd</sup> defendant's instructions. However, as per the testimony that was adduced, the defendants were actually on the site of Plot No C42 believing it to be Plot no 42. Be that as it may, the Court finds that the defendants' action of moving into Plot No C42 and commencing construction on the said Plot amounted to an act of trespass.

### **Issue No 4 – Whether the Plaintiff is entitled to the prayers sought.**

35. Having held that the Plaintiff is the legal owner of suit land and that the Plaintiff never authorized the defendants to enter into, occupy or possess the land, it is evident that the Defendants have trespassed onto the suit land and they should be restrained.

36. Further, the Plaintiff is entitled to quiet possession and enjoyment of the suit land. Accordingly, the order of a permanent injunction against the defendants jointly and severally as prayed is appropriate.

37. The Plaintiff has proved her case against the Defendants to the required standards and as such she has laid down a basis for the grant of the prayers sought.

### **Issue No 5 – Who bears the cost of the Suit.**

38. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. Looking at the circumstances of this case, I direct that each party will bear own costs of these proceedings.

### **G. Final orders**

39. From the foregoing analysis, the Plaintiff proved her case on a balance of probabilities against the Defendants and in this regard, this Court makes the following final orders;

*a) A declaration that the Plaintiff is the legal owner of Plot No. 41, subsequently allocated Plot No C42 by the City Council of Nairobi and issued with Plot formalization card Number 8007, located in Komarock Phase III developed by Embakasi/Njiru United Self Help Group.*

*b) A permanent injunction be and is hereby issued restraining the Defendants from trespassing or in any other manner interfering with the Plaintiff's occupation and ownership of Plot No. 41 and subsequently allocated Plot number 42.*

*c) A mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant to remove within 30 days from today any structures illegally erected on Parcel of land known as Plot Number 41 and subsequently allocated plot number C42.*

*d) That should the defendants not have complied with order (c) above after the thirty (30) days period, the plaintiff shall be at liberty to remove the said structures and recover the said costs from the defendants.*

*e) Each party to bear their own costs of the suit.*

40. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER 2021.**

**E. K. WABWOTO**

**JUDGE**

In the Presence of: -

Mr. Nderitu for the Plaintiff.

Ms. Maina for the Defendants.

Court Assistant: Caroline Nafuna