



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 62 OF 2012

FREDRICK BAARIU IMATHIU & 117 OTHERS.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF MERU.....DEFENDANT

JUDGMENT

Introduction

1. Vide an amended Plaint dated 24th February, 2014 the Plaintiffs seek the following prayers against the Defendant:-

a) A declaration that the plaintiffs are entitled to Plots as approved by the Defendant's Town Planning and Market Committee and as confirmed by the defendant's full council meeting.

b) An order compelling the defendant to indicate and point out the plaintiffs respective plots upon payment of the requisite fees.

c) An Order that the defendant do facilitate the exercise by urgently taking the requisite fee and issuing necessary receipts.

d) Costs and interest

e) Any further or better relief this Honourable Court may deem fit to grant.

2. It is the plaintiffs case that in or about the year 1996 the defendant surveyed and did planning of commercial plots at REI and KAARE Markets, Tigania West District within Meru County, where it subsequently invited application from the residents for allocation of plots therein. They allege that pursuant to the defendant invite, the respective plaintiff herein tendered their applications successfully and were allotted the said commercial plots, and they accepted the offer and were directed to pay the required fees so that they would be shown their respective plots. They contend that they complied and paid the said fees, however the defendant failed to complete their part by showing them their respective plots, only to learn later that there were plans to allocate plots to other people necessitating the filing of the instant suit.

3. In response to the plaintiffs suit, the defendant through their defence dated 30th May, 2012 denied the plaintiffs allegations, contending that there was no survey or plan for commercial plots at REI and KAARE markets in Tigania West District.

Evidence In Court

4. Five witnesses testified in court. PW1 Fredrick Baariu Imathiu told the court that in October, 1995 the County Council of Nyambene advertised the allocation of plots in Kaare and Rei Market, that they were going to allocate plots to prospective owners in April 1996, and on that day they went there as a group and those successful paid the requisite fees and were issued with receipts and letters of allotment and were told to await the surveyor to undertake survey of the plots. He alleged that the defendant never communicated to them over the plots despite various follow up, which culminated in them writing a demand letter dated 12th January, 2011. He produced the copies of allotment letters for the Plaintiffs herein and receipts therein and urged the court to compel the defendant to show them the plots.

5. PW2 Geoffrey Kainga Ambani testimony is similar to that of PW1; he told the court that the plaintiffs herein were allotted the said plots pursuant to balloting conducted by the defendant. On being asked whether he has produced an allotment letter and receipt, he told the court that he forgot it at home. PW3 Samuel Kirera also testified that he was allotted Plot No. 120 after being successful in balloting and that he paid Kshs. 4,000/= and was issued with allotment letter, which he alleges forgot at home.

6. PW4 Ali Chemaswet testified that he is the Sub-County Land

Adjudication and Settlement Officer Tigania West, he denied knowledge of the existence of any plan regarding REI and Kaare Markets and that he was not familiar with the maps presented by the plaintiffs herein. He told the court that the area in question has been declared an Adjudication Section 284 and that there are people who have been demarcated as owners of the area, now christened as Mbwaa 1 and II respectively.

7. PW5 Chafferson Musyoka Paul, testified as the acting Director Physical Planning Meru County, In regard to the maps produced by the plaintiff, he told the court that the same were proposals which were not approved by the Director of Planning and therefore the process was not completed by the County Council of Nyambene and therefore the REI and Kaari Markets are non-existence as the surveyor would not proceed without the approval. And that the same has been overtaken by events as the land in question has been adjudicated.

Submissions

8. Both parties filed their respective submissions. The plaintiffs submissions are dated 21st June, 2019 and filed on 26th June, 2019 whereas the defendants submissions are dated 8th July, 2019 and filed on 10th July, 2019.

9. The Plaintiff addressed three issues in their submissions. The first one is on whether the plaintiffs were shown their plots on the ground, and in this regard they submitted that the defendant surveyed and planned commercial plots at REI and KAARE markets in Tigania West District in 1996 but failed to indicate and or show the plaintiffs their actual plots on the ground despite paying the requisite fees.

10. The second issues is on whether there was breach of agreement with the plaintiffs, and in this respect they submitted that the defendant action amounts to breach of trust as they failed to perform part of their obligations after the plaintiffs complied with the requirements therein. The Third issue is on whether the plaintiffs are entitled to their plots as approved by the town planning and market committee and confirmed by the defendants through its full council meeting, in this they submitted in the affirmative. On burden of prove, the plaintiffs submitted that they have discharged the same on balance of probability and urged the court to enter judgment in their favour.

11. The defendants vide their submissions addressed four issues. The first one is on whether REI and KAARE Markets exists, and in this regard they submitted that the said markets are nonexistent relying in the evidence of PW5 who told the court that the maps relied on by the plaintiffs although drawn by the Directorate of Physical planning, the same were drafts and unapproved, and therefore the said markets do not exists.

12. The second issue addressed by the defendants is on whether due process was followed to establish REI and KAARE markets, and in this regard they relied in the evidence of PW4 who told the court that he was not aware of the said markets and therefore no due process of adjudication was undertaken. Thirdly and related the defendant submitted on whether due process was undertaken by plaintiffs to acquire the alleged plots at REI and KAARE and in this respect they submitted that the plaintiffs did not prove their case to the required standard relying in the case of *Wareham T/A Wareham & 2 others Vs Kenya Post Office Savings Bank (2004) e K.L.R.*

13. Finally, the defendants submitted on whether the plaintiffs are entitled to the prayers sought, and in this regard they submitted the

plaintiffs are bound by their pleadings and that they only called 3 witness out 117 plaintiffs alleging that they failed to prove their case. They rely in the case of *Adetoun Oladeji (NIG) Vs Nigeria Brewerie PLC SC 91/2002.*

Analysis and Determination

14. After an analysis of the evidence adduced by the plaintiffs, defendant responses and parties respective submissions, it is an established fact that the defendant on or about the 1996 invited application for allocation of Commercial Plots at REI and KAARE Markets, Tigania West District within Meru County, and that the Plaintiffs were successful bidders thereof. In view of the above the following issues emerge for determination, firstly is whether the plaintiffs were shown their plot on the ground; secondly whether the defendant was in breach of any agreement with the plaintiffs; thirdly whether the plaintiffs are entitled to compensation from the defendant and lastly whether the suit is statute barred.

15. On the first issue, it is clear that the plaintiffs were not shown their respective plots on the ground. The plaintiffs were successfully allotted plots after balloting, however, the defendants thereafter failed to go ahead with the process culminating in the plaintiffs being shown their respective plots on the ground.

16. On the second issue, on whether there was breach of agreement by the defendant. It is clear that the defendant offered the plaintiffs plots which they accepted in writing and went ahead to make the required payments. However no plots were issued to the plaintiffs. PW5 told the court that the Physical Planning Maps produced were not approved and therefore no survey was undertaken in respect to the plaintiffs' alleged plots. He told the court that it was upon the defendant to complete the process, but failed to do so. It is therefore my finding that there was breach of agreement by the defendants.

17. On whether the plaintiffs are entitled to compensation from the defendant, I think so; they have a valid claim for compensation for the sum they incurred and paid to the defendants for the issuance of the said plots at REI and KAARE. This leads me to the final issue which is as to whether the instant suit is time barred. This suit has been filed by the plaintiffs after a lapse of over 16 years since the agreement was reached, and therefore their claim is time barred based on contract for Land under the *Limitation of Action Act Cap 22*. The allocation of the said plots happened in the year 1996, and the plaintiff waited until the 2012 to file their claim.

Whether the alleged commercial plots at REI and KAARE exists

18. The burden of proof in civil claim is that of balance of Probabilities as was held in the case of *Wareham t/a A.F Wareham & 2 others Vs*

Kenya Post Office Savings Bank (2004) 2 KLR where the court stated:-

“The burden of proof is on the plaintiff and degree of proof is on balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail”.

19. It was upon the plaintiffs to prove that the said plots actually exists, however as it stands there is nothing like REI or KAARE markets on the grounds and therefore in this regard the burden of proof was not discharged.

Conclusion

It is clear to this court that the plaintiffs have failed to prove their case to required standard and additionally their claim is time barred under the statute and I hereby dismiss the same with no orders as to cost.

DATED and SIGNED at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: