



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 310 OF 2017

**MARY WAIRIMU KIMURUA (Suing through Stephen Kimurua Wandani holder of
Power of Attorney as P/A No. 59718/1).....PLAINTIFF**

VERSUS

OL KEJUADO COUNTY COUNCIL.....1ST DEFENDANT

JOSEPH KATITA.....2ND DEFENDANT

BENSON TITIAL.....3RD DEFENDANT

JUDGMENT

By the further amended Plaint dated the 18th June, 2013 the Plaintiff prays for the Court to find judgement in her favour against the Defendants jointly and severally for:-

1. A permanent injunction restraining the Defendants either by themselves, their agents and/or servants from constructing or in any other manner interfering with the Plaintiff's quiet possession of all that property known as Plot No. 599 'B' residential Ongata Rongai Trading Centre;
2. That this Honourable Court do issue an order declaring that the Plaintiff is the rightful owner of Plot No. 599 'B' residential at Ongata Rongai Trading Centre;
3. That in the alternative and without prejudice to the prayers sought in paragraph (a) and (b) above, this Honourable Court do have an order compelling the first Defendant to allocate to the Plaintiff an alternative plot of the same value or to compensate the Plaintiff a sum equivalent to the current market value of the plot;
4. Costs of this suit.

The 1st Defendant filed its Defence and denied all the averments in the Plaint except for the descriptive and jurisdiction of the Court. It contended that the Plaintiff's suit did not disclose any reasonable cause of action against it. Further, that the Plaintiff as an alleged allottee without title did not have proprietary rights known to law. It claimed the Plaintiff lacks capacity and/ or locus to bring and or maintain this suit.

The 2nd Defendant filed an Amended Statement of Defence where he denied the averments in the amended Plaint except for the description of the parties and jurisdiction of the Court. He avers that he is unaware of the existence and/or location of the alleged plot No. 599 'B' Residential situated in Ongata Rongai Trading Centre. He denies instigating an officer from the 1st Defendant to write any letter purporting that the Plaintiff had encroached on his plot and cease forthwith. He explains that the 1st Defendant allotted them plot number 247/ Residential – Kware at Ongata Rongai Trading Centre together with the 3rd Defendant upon meeting the requirements set by it. He confirmed that on 25th June, 2001, he sold his land to one CYRUS PETER NGUYO KIMACHU and effected a transfer to him. He insists that his plot was distinct from the Plaintiff's land. He reiterates that he has no interest in the subject property and denies receiving any notice as alleged by the Plaintiff. Further, that the amended Plaint does not disclose a reasonable cause of action against him.

The 3rd Defendant filed an Amended Statement of Defence and Counterclaim dated 14th April, 2010 where he denied the Plaintiff's averment especially the existence of plot no. 599 B Residential situated at Ongata Rongai Trading Centre. He contends that he has both

ownership and possession of plot Number 247 'B' Residential Kware, Ongata Rongai Trading Centre. He explains that the 1st Defendant allotted them plot number 247/ Residential – Kware at Ongata Rongai Trading Centre together with the 2nd Defendant upon meeting the requirements set by it. He insists the Plaintiff's plot is distinct from his plot. Further, the 1st Defendant recognized that his plot belongs to him. He denies receiving any notice of intention to sue. As a Plaintiff in the Counterclaim, he sought for judgment against the Defendant (Plaintiff in the main suit), to the Counterclaim as follows:

- a) A declaration that the Plaintiff to the Counterclaim and the 2nd Defendant in the main suit were properly allotted plot Number 247/ Residential Kware at Ongata Rongai Trading Centre;
- b) A declaration that the subject parcel of land is Plot no. 247 'B' Residential Kware Ongata Rongai Trading Centre derived from Plot No. 247/ Residential – Kware Ongata Rongai Trading Centre;
- c) A declaration that the Plaintiff to the Counterclaim is the lawful and proper owner of the said parcel of land Plot Number 247 'B' Residential Kware Ongata Rongai Trading Centre;
- d) A permanent injunction restraining the Defendant to the counterclaim by herself, her servants, agents or otherwise howsoever from trespassing, wasting, alienating, attempting to fence off, entering, constructing, dumping any material, and/ or interfering with the Plaintiff to the Counterclaim's occupation, possession, enjoyment and/or interest in Plot Number 247 'B' Residential – Kware Ongata Rongai Trading Centre;
- e) That for purposes of maintaining peace, order and security, the Officer Commanding Station (OCS) Ongata Rongai Police Station do avail the Plaintiff to the counterclaim security to facilitate implementation and/ or service of any orders issued herein;
- f) General damages for trespass and loss of development on the subject property;
- g) Costs of this suit;
- h) Any other relief that this Honourable Court may deem just and appropriate to grant.

The matter proceeded to full hearing where the Plaintiff had one witness while the Defendants called a total of two witnesses.

Evidence of the Plaintiff

PW1 who is the husband to the Plaintiff and holder of a Power of Attorney testified that the Plaintiff was allotted plot number 599 'B' Kware Ongata Rongai Trading Centre and issued with a Notification of Allotment Letter dated 22nd November, 1979. Further, the Plaintiff proceeded to pay the survey fees and rates and was shown her plot by the 1st Defendant's surveyor. It was his testimony that the wife continued to pay rates to the 1st Defendant. He explained that they fenced the suit plot and commenced planning for its development. Further, they even sought for approval of the building Plans and the same was approved by the 1st Defendant vide their letter dated the 5th September, 2009. He confirmed that they built a two roomed house in the year 2000 to store materials as they wanted to start building. They have continued to pay land rates to the 1st Defendant to date. It was his testimony that the Assistant Chief of Kware one Joseph Katita who is the 2nd Defendant herein came to claim the suit plot. He contended that they only received a complaint in respect to their plot in the year 2000. He testified that the 2nd Defendant despite being warned to stop encroaching on their land, persisted to do so. He clarified that the suit plot was now known as C90.

In cross examination, he confirmed paying plot rent after 10 years of its allotment. He averred that he lodged a complaint with the 1st Defendant who directed the encroachers on their land to stop. Further, that they never received any letter inviting them to the validation exercise. He confirmed that he did not have the new Letter of Allotment. Further, when he went to pay rates on 29th June, 2018 when this suit was pending, without the new Letter of Allotment, and was advised to confirm the new plot number, which number he got from the suit land after which he paid the rates. He insisted that all his receipts relate to plot 599 'B' and not 247 'B'. He stated that someone had built on their plot and he had never been informed that his Letter of Allotment had been withdrawn.

The Plaintiff produced various documents including Notification of Allotment; Rate Payment Receipts as their exhibits.

Evidence of the Defendants

DW1 who was the Assistant County Surveyor for the 1st Defendant testified that he undertook a site visit and found that plot Number 247 had been subdivided to 247 'A' and 247 'B'. He explained that from the plan, he could not find plot number 599 'A' and 599 'B'. He confirmed being present in the second site visit on 15th March, 2018. Further, that plot 247 'B' was changed to C 90 after the validation exercise. He explained that as per the old plan, there are plot 247 'A' and 247 'B' while the new map which was done in 2017 has renamed the said plots C 90 and C91 respectively. He was emphatic that it is only the old map that exists for the Ongata Rongai Area. In cross examination, he clarified that it is the planner who provides the numbers and not the survey office. Further, for plot 247, it was subdivided but he did not have the records. He testified that it was the Clerk to Council who approved subdivisions. He insisted he could not find plot number 599 'B' in the map. He did not have plans for 1970s and 1980s. He was categorical that the map forms the basis for identification of all the plots in the County. It was his testimony that the Plaintiff's letter dated the 22nd November, 1979 was a Notification for allocation and a Letter of Allotment is only issued after the survey. He was able to establish the existence of plot 247 'B' on the map as well as on the ground which plot is now referred to as C 90. Further, his map did not contain plot number 599. He produced his reports dated 2nd October, 2009 and 15th March, 2018 as his exhibits.

DW2 explained that he applied for Certificate of Lease on 8th November, 2016. He confirmed having been issued with a new Generation Letter of Allotment dated 19th May, 2017 for his plot 247 'B' and the new number is C90. It was his testimony that he was present on his plot during the validation exercise. He referred to the Surveyor's report dated the 2nd October, 2009 where it confirmed that the disputed plot is 247 'B'. He contended that they were allotted plot 247 in the year 2000 and at that time the said plot was not developed. Further, after the allotment, he has continued to pay land rates. He insists at the time of validation, no one came to claim the said plot. In further cross examination, he insisted, he did not know plot 599'B' and that his plot changed numbers when he was already in ownership. He did not know if plot 599' B' had been issued with Letters of Allotment in 1979 and allotted to the Plaintiff. He reiterated that their plot number 247 was issued to 2nd and 3rd Defendants with the subdivision overseen by the surveyor. He further confirmed that his Letter of Allotment for plot 247 'B' is dated the 3rd October, 2006. Further, that he started developing his plot in 2006 and it is the County Government that issues plot numbers.

DW3 confirmed applying for a plot in 1998 from the 1st Defendant that allotted him plot No. 247 jointly with 2nd Defendant after which they were issued with a letter of allotment in the year 2000. He denied encroaching on anybody's plot nor receiving a letter from the DO to stop interfering with plot 599 'B'. He contended that the letters of complaint were after the year 2000. He denied getting letter dated the 5th June, 2003 from Clerk to Council. He stated the he sold his portion of plot 247 to Cyrus Peter Nguyo vide a Sale Agreement dated the 25th June, 2001 before subdivision. Further, that he is the one who applied for subdivision of 247. The Defendants produced various documents including letters of Allotment, Transfer, Sale Agreement, Rate payment receipts, Surveyors' Reports as their exhibits.

All the parties filed their respective submissions.

Analysis and Determination

On consideration of the Pleadings filed herein including witnesses' testimonies, exhibits and submissions, the following are the issues for determination:

Who is the owner of the disputed plot.

Is the Plaintiff entitled to the orders sought in the Plaintiff.

Is the 3rd Defendant entitled to the orders sought in the Counterclaim.

Who should bear the costs of this suit.

As to who is the owner of the disputed plot.

The Plaintiff contends that the disputed plot is number 599 B which was allocated to her in 1979. The 2nd and 3rd Defendants insist that the disputed plot is 247 "B" and now C90. The Plaintiff in her submissions contend that she had an earlier letter of allotment and hence entitled to the suit plot. Further, that there is a double allocation of the suit plot. She relied on the following cases **Mbau Saw Mills Ltd V Attorney General for and on behalf of the Commissioner of Lands & 2 others (2014) eKLR; Eunice Cynthia Njeri V Andrew T. Kiptanui & Another (2018) eKLR; Henry Muthee Kathurima V Commissioner of Lands & Another (2015) eKLR; and Salome Warware V George Muna & Another (2015) eKLR** to buttress her arguments. The 1st Defendant submitted that the suit property is number 247' B' and not 599 'B' as claimed by the Plaintiff. Further, that the Plaintiff failed to fulfill the conditions of the Notification of Allotment and hence did not acquire any proprietary interest over the suit plot. It relied on the cases of: **Mbau Saw Mills Ltd V Attorney General for and on behalf of the Commissioner of Lands & 2 others (2014) eKLR; Japheth Okumu Olual V County Government of Kisumu & 2 others (2019) eKLR; Samuel Ngandu Waweru t/a Ngandu Beekeeping Farming Industry V Abujar Investment Limited & 2 others (2017) eKLR and Bubaki Investment Company Ltd V National Land Commission & 2 Others (2015) eKLR** to support its arguments. The 2nd and 3rd Defendants in their submissions insisted the Plaintiff had not proved her claim and the same should be dismissed. Further, that judgment should be entered in their favour as per the Counterclaim. They relied on the following case law: **Amasom Builders Ltd V Betty Ngendo Gachie & 2 others (2009) eKLR; Kenya Power and Lighting Company Limited V Margaret Akoth Olang (2017) eKLR; M'kiriara M'Mukanya & Another V Gilert Kabeere M'Mbijiwe (1984) eKLR; Benja Properties Limited V Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR and Embakasi Properties Limited & Another V Commissioner of Lands & Another(2019) eKLR** to oppose the Plaintiff's claim.

The Plaintiff presented a Notification of Allotment dated 1979 issued by the 1st Defendant wherein he was allocated plot number 599 'B'. The Plaintiff confirmed that they were shown the plot after which they commenced paying land rates. Further, that their building plans were approved by the 1st Defendant. The 1st Defendant's witness relied on the two reports and insisted that a County Surveyor, they relied on the map and as per the map, there was not plot 599 'B' as claimed by the Plaintiff. I note the Plaintiff presented receipts confirming payment land rates which were received by the 1st Defendant and this is puzzling as to why the 1st Defendant was receiving land rates from the Plaintiff yet it knew the plot was non existent. Further, why did it approve building plans to be constructed on non existent plot. In the Notification of Allotment, there were certain conditions to be fulfilled by the Plaintiff. The Plaintiff did not inform Court on whether they indeed fulfilled the said conditions and whether they received a Letter of Allotment after the Notification of Allotment. The Plaintiff presentation various correspondence from the Clerk to Council and local DO where the 3rd Defendant was advised to cease interfering with the suit plot. However, the 1st Defendant's witness insisted the suit plot is 247' B' and not 599 'B'. The 2nd and 3rd Defendants testified that they were allotted the plot 247 in 2000 after which the same was subdivided into 247 'A' and 247 'B'. Further, the 3rd Defendant sold 247 'A' while the 2nd Defendant retained 247 'B'. The 2nd Defendant produced his Letter of Allotment, confirmed the plot was validated and he was issued with a new number C90. Further, that he has continued to pay rates to the 1st Defendant. PW1 confirmed in Court that he did not participate in the validation exercise and that he obtained the number C 90 from the suit plot and proceeded to pay for rates during the pendency of the suit. This brings me to the question on which plot the Plaintiff was allotted. In the case of **Benja Properties Limited V**

Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR, the Court of Appeal in dealing with an issue of Allotment held thus: ‘ In arriving at our decision, we note an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.’ Which position was reaffirmed in the case of **Embakasi Properties Limited & Another V Commissioner of Lands & Another(2019) eKLR.**

In relying on these decisions and based on the evidence before me, insofar as the Plaintiff had been paying land rates, I opine that the same was for a non existent plot since the 1st Defendant’s Surveyor’s report dated the 2nd October, 2009, confirmed that the site being claimed by the Plaintiff as plot 599B is the same site for plot 247 ‘B’. Further, except for Notification for Allotment, the Plaintiff never produced a Letter of Allotment nor participated in the validation exercise to get a new Letter of Allotment. I note the 2nd Defendant’s title has been upheld by the 1st Defendant that was the allotting authority and he is actually in the process of acquiring a Certificate of Lease. It is against the foregoing that I find that the owner of the disputed plot is the 2nd Defendant and will proceed to uphold is Letter of Allotment.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. Since I have already held that she is not the owner of the suit plot, I am unable to issue an order of a permanent injunction restraining the Defendants either by themselves, their agents and/or servants from constructing or in any other manner interfering with the Plaintiff’s quiet possession of all that property known as Plot No. 599 ‘B’ residential Ongata Rongai Trading Centre as the said plot is non-existent. However, from the testimony of PW1 as well as the receipts for rate payment, it is clear the 1st Defendant continued to receive its rates despite the fact that her plot was non-existent as per their map. To my mind the 1st Defendant was responsible for the confusion and declined to resolve the same. The Plaintiff has sought for an order to compel the 1st Defendant to allocate to her an alternative plot of the same value or to compensate her for a sum equivalent to the current market value of the plot. PW1 confirmed in court that they paid land rent for the year 1979 on 21st October, 1989 which is ten years later. Further, he never presented any receipt of the survey fees that he was required to pay after which he was to be issued with a plot number. The 1st Defendant submitted that the plot could be allocated to a third party since the Plaintiff paid the said charges ten years. However, I note that the 1st Defendant received the monies from the Plaintiff which culminated in the Plaintiff having legitimate expectation that the plot was still hers. Further, from some of the correspondence from the 1st Defendant, it reaffirmed that the plot indeed belonged to the plaintiff. It is hence my considered view that the 1st Defendant was indeed responsible for the confusion and it would be just and equitable for her to be compensated. She has claimed for value of the land but has not furnished court with a valuation report. Further, I am unable to compel the 1st Defendant to allot another plot to the Plaintiff as this is only subject to availability. Since the Plaintiff has produced receipts for the monies she paid to the 1st Defendant, I direct that the 1st Defendant do refund her the same plus interest at court rates from the date she filed this suit until payment in full.

As to whether the 3rd Defendant is entitled to the Orders in the Counterclaim. The 3rd Defendant sought for various orders which have been cited above. Based on my findings that the suit plot is indeed 247 ‘B’ Residential Kware Ongata Rongai Trading Centre, I will make an order of permanent injunction restraining the Plaintiff by herself, her servants, agents or otherwise howsoever from trespassing, wasting, alienating, attempting to fence off, entering, constructing, dumping any material, and/ or interfering his occupation of the plot. As for the prayer for general damages for trespass and loss of development, I note he never presented any evidence to that effect. In fact he admitted that he had commenced developing the suit plot from the year 2006 which means he was actually in occupation of the same. In the circumstance, I will decline to grant general damages.

As to who should bear the costs of this suit. From the evidence in court, it is actually the 1st Defendant that was responsible for the confusion herein and will penalize them to pay costs.

It is against the foregoing that I proceed to make the following final orders:

- i. A declaration be and is hereby issued that that the subject parcel of land is Plot no. 247 ‘ B’ Residential Kware Ongata Rongai Trading Centre derived from Plot No. 247/ Residential – Kware Ongata Rongai Trading Centre and not 599 ‘ B’ as claimed by the Plaintiff.
- ii. A declaration be and is hereby issued that the 3rd Defendant is the lawful and proper owner of the said parcel of land Plot Number 247 ‘B’ Residential Kware Ongata Rongai Trading Centre;
- iii. A permanent injunction be and is hereby issued restraining the Plaintiff by herself, her servants, agents or otherwise howsoever from trespassing, wasting, alienating, attempting to fence off, entering, constructing, dumping any material, and/ or interfering with the Plaintiff to the Counterclaim’s occupation, possession, enjoyment and/or interest in Plot Number 247 ‘ B’ Residential – Kware Ongata Rongai Trading Centre;
- iv. The 1st Defendant be and is hereby ordered to refund to the Plaintiff all the monies and she paid in respect to land rates, land rent and approval as regards the with interest from the date of filing this suit until payment in full.
- v. The costs of this suit is awarded to the Plaintiff 2nd and 3rd Defendants to be borne by the 1st Defendant.

Dated and delivered at Kajiado on 3rd February, 2020.

CHRISTINE OCHIENG

JUDGE