



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 586 OF 2001**

**WANJIKU NGANGA.....PLAINTIFF**

**AND**

**ELIZABEHT SHIGADI DAVID.....1<sup>ST</sup> DEFENDANT**

**MWANAISHA ABID.....2<sup>ND</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF MOMBASA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by a Plaint dated 23<sup>rd</sup> November, 2001 and amended on 13<sup>th</sup> December, 2001. The plaintiff prays for judgment against the defendants jointly and severally for:

**a. Special damages for Kshs.21,000/= plus mesne profit of Kshs.5,000/= per month from 5<sup>th</sup> November, 2001 till delivery is given.**

**b. A declaration that the re-possession and re-allocation of the plaintiff's plot no. 7/32 Chaani Site & Service Scheme by the Third Defendant to the Second Defendant and the sale and/or transfer of the same by the second Defendant to the First Defendant was and still remains illegal, unlawful, fraudulent, null and void and an order to revoke the purported repossession, re-allocation, sale and/or transfer.**

**c. A permanent injunction restraining the Defendant whether by herself, her servants, employees and/or agents or otherwise howsoever from alienating, disposing, constructing, trespassing or in any other manner interfering with the plaintiff's said PLOT NUMBER 7/32 CHAANI SITE & SERVICES SCHEME; a mandatory injunction that the defendants do forthwith grant vacant possession to the plaintiff and vacant possession plus damages for trespass/illegal interference with the property.**

**d. Costs of and incidental to this suit.**

**e. Interest thereon at court rates.**

2. The plaintiff's suit as pleaded is that the plaintiff is and has at all material times been the registered owner and entitled to possession of the property known as Plot Number 7/32 Chaani Site and Service Scheme. The plaintiff states that she has at all material times paid and/or been willing to pay to the Third Defendant all the arrears of ground rent in respect of the suit premises. The plaintiff avers that on or about 5<sup>th</sup> November, 2001, the 1<sup>st</sup> defendant, together with her servants, employees and/or agents moved into the aforesaid property, pulled down a kiosk that was standing thereon and commenced construction thereon. That on 13<sup>th</sup> November, 2001, the third defendant's Acting Director of Housing Development Department ordered the 1<sup>st</sup> defendant to stop the aforesaid construction, but the 1<sup>st</sup> defendant had deliberately failed and/or refused to abide by the said notice and has continued with the construction.

3. The plaintiff avers that it has come to her knowledge that on 24<sup>th</sup> July, 2001, the 3<sup>rd</sup> defendant allegedly re-allocated the suit premises to the 2<sup>nd</sup> defendant who thereafter on 4<sup>th</sup> November, 2001 sold the same to the 1<sup>st</sup> defendant. The plaintiff contends that there was no re-possession by the 3<sup>rd</sup> defendant and if done so, the 3<sup>rd</sup> defendant by its conduct was and is estopped from repossessing the suit premises. The plaintiff avers and contends that the acts of the defendants are illegal and further that any purported re-possession by the 3<sup>rd</sup> defendant and re-allocation to the 2<sup>nd</sup> defendants and the sale and transfer to the 1<sup>st</sup> defendant was unlawful, null and void ab initio and of no legal

consequence as the same was done fraudulently, and contrary to the established by-laws, rules and procedures. The plaintiff has given particulars of fraud to wit; the 3<sup>rd</sup> defendant never re-possessed the premises; the right and established by-laws and procedures were not followed; no notice of repossession or otherwise was ever given to and served upon the plaintiff; that the 3<sup>rd</sup> defendant owing to its conduct, waived its right to repossession and could only sue the plaintiff for the arrears; and that the documents of the re-allocation and sale/transfer were doctored.

4. The plaintiff further avers and contends that if the said re-allocation was done, the same was null and void ab initio as the 2<sup>nd</sup> defendant was mandatorily required to pay an initial deposit of Kshs.600.00 on or before accepting the offer on 24<sup>th</sup> July, 2001 which was not done. Further, that the 2<sup>nd</sup> defendant was not to assign, transfer, sublet the whole plot or otherwise part with the possession of the plot or building for the first 5 years from the date of re-allocation. In the premises, the plaintiff contends that the purported sale and transfer to the 1<sup>st</sup> defendant was illegal, null and void. The plaintiff avers that the defendants' acts amount to trespass and states that by reason of the matters aforesaid, she has greatly been inconvenienced and has been deprived of the use, possession, enjoyment and/or control of the suit property and has thereby suffered loss and damage. The plaintiff claims Kshs.12,000.00 being the value of the demolished kiosk and the other prayers aforesaid.

5. The 1<sup>st</sup> defendant responded to the plaintiff's claim by way of a defence dated 23<sup>rd</sup> January 2002. The 1<sup>st</sup> defendant denied the contents of the Amended Plaintiff and stated that the 1<sup>st</sup> defendant acquired the suit premises in vacant possession and has lawfully and legally constructed a building thereon. The 1<sup>st</sup> defendant avers that she is an innocent purchaser for value without notice of any fraud of the suit premises. It is the 1<sup>st</sup> defendant's contention that the plaintiff's suit is bad in law and incompetent and should be struck out. The 1<sup>st</sup> defendant further states that the plaintiff lacks the locus standi to file the suit herein as per the provisions of the Law of Succession Act and that there is no privity of contract between the 1<sup>st</sup> defendant and the plaintiff.

6. The 1<sup>st</sup> defendant also filed a claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 16<sup>th</sup> October, 2002 seeking contribution and indemnity for any damages or mesne profits or other relief that the court may grant the plaintiff in the suit.

7. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence dated 28<sup>th</sup> February, 2002 in which they denied the plaintiff's claim. They aver that the plaintiff had been allotted the suit premises but failed to pay any rents or premium for the same after due notice to her. They further aver that the subsequent repossession, reallocation and ultimately sale and/or transfer was lawful and legal. The 3<sup>rd</sup> defendant put up a counter-claim for outstanding/unpaid plot charges of Kshs.36,649.50 for the period from January 1989 to October 2001.

8. Both the plaintiff and the 1<sup>st</sup> defendant called one witness each who testified before L. Njagi J on 3<sup>rd</sup> May 2007 and on 6<sup>th</sup> February 2008. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not call any witnesses despite being granted several opportunities by the court to do so. This court, therefore, did not take any evidence and is only writing this judgment based on the evidence already taken earlier, and without the benefit of gauging the demeanor of the witnesses.

9. The plaintiff's witness, Titus Kamande Nganga testified twice, initially as a witness of the plaintiff and later as the Attorney of the Plaintiff. He testified that the plaintiff is his mother who owned a property at Chaani, being Plot No. 7/32 Chaani Site and Service Scheme. He produced the letter of allotment dated 4/2/1988 in favour the plaintiff and issued by the 3<sup>rd</sup> defendant. PW1 stated that initially, the suit property was owned by one Nganga Muchoki and after his death, the property was allocated to the plaintiff. The witness produced the Letter of Allotment as P.exhibit 1.

10. PW1 stated that after the allotment, the plaintiff started constructing a house in accordance with the plans approved by the 3<sup>rd</sup> defendant but did not complete the construction due to poor health. The witness testified that after sometime, he got information that some other people were demolishing the rooms the plaintiff had constructed and went ahead to construct on the suit premises. That turned out to be the 1<sup>st</sup> defendant. The witness stated that his attempts to stop the construction were unsuccessful. He testified that at the time the 1<sup>st</sup> defendant started construction, the plaintiff had already put up a house comprising 4 rooms and a foundation for another 4 rooms.

11. The witness testified that in the course of that exercise, he came to learn that the 1<sup>st</sup> defendant had bought the plot from the 2<sup>nd</sup> defendant. It was his evidence that this was fraudulent as the plot belonged to the plaintiff who had paid all rents and was still paying and never received any notice from the 3<sup>rd</sup> defendant that the plot would be repossessed. The witness stated that the 2<sup>nd</sup> defendant did not keep the property for 5 years and did not pay Kshs.600/= before accepting the Letter of offer as required. He concluded that the value of the house on the suit property was Kshs.285,000.00.

12. The 1<sup>st</sup> defendant testified that she bought the plot from the 2<sup>nd</sup> defendant with the consent of the 3<sup>rd</sup> defendant and that all the transactions were made in the offices of the 3<sup>rd</sup> defendant and were documented. She produced the Sale Agreement dated 4<sup>th</sup> October, 2001 as D.exhibit 1 and Power of Attorney issued to her by the 2<sup>nd</sup> defendant as D.exhibit 2, Letter of Transfer dated 4<sup>th</sup> October, 2001 as D.exhibit 3, Letter of Allotment dated 24<sup>th</sup> July 2001 issued to the 2<sup>nd</sup> defendant by the 3<sup>rd</sup> Defendant as D.exhibit 4. She further stated that after paying the 2<sup>nd</sup> defendant, she took possession of the plot and then submitted building plans for approval by the 3<sup>rd</sup> defendant which were duly approved and which she produced as D.exhibit 5, and thereafter started construction until she was served with the court order in the matter herein. The 1<sup>st</sup> defendant stated that she was not aware of any dispute between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She denied that there was structure on the plot and stated that she paid Kshs.1,500/= for labour to clear the bush before commencing the construction. The 1<sup>st</sup> defendant added that when they were doing the sale transaction, the vendor owed the 3<sup>rd</sup> defendant Kshs.620/= which she said she paid vide receipt No.277215 and receipt No.277216 for kshs.34,611 which she produced as D.exhibits 7(a) and (b). The 1<sup>st</sup> defendant also produced the Letter of Allotment dated 24<sup>th</sup> July 2001 in favour of the 2<sup>nd</sup> defendant as D.exhibit 8. She denied dealing with the plaintiff or her representative.

13. The plaintiff filed her written submissions on 14<sup>th</sup> May, 2019 while the 3<sup>rd</sup> defendant filed on 13<sup>th</sup> August 2019 and the 1<sup>st</sup> defendant on 24<sup>th</sup> September, 2019.

14. I have considered the pleadings, the evidence adduced and the rival submissions. The issues for determination are:

**i. Whether the plaintiff had locus standi to institute the suit herein.**

**ii. Whether the 3<sup>rd</sup> defendant had the right to repossess and reallocate the suit property.**

**iii. Whether the plaintiff is entitled to the orders sought.**

**iv. Whether the 1<sup>st</sup> defendant is entitled to the orders sought.**

**v. What is the order as to costs.**

15. From the pleadings and the evidence on record, the suit property had been allocated to the plaintiff's late husband, Nganga Muchoki (deceased). It is evident that when Nganga Muchoki died, a fresh Letter of Allotment was executed by the 3<sup>rd</sup> defendant and issued to the plaintiff in her name. Subsequently, the property became vested to plaintiff who became the owner of the suit property. In the suit, the plaintiff is claiming the suit property as the owner and not as the legal representative of her late husband. In my view, the property having been allocated to the plaintiff in her own name and personal capacity, the property became vested to the plaintiff and thus she became the legal owner thereof and as the legal owner of the property, the plaintiff had the legal capacity and right to safeguard her interests, including filing the suit to protect her property. It is therefore my finding that though the suit property was initially allocated to the plaintiff's late husband, when the 3<sup>rd</sup> defendant executed and issued a fresh Letter of Allotment to the plaintiff, the plaintiff as owner, had locus standi to institute the suit herein to assert her rights.

16. Regarding the issue as to whether or not the 3<sup>rd</sup> defendant had the right to repossess and re-allocate the suit property, the plaintiff's evidence is that she was paying rent and rates to the 3<sup>rd</sup> defendant and was ready and willing to pay any outstanding arrears. The plaintiff further maintains that she never received any demand notice from the 3<sup>rd</sup> defendant regarding any outstanding payments. Although the 3<sup>rd</sup> defendant pleaded that it gave the plaintiff various notices to pay charges that were owed, the 3<sup>rd</sup> defendant failed to adduce any evidence in support of that pleading. Therefore the plaintiff's evidence that she never received notice remains unchallenged and uncontroverted.

17. Section 17 of the Rating Act Chapter 267 Laws of Kenya provides as follows:

**17. Enforcement of payment of rates**

**(1) if, after the time fixed for the payment of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in Section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with Section 16 (3) of this Act which demand shall be in the manner hereinafter prescribed.**

18. From the above provisions of the law, and indeed from the wording of the letters the 3<sup>rd</sup> defendant purported to have issued to the plaintiff, it is clear that the 3<sup>rd</sup> defendant could not purport to repossess the suit property. The only recourse the 3<sup>rd</sup> defendant had was to sue for the arrears. In my considered view, in the absence of evidence that notice was served upon the plaintiff to pay the unpaid rates as mandated by the provisions of Section 17 of the Rating Act, then the 3<sup>rd</sup> defendant's repossession of the suit property was unprocedural, unlawful and illegal. And even if such demand was issued and default persisted after the mandatory 14 days, the only redress authorized by the law as provided under Section 17 (2) of the said Act would have been taking legal proceedings for its recovery in a subordinate court and not repossession. It is therefore the court finding that the 3<sup>rd</sup> Defendant had no right to repossess the suit premises and the procedure applied by the 3<sup>rd</sup> defendant was unprocedural and unlawful. Having held that the repossession of the suit property by the 3<sup>rd</sup> defendant was illegal, it therefore follows that the subsequent reallocation of the plot to the 2<sup>nd</sup> defendant was likewise illegal. The 3<sup>rd</sup> defendant had no right to take the plot from the plaintiff and re-allocate it to the 2<sup>nd</sup> defendant without following the proper procedure provided under the Act. Due process ought to have been followed. From the above finding, it follows that the 2<sup>nd</sup> defendant had no good title to pass to the 1<sup>st</sup> defendant and therefore the sale and/or transfer of the suit property to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant was illegal, unlawful, null and void.

19. The next issue to consider is whether the plaintiff is entitled to the orders sought. The court has already found that the defendants actions were fraudulent, illegal, unlawful and wrongful. The plaintiff stated that her four (4) rooms and the foundation for other four (4) rooms which had been erected on the suit property were partially demolished and the 1<sup>st</sup> defendant started constructing on the property. No doubt, by the defendants' actions, the plaintiff had been denied the use of the suit property and the income and benefits expected therefrom since the year 2001 and has thus suffered and continues to suffer loss and damage. The plaintiff's evidence is that had she been utilizing the property over the years, she would have earned an income of about Kshs.5,000/= per month. The defendants' actions also amount to trespass to the plaintiff's property.

20. It is trite law that trespass is actionable per se. Where trespass is proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages payable depending on the unique facts and circumstances of each case. In my considered view, general damages for trespass in the sum of Kshs.300,000/= would be reasonable in this case.

21. In the result, I find that the plaintiff has established her case against the defendants jointly and severally on a balance of probabilities. I

enter judgment for the plaintiff against the defendants jointly and severally as follows:

**a. A declaration that the purported re-possession and re-allocation of the plaintiff's plot number 7/32 Chaani Site & Service Scheme by the 3<sup>rd</sup> defendant to the 2<sup>nd</sup> defendant and the sale and/or transfer of the same by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal, unlawful, fraudulent, null and void and the same is revoked.**

**b. Special damages of Khss.21,000/=**

**c. Mesne profits of Kshs.5,000/= per month from 5<sup>th</sup> November, 2001 till delivery is given.**

**d. Kshs.300,000/= as general damages.**

**e. The 1<sup>st</sup> defendant is hereby ordered to grant the plaintiff vacant possession of the suit plot within sixty (60) days from the delivery of this judgment in default, she be evicted therefrom.**

**f. The plaintiff is also entitled to orders of permanent injunction in terms of paragraph (c) of the Amended Plaint.**

**g. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants counter-claim is dismissed as there was no evidence tendered in support.**

**h. Costs of the suit to be borne by defendants.**

Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of March 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Siminyu holding brief for Tindika for plaintiff.

Adiga holding brief for Kangu for 1<sup>st</sup> defendant.

Makori holding brief for Muinde for 3<sup>rd</sup> defendant.

No appearance for 2<sup>nd</sup> defendant.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**