



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 277 OF 2016**

**ANNE NAKWEYA.....PLAINTIFF**

**- VERSUS -**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

1. Anne Nakweya (**the plaintiff**) instituted this suit on 22/3/2011 through a plaint of even date. She contended that a section of the Administration Police Unit had wrongfully entered into and taken possession of her property, **Plot Number B1/179 Kayole Site and Service Scheme**, situated in Kayole Area of Nairobi City County. She sought the following verbatim orders against the Attorney General on behalf of the Inspector General of Police of the Kenya Police Service:

- a. An order of eviction directing the Section of Administration Police unit to vacate and hand over vacant possession to the plaintiff**
- b. General damages for trespass**
- c. Costs of this suit**
- d. Any other remedy deemed appropriate**

2. The Attorney General filed a statement of defence dated 3/8/2016 in which it denied the plaintiff's claim of ownership of the suit property, allegations of trespass, and the plaintiff's entitlement to the prayers sought in the plaint. He urged the court to dismiss the plaintiff's suit with costs.

**Plaintiff's Case**

3. The plaintiff's case was contained in her plaint dated 22/3/2016, witness statement dated 22/3/2016, oral and documentary evidence tendered at the hearing of the suit, and written submissions dated 16/12/2019. In summary, the plaintiff contended that by a letter of allotment dated 18/1/1994, the defunct City Council of Nairobi allocated her the suit property. She paid all the requisite charges and was granted a lease in 1998. She took possession of the suit property in the year 2004. On taking possession in 2004, she discovered that Administration Police had erected some temporary structures on the suit property and were using the temporary structures for accommodation. She severally asked the Administration Police to vacate the suit property without success. She was constrained to bring this suit and seek the above reliefs.

4. She relied on a bundle of 10 documents, namely: (i) copy of allotment letter dated 18/1/1994; (ii) copy of a lease dated 25th February 1998; (iii) copies of receipts dated between 28th June, 1994 and 24th July, 2014; (iv) copy of a handwritten letter by the plaintiff dated 2nd June, 2009; (v) copy of a letter by the plaintiff's advocate dated 14th July, 2014; (vi) copy of a letter by the plaintiff's advocate dated 25th July 2014; (vii) copy of a letter by the plaintiff's advocate dated 2nd October 2014; (viii) copy of a notice to the defendant dated 2nd October 2014; (ix) statement of account from the Nairobi City County Government dated 26th August 2013; and (x) copy of letter by the defendant addressed to the Inspector-General of Police and copied to the plaintiff's lawyers dated 7th October 2014.

**Defendant's Case**

5. The defendant cross-examined the plaintiff but did not lead any evidence. He contested the plaintiff's claim in its entirety. He also contested the plaintiff's entitlement to the prayers sought in the plaint.

## Submissions

6. Counsel for the plaintiff, Mr L M Ombete, through written submissions dated 29/11/2019, argued that the defendant's statement of defence was a mere denial and there was nothing in it that questioned the plaintiff's legitimacy to own the suit property nor the authenticity of the documents produced by the plaintiff. Relying on the decision in **Odd Jobs v Mubia [1970] EA 476**, counsel argued that a party is bound by his pleadings and is not allowed to introduce in the case an issue that was not pleaded except if the issue arises from the facts stated by the parties. It was contended that the defendant did not plead that the suit property was owned by the National Government.

7. Mr Ombete further submitted that the question relating to the letterhead used on the letter of allotment was irrelevant, firstly, because it was not pleaded and was not canvassed in evidence. Secondly, the plaintiff had no capacity to determine which letterhead the Council or the Commission would use. Thirdly, it was possible that letterheads of the Commission were still in use in 1994.

8. On the plaintiff's late remittance of the sums stipulated in the letter of allotment, and on lack of a witnessing signature on the lease, Mr Ombete argued that those were irrelevant issues because they were not pleaded and were not canvassed in evidence.

9. As regards the plea for ejection, counsel submitted that the only effective remedy against a trespassor is that of eviction and removal of the trespasser from the claimant's land. On the plea for general damages, Mr Ombete submitted that the Administration Police had engaged in trespass since 2004 and had denied the plaintiff the right to use the suit property for 15 years. Counsel argued that this was a proper case for an award of Kshs 6,000,000 in general damages.

10. The defendant, through Ms Ruth Kerubo, Senior State Counsel, filed written submissions dated 16/12/2019. Ms Kerubo itemized the following as the two issues falling for determination: (a) whether the plaintiff complied with the conditions set out in the letter of allotment; and (b) whether the letter of allotment held by the plaintiff is conclusive evidence of ownership of the suit property.

11. Counsel submitted that because the plaintiff had not exhibited any evidence of acceptance of the allotment and did not pay the sums stipulated in the letter of allotment within 30 days, she had failed to demonstrate that she had satisfied the conditions laid down in the letter of allotment to earn proprietary rights over the suit property. Reliance was placed on the decisions in (i) **Bubaki Investment Company Ltd v National Land Commission & 2 Others [2015]eKLR**; (ii) **Lucy Njeri v Isaac Wangoya Mwangi [2018]eKLR**; and (iii) **Ahmed Obo v Kenya Airport Authority [2013]eKLR**.

12. Counsel for the defendant further submitted that the documents produced by the plaintiff were not conclusive evidence of ownership. She argued that a letter of allotment was not proof of ownership of land, contending that a certificate of title is the *prima facie* evidence of ownership. Relying on the decisions in (i) **ACK St Monica's Parish Dandora v City Council of Nairobi [2013]eKLR** and (ii) **Joseph N K Arap Ngok v Justice Moijo Ole Keiwua & 4 Others, Nairobi Civil Appeal No 60 of 1996**, counsel argued that the plaintiff had failed to prove ownership.

13. Lastly, Ms Kerubo submitted that the suit land remains public land and can be used by the Government for public purposes. She added that it would be detrimental to the security of the residents of Kayole if an eviction order were to be issued against the Administration Police. She urged the court to dismiss the suit.

## Analysis & Determination

14. I have considered the parties' respective pleadings, the evidence tendered by the plaintiff, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The cause of action in this suit is founded on the tort of trespass. Parties did not frame a common statement of issues. In my view, the following are the two key issues falling for determination in this suit: (i) whether the plaintiff is the lawful owner of the suit property; and (ii) whether the plaintiff is entitled to the reliefs sought in the plaint.

15. It was the burden of the plaintiff to prove on a balance of probabilities that she owned the suit property and the Administration Police were trespassers on it. The suit property is unsurveyed and untitled. The first document relied on by the plaintiff is an allotment letter dated 18/1/1994 purporting to be from the Nairobi City Commission. It is in public knowledge (through legal notices relating to elections), and the court takes judicial notice of the fact, that the tenure of the defunct Nairobi City Commission ended upon conclusion of the first multiparty general elections in Kenya in December 1992. Effective from **early 1993**, the elected City Council of Nairobi was in charge of the City. It is therefore strange that an important instrument such as a letter of allotment would in **January 1994** be emanating from the non-existent Nairobi City Commission. The suit property is public land which the plaintiff claims was lawfully allocated to her. If indeed there was a genuine and procedural allocation to the plaintiff through a resolution of the Council, the relevant resolution of the Council would have been presented by the plaintiff as an exhibit to explain the serious discrepancy relating to the origin of the letter of allotment relied on. None was presented. The letter of allotment emanated from an entity that did not exist in January 1994.

16. The second instrument relied on by the plaintiff is a lease dated 25/2/1998. Firstly, the exhibited lease was not signed by the Mayor of the City Council of Nairobi. Secondly, the plaintiff's signature was not witnessed. Thirdly, the lease was not processed into a registrable title. In my view, I do not think the unexecuted lease can be taken as an instrument of title conferring to the plaintiff legitimate title to public land to enable her pursue a claim of trespass against a state agency or a state department occupying public land.

17. It was contended by counsel for the plaintiff that the fact that there was no acceptance within 30 days should be treated as a non-issue. I do not agree with counsel on that. The plaintiff seeks, inter alia, an eviction order against a public entity. Her claim of title is based on what she considers to be a valid letter of allotment and a valid lease. It was therefore incumbent upon the plaintiff to demonstrate that upon expiry of the 30 days, the offer contained in the letter of allotment was extended and duly accepted by her. She did not.

18. Lastly, in her written witness statement which she subsequently adopted as part of her sworn evidence in chief, the plaintiff stated thus:

**“I was allocated the plot by the defunct City Council of Nairobi in 1994. I paid all the requisite charges and was given a lease in 1998. I took possession of the property in the year 2004 and I discovered that Administration Police had added some temporary structures to the one which had been on the plot and were using them as their accommodation”**

19. My understanding of the above evidence is that the Administration Police were in occupation of the suit property before the plaintiff purported to take possession in 2004. Put differently, the Administration Police did not dispossess the plaintiff of the suit property. They were in occupation of the public land all along.

20. Regrettably, the letter of allotment purporting to be from the Nairobi City Commission which had long ceased to exist and the unexecuted lease which the plaintiff has relied upon are not conclusive evidence of ownership of what is contended to be public land. The two documents cannot, in my view, form a proper basis for grant of the order of eviction sought by the plaintiff. My finding on the first issue therefore, is that the plaintiff has failed to prove that she is the lawful owner of the suit property.

21. The logical consequence of the above finding is that the plaintiff is not entitled to the reliefs sought in the plaint. The result is that the plaintiff has failed prove her case on a balance of probabilities. Consequently, the plaintiff’s suit is dismissed. The defendant shall have costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

June Nafula - Court Clerk