



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 233 OF 2017

APPOLLO KIARIE NG'ANG'A.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT

DORCAS AYOMA MBALANYA NANJERO.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 3rd April 2017 the plaintiff seeks judgment against the defendants for:-

- a. A declaration that the 2nd defendant is a trespasser on the plaintiff's property known as Plot No. 320 Kariobangi Light Industries located in Kariobangi in Nairobi County.**
- b. An order of eviction of the 2nd defendant, its servants and/or agents by the 1st defendant from the plaintiff's property known as Plot No. 320 Kariobangi Light Industries located in Kariobangi in Nairobi County.**
- c. General damages against the defendant for trespass and mesne profit**
- d. Costs of this suit.**
- e. Any other relief that this honourable court may deem fit to grant**

2. Upon being served with copies of plaint and summons to enter appearance the 1st defendant entered appearance on 19th April 2017 through the firm of M/S Kabue Thumi & Co. Advocates. It also filed a statement of defence dated 10th April 2017 and filed in court on the same date.

3. The 2nd defendant entered appearance through the firm of M/S Kakai Mugalo & Co. advocates on 7th July 2017 and filed a statement of defence dated 13th July 2017.

4. PW1, Apollo Kiarie Nganga, the plaintiff told the court that he was adopting his witness statement dated 3rd April 2017. He also stated that he was relying on the list of documents dated 3rd April 2017 and a further list of documents dated 5th April 2019. He is one of the administrators of the Estate of the late Joseph Ng'ang'a Kiarie. That plot No 320 Kariobangi Light Industries belonged to his father who bought the same from one Charles Oyatta. A beacon certificate was issued to Joseph Ng'ang'a Kiarie on 13th August 2002.

5. He further told the court that the 2nd defendant has encroached on plot no. 320. He prays that the 2nd defendant be declared a trespasser and for eviction orders against her.

6. The plaintiff called one witness. PW2 Peter Ayimba Atandi a land surveyor practicing in the name and style of Covenant Geo Survey systems told the court that he was instructed to undertake survey on the suit property by Joseph Ng'ang'a Kiarie in May 2012. He confirmed that the instructions were to determine the encroachment on the suit property. He visited the site and prepared a report which he produced as exhibit P6. He told the court there was an encroachment on 6 metres on the plot 320. Further that the beacons certificate issued on 13th August 2002 does not conform with what is on the ground.

7. Ms Magu for the 1st defendant told the court they were not availing any witnesses. She then closed the 1st defendant's case.

8. DW1, Dorcas Ayoma Mbalanya the 2nd defendant adopted her witness statement dated 3rd May 2018 and relied on the list of documents dated 3rd May 2018. She told the court that she bought the plot from one Peter Marega, who assigned her his interest. The power of attorney was produced as exhibit D12. It was registered on 8th January 1991. She told the court she took possession and did some developments. She told the court at some point Joseph Ng'ang'a Kiarie trespassed on her plot No.319 necessitating her to file a suit being HCCC No. 5097 of 1991. The said matter was referred to Arbitration and the Award was in her favour. She further told the court that she rented out the premises to two people. She sold the suit property more than twenty years ago. She told the court that she did not know about plot no. 320.

9. At the end of the trial the parties tendered written submissions.

Plaintiff's submissions

10. It is the plaintiff's submissions that his late father complied with the conditions in the letter of allotment, took possession and put a permanent structure, upon approval of his development plans. A survey conducted by PW2 Peter Ayimba Atandi confirmed that there was an encroachment on plot 320. Further that 1st defendant failed to handover vacant possession of the suit property. He has put forward the case of **Gitonga Wambugu Kariuki & 7 Others vs Eliud Timothy Mwamunga ELC 239 of 2015**.

11. The 1st defendant failed to handover well subdivided plots as expected to conform with the survey plan and part development plan leading to the encroachment by the 2nd defendant into the plaintiff's plot. The plaintiff's quiet and peaceful enjoyment of the said property has been violated by the 1st defendant's refusal and/or neglect to issue vacant possession and the 2nd defendant's trespass into the plaintiff's property.

12. The act of encroachment which still continues to this day is an act of continuous trespass. The court ought to find that the acts of the 2nd defendant amounts to trespass. The plaintiff is entitled to the reliefs sought. He is entitled to general damages and mesne profits. He prays that Kshs.200,000 be awarded as general damages. He has put forward the case of **Eliud Njoroge Gachiri vs Stephen Kamau Ng'ang'a, ELC 121 of 2017**.

The 1st defendant's submission

13. There is no cause of action disclosed as against the 1st defendant and the entire suit ought to be struck out with costs. The title to the suit does not indicate that the matter has been filed on behalf of the estate of the deceased. The plaintiff does not state that he has brought this matter as the administrator of the Estate of the late Joseph Ng'ang'a. He has filed the suit in his own individual capacity. There is no authority to sue from the other two administrators. It has put forward the case of **Simon Kamau Muhindi (suing as the Administrator of the Estate of Esther Nyokabi Muhindi vs Monica Wambui Ngugi & Another [2014] eKLR**.

14. The 1st defendant has no claim whatsoever over the ownership of Plot No. 320 Kariobangi Light Industries. The plaintiff has not tendered any documentary evidence as proof of ownership over the suit property. The title dated 6th June 1985 which the plaintiff claims to be an allotment letter does not qualify to be one as the letter is addressed to Charles Oyatta and not the plaintiff or his deceased father. It refers to a then council's letter of allocation. The said letter of allocation was not tendered in evidence by the plaintiff. The law does not recognize an allotment letter as a document of ownership. It has put forward the case of **Josephat Tobiko Kelemu vs Corporative Management Committee of Emparnat Farmers Dairy Cooperative Society Limited [2017] eKLR**. The beacon certificate does not aid the plaintiff either if it does not have further documents to support his title over the suit property. It has put forward the case of **Mary Wanjiku Gitagia vs Lucy Mwhaki Wa Ngugi & 2 Others.[2016] eKLR**.

15. No evidence has been tendered of any land sale agreement between his deceased father and Charles Oyatta. There is no transfer signifying that the interest in the suit property that Charles Oyatta held in the suit property had been transferred to the plaintiff's deceased father. The letter dated 29th April 1997 is not a transfer. The plaintiff has not proved his interest in the suit property or evidenced his claim of ownership as the documents he intends to rely upon do not demonstrate that he is the legal owner of the suit property. The plaintiff seeks that the 1st defendant enforces an order of eviction which is not the mandate of the 1st defendant. No damages for trespass can be awarded against the 1st defendant as the 1st defendant has not trespassed on the suit property. There is no cause of action disclosed against the 1st defendant. It has put forward the case of **Time Magazine International Limited & Another vs Michael F Rotich & Another [2000] eKLR**. It prays that the entire suit as against the 1st defendant be dismissed with costs.

The 2nd Defendant's submissions

16. The plaintiff relied on a grant of letters of administration which clearly indicate the administrators as the plaintiff, Susan Mweru Ng'ang'a and David Karianjohi Ng'ang'a. the plaintiff has not stated if he is suing on behalf of the estate of Joseph Ng'ang'a Kiarie. The plaintiff has not been given authority by his co-administrators to institute these proceedings against the 2nd defendant. She has put forward the case of **Republic vs Nairobi City Council & 3 Others exparte Christine Wangare Gachege Misc Civ. Appl. NO. 103B of 2013**. The plaintiff lacks capacity and the suit ought to be dismissed.

17. The 2nd defendant has adduced evidence as to how she acquired Plot NO. 319. She attached a ruling of a review application filed by the plaintiff's late father who at the time had encroached on her plot no. 319. It is the evidence of the defendant that she is no longer in possession of the said Plot NO. 319. The plaintiff's case is in respect of Plot NO. 320 which the 2nd defendant has never owned and/or trespassed on and is not in possession. The prayers sought on the plaint cannot issue. The court cannot issue orders in vain. She prays that the suit be dismissed with costs.

18. I have considered the pleadings and the evidence on record. I have also considered the written submissions made on behalf of the respective parties and the authorities cited. The issues for determination are:-

- i. Whether or not the plaintiff has capacity to sue.**
- ii. Whether or not the plaintiff has proved ownership of the suit property.**
- iii. Has the plaintiff disclosed any cause of action against the 1st defendant?**
- iv. Has the 2nd defendant encroached on Plot No. 320?**
- v. Is the plaintiff entitled to the reliefs sought?**
- vi. Who should bear costs?**

19. The plaintiff claims plot no. 320 Kariobangi Light Industries was allocated to Joseph Ng'ang'a (deceased). The title in the plaint does not state that the matter has been filed on behalf of the estate of the deceased. It is also the plaintiff's case that he relies on the grant of letters of administration which state that the administrators are the plaintiff Susan Mweru Ng'ang'a and David Karianjohi Ng'ang'a. If indeed the plaintiff is suing on behalf of the estate of the deceased then he has not demonstrated that he has authority from the other two administrators. There is no such authority annexed to the plaint.

20. Section 82(a) of the Laws of Succession Act provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his death for his estate”

21. The plaintiff herein has not stated that he is suing as an administrator of the estate of the late Joseph Ng'ang'a as required by law. Since the plaintiff has sued on his own individual capacity then the suit is bad in law. I find that the plaintiff lacks capacity to sue. I am guided by the case of **Simon Kamau Muhindi (suing as the administrator of the Estate of Esther Nyokabi Muhindi vs Monica Wambui Ngugi & Another [2014] eKLR** where **J Gitumbi** stated thus:

“Plaintiff was jointly appointed with his brother Richard Wainaina Muhindi as the administrators of the estate of the late Esther Nyokabi Muhindi. However this suit has been brought by only the plaintiff and no authority to sue on behalf of Richard Wainaina Muhindi has been produced to this court. To that issue, I wish to rely on the decision of Majanja J in Misc Civil App No. 103B of 2013 Republic vs Nairobi City Council & 3 Others Ex parte Christine Wangare Gachege where he stated as follows:-

“The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times. One administrator out of the other lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”

On that issue, I find that the plaintiff lacks capacity to file suit on behalf of the estate of the deceased, in the absence of his co-administrator, Richard Wainaina Muhindi.....”

22. The plaintiff herein relies on the letter dated 6th June 1985 which he claims is an allotment letter. The said letter is addressed to Charles Oyatta and not the plaintiff or his deceased father. The letter of allocation relied on in that letter is not tendered as evidence in this court. Nevertheless, an allotment letter cannot be proof of ownership.

In the case of **Mary Wanjiku Gitagia vs Lucy Mwhaki Wa Ngugi & 2 Others [2016] eKLR** it was observed thus:-

“In any event, a beacon certificate by itself without any other supporting document, is a very weak document to use as proof of ownership of land”

I find that the plaintiff herein has not produced any transfer signifying that the interest in the suit property that Charles Oyatta held in the suit property had been transferred to his deceased father. The letter dated 29th April 1997 is not a transfer as it is not signed by the transferee and the transferor. The plaintiff has failed to prove ownership to the suit property that is plot no. 320 and his case must fail.

23. I have gone through the prayers sought in the plaint dated 3rd April 2017, it is not in doubt that the plaintiff confirmed that the 1st defendant has not trespassed on plot no. 320 hence no damages can be said to arise therefrom. In a nut shell, I find that the plaintiff has failed to disclose a cause of action against the 1st defendant. The case against the 1st defendant must fail.

24. It is the plaintiff's claim that the 2nd defendant has encroached on plot no. 320. I have gone through the evidence and find that the plaintiff failed to demonstrate that the 2nd defendant has encroached and/or trespassed on the said plot. It is not stated in the plaint when the

alleged encroachment occurred. PW2, a surveyor told the court that he was to undertake an accurate boundary survey to determine the position of plot no. 320 and 321. His report addressed the boundary issue between the two plots. It does not assist the court much. DW1, the 2nd defendant on the other hand said that she has never encroached plot no.320. She told the court that she purchased plot no. 319 from Peter Odhiambo Marega. She produced a sale agreement. She also told the court that in 1991, the plaintiffs late father Joseph Ng'ang'a trespassed on the said plot 319. She filed a suit against him and judgment was delivered in her favour on 3rd July 2001. This evidence was not rebutted by the plaintiff. DW1 further told the court that she disposed of plot no. 319 about twenty years ago. I find that the plaintiff has failed to prove that the 2nd defendant encroached and/or trespassed on plot no. 320.

25. All in all I find that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. He is therefore not entitled to the reliefs sought. The plaintiff's suit is dismissed with costs to the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21ST day of MAY 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendants

Kajuju - Court Assistant