



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO. 1312 OF 1998

JAMES CHEGE.....1ST PLAINTIFF

CATHERINE MARETE.....2ND PLAINTIFF

-VERSUS-

DANIEL MWANI1ST DEFENDANT

MARY MACHARIA.....2ND DEFENDANT

EMMA W. MURAL.....3RD DEFENDANT

JACOB OCHIENG.....4TH DEFENDANT

D. RATEMO.....5TH DEFENDANT

F. S. MUKOLA.....6TH DEFENDANT

F. LUGONZO.....7TH DEFENDANT

L. NJOROGE.....8TH DEFENDANT

NAIROBI CITY COUNCIL.....9TH DEFENDANT

COMMISSIONER OF LANDS.....10TH DEFENDANT

JUDGEMENT

1. In the Further Amended Plaint dated 6/6/2007, the Plaintiffs seek an injunction to restrain the Defendants from trespassing onto the Plaintiffs' property known as Plot Number J9 Jamhuri Phase 1 (infills) ("the Suit Property") or in any other way dealing with Plaintiffs' property. They also seek compensation for the destruction and loss of materials caused at the instance of the 1st and 2nd Defendants, general damages, an order directing the 10th Defendant to issue a title deed to the Plaintiff over the Suit Property and costs of the suit.

2. The 1st to 8th Defendants are residents of Jamhuri Estate Phase 1. The Plaintiffs claim that they are the lawful registered allottees of the Suit Property which initially belonged to the 9th Defendant. The Plaintiffs purchased the Suit Property from Pancras Ndungu Kirori who had been allocated the plot by the 9th Defendant at a cost of Kshs. 360,000/= on 22/12/1997. The Plaintiffs paid all the necessary dues including ground rent, stand premium and survey fees to the 9th Defendant and were issued the letter of allotment in their names by the 9th Defendant.

3. The Plaintiffs claim that they took possession of the Suit Property and paid survey fees for purposes of identifying the beacons to facilitate the fencing of the Suit Property. The Plaintiffs submitted their building plans to the 9th Defendant for approval and embarked on fencing the Suit Property. They delivered several bags of cement, sand, ballast, hard-core, timber, iron sheets and other building materials to the Suit Property.

4. While the Plaintiffs and their workers were digging the trenches for purposes of erecting the perimeter wall on 30/5/1998, the 1st and 2nd Defendants stormed the suit premises and destroyed the work that was already done and covered the trenches. The Plaintiffs claim they suffered material damage. The Plaintiffs deny that the Suit Property is designated as public utility land, playing ground, parking, shopping

centre or any other utility and maintain that it is residential in line with the houses around. The Plaintiffs accuse the Defendants of colluding to fraudulently disentitle the Plaintiffs of their rights in the Suit Property.

5. The 1st to 8th Defendants denied the Plaintiffs claim in their Amended Defence filed in court on 7/8/2007. They denied that the Plaintiffs were the lawful allottees of the Suit Property on the grounds that proper land allocation procedures were not followed in the allocation of the Suit Property to the Plaintiffs.

6. They accused the City Council of Nairobi of breaching its implied contract by issuing letters of allotment to third parties over the subdivided plots created from the initial open spaces which were designated as J1 to J53. They were apprehensive that the City Council intended to subdivide all the open spaces in Jamhuri estate and allocate it to third Parties. They claimed that the Plaintiffs are the beneficiaries of the wrongful subdivisions and allocations by the Nairobi City Council. They contended that the Nairobi City Council is estopped from subdividing and allocating the open spaces in the estate which were meant for public utility and intended for the common use of the residents of the estate, without the consent of the residents.

7. They argued that the allotment to the Plaintiffs was illegal and their stay in the suit premises amounts to trespass hence the Plaintiffs have no cause of action against the Defendants. They urged the court to dismiss the case and nullify the letters of allotment and the subdivision of Jamhuri Estate Phase 1 by the 9th Defendant. They further sought an order directing the 10th Defendant to recall and cancel all the title documents he may have issued in respect of the subdivision by the 9th Defendant.

8. This suit was consolidated with **HCCC No. 1390 of 1998**. Nairobi City Council filed a defence dated 23/7/1998 in HCCC No. 1390 of 1998. The Council denied the Plaintiffs claim and contended that the Plaintiffs had not disclosed what interest they had in the open spaces and whether such interests was actionable at law. The Council further denied entering into any contract over the open spaces.

9. This suit was first heard by Lady Justice Rawal on 15/3/2007 when the Plaintiff gave evidence. The Plaintiff bought the suit land in 1997 from Pancras Ndungu Kirori. He produced a copy of the sale agreement. He informed the City Council of the sale and the City Council gave consent to transfer. The City Council issued a fresh letter of allotment to the Plaintiffs dated 15/1/1998. The Plaintiffs paid rates and survey fees. They got permission to fence the land. The 1st Plaintiff stated that he bought 35 bags of cement, sand and other materials whose value he estimated at Kshs. 207,500/=. When he commenced construction by digging the trenches the Defendants accompanied by youths stopped them from constructing on the land.

10. He claims he reported the incident to the police but the police took no action. The Plaintiff filed a suit and obtained an order restraining the Defendants from interfering with his land. He claims the Defendants disobeyed the court order. He stated that there was an electric post in the middle of the site and that he wrote to the City Council on 5/5/1998 requesting the Council to facilitate its removal. His building materials were vandalized from the Suit Property. The Plaintiff confirmed that he did not have a title for the Suit Property. He got a beacon certificate. By the time he was fencing the suit land, his building plans had not been approved. The Plaintiff was last on the Suit Property in 2002.

11. The defence hearing proceeded before this court in October, 2018. Clement Sironka Keriasek gave evidence for the defence. He produced a copy of his valuation report dated 14/1/2009. He states in his report that the approved plans for Jamhuri Estate Phase 1 of 1968 created 24 blocks of terraced maisonette plots on which a total of 156 maisonette were built covering 22.96 acres excluding the parking, lawns and playing grounds. He was of the opinion that the proposed subdivisions to carve out 53 plots would reduce the public or common utility land vested in the owners of the houses in the estate.

12. James Muriuki Kabau who claimed to be the Chairman of Jamhuri Estate Residents Welfare Society gave evidence. He produced a list of the members of the society. He stated that the open spaces and roads within the estate form part of the social amenities attaching to the house and are part and parcel of the houses. The Residents sent letters protesting over the encroachment of open spaces to City Hall. They felt that the value of their houses and the estate would greatly diminish if the infill plots were allowed.

13. The witness confirmed that the residents stopped the Plaintiffs from constructing on the Suit Property and brought down the perimeter wall which the Plaintiffs had constructed. He was categorical that they do not have plot numbers J4 to J8 in the estate and they do not recognize these plots. He denied that the plots belonged to the Nairobi City County.

14. He stated that J9, the Suit Property was part of the open space in the estate preserved for public utility just like the road reserves. He maintained that no such plots existed and the creation of J9 was an encroachment on the estate. He produced maps which showed the plan of the estate and when the plots were created. He stated that the residents of the estate were not consulted by City Hall before it attempted to allocate open spaces within the estate. He expressed the residents' desire to have City Hall permanently restrained from giving out the open spaces and footpaths within the estate. He produced various documents including the certificate of registration for Jamhuri Estate Residents Welfare Association and its Constitution as well as a sample lease over the dwelling house whose term is 99 years which will expire on 28/2066.

15. Another resident of Jamhuri Estate, Daniel Mwangi Gathu also gave evidence. He denied inciting any youths to bring down the Plaintiffs wall. He maintained that the residents of Jamhuri Estate are the ones who stopped the Plaintiffs from developing the Suit Property. He stated that he bought his house which is in Jamhuri Estate in 1987 when there were many open spaces in the estate. The residents are still using the spaces that have not been grabbed. He contended that the infills were grabbed plots and that J9 was part of the open spaces being referred to as infills and which was grabbed from the residents.

16. Parties filed submissions which the court has considered. The issue for determination is whether the court should grant the orders sought by the Plaintiffs in the further amended plaint.

17. The Plaintiffs relied on Article 40 of the Constitution and Section 13(7) of the Environment and Land Court Act in urging the court to

award damages of Kshs. 40 million. They relied on the case of *Dr. Joseph Arap Ng'ok v Justice Moijo Ole Keiwua & 5 others* where the court stated that landed property can only come into existence after issuance of a letter of allotment, meeting the conditions and actual issuance of the title pursuant to the provisions of the Act under which the property is held. The court notes that the Plaintiffs had not been issued with any title over the Suit Property.

18. The 9th Defendant in its written submissions denied entering into any contractual agreement with the Plaintiffs or the Defendants with regard to the Suit Property. The 9th Defendants submitted the Plaintiffs ought to have sued the former owner of the Suit Property who sold it to them. They urged the court not to rely on the documents of ownership presented by the Plaintiffs on the grounds that they were not authentic and did not emanate from the 9th Defendant's office. They further submitted that the 9th Defendant cannot be held accountable for the demolitions which the 3rd to 8th Defendants admitted they carried out. They further stated that the Plaintiffs illegally constructed the perimeter wall without its approval. They urged that the Plaintiffs do not deserve the permanent injunction they seek since they did not prove that the 9th Defendant indeed allotted the Suit Property to them.

19. The 1st to 8th Defendants submitted that the subdivision of the open spaces and creation of the infills was illegal and could not confer a legal title to the Plaintiffs. They urged that the residents of Jamhuri Estate possess the estate land together with the open spaces and have greater interest in the land than the City Council which purported to allocate the open spaces to third parties.

20. They contended that no approval was obtained from the Minister of Local Government pursuant to Section 144 of the Local Government Act for the council to allocate the suit land to the Plaintiffs. Having failed to comply with the Local Government Act, the 1st to 8th Defendants contended that the allocation of the Suit Property to the Plaintiffs was a nullity. They further argued that the common areas, playing fields, open spaces and road reserves within the estate are owned by the residents in common and were paid for when they purchased the houses and were granted leases over their land. They therefore submitted that these are held in trust for the benefit of the residents.

21. The court notes that no evidence was led to show that Section 144 of the Local Government Act which was in force then was complied with when the Suit Property was allotted to the Plaintiffs by the City Council of Nairobi. In any event the Council has denied allocating the Suit Property to the Plaintiffs.

22. The court has looked at the maps produced by the Defendants and notes that the plots owned by the Defendants bear land reference numbers such as 209/6989/57 or 209/6989/133 and other numbers such as K20A. Other plots are written O.S. which the court presumes stands for open space. Parking slots are also marked on the plan. J7, J8 and J9 appear to have been created on land which was abutting on L.R. Numbers 209/6989/57 up to 209/6989/64. The court can see other plots marked J3 to J6, J37 to J41 amongst other plots.

23. From the plan it is clear that at the time the estate was developed the plots denoted J were not in existence, otherwise they would have been given land registration numbers similar to those of the existing houses. The layout plan for L.R. No. 209/6989 Kibera which the Defendant produced showed Jamhuri Estate Phase 1 and the houses developed on those plots bearing L.R. No. 209/6989 and the individual parcel numbers at the end. There are many spaces within the estate. J9 was created out of the land shown as BL21 which was left as an open space.

24. Section 29 of the Physical Planning Act enjoined the City Council of Nairobi to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan. The Council had an obligation to maintain the open spaces within Jamhuri Estate in accordance with the physical development plan for the area but not to allocate it as the Plaintiffs allege it did. The Council could only allocate land under the provisions of Section 144 of the Local Government Act.

25. The court has considered the pleadings, the evidence adduced and the submissions and finds that the Plaintiffs have failed to prove their case on a balance of probabilities. The suit is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 6th day of December 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Moriasi holding brief for Mr. Anam for the 2nd to 8th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and the 1st Defendant