



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 323 OF 2009

NELSON MWANGI.....PLAINTIFF

VERSUS

KIKUYU TOWN COUNCIL.....1ST DEFENDANT

JOHN KAMAU NDERE.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 12th May 2009, amended on 6th July 2013 and further amended on 9th June 2016, the plaintiff prays for judgment against the defendants for:-

(a) A declaration that the construction by the 2nd defendant of over and above the initial approval by the 1st defendant for a lock up measuring 15 X 15 feet is illegal and that it intereferes with the plaintiff's property, Plot NO. 41/12 Nderi B.

(b) A mandatory order requesting the 2nd defendant to demolish the part of his building that goes past the mandate of a temporarily lock up measuring 15 x 15 feet initially granted to him by the 1st defendant and in lieu of such demolition within such reasonable time as may be set by the court the 1st defendant and/or the plaintiff do demolish the same at the 2nd defendant's costs.

(c) A permanent injunction against the 1st and 2nd defendants, their agents and/or servants from interfering with the open space frontage to the Kikuyu-Nderi Road and Kikuyu –Kefri Road of plaintiff's parcel known as Plot No. 41/12 Nderi B, a further order that the 1st defendant's structure that has caused aforementioned nuisance be destroyed and/or demolished and an order for damages for nuisance against both defendants.

(d) Damages for nuisance as against the defenadnts

(e) Cost of this suit plus interest at court rates.

(f) Any other or further relief that this honourable court may deem fit and just to grant

2. Upon being served with copies of plaint and summons to enter appearance the 1st defendant entered appearance and filed a statement dated 24th August 2009.

3. The 2nd defendant entered appearance and filed a statement of defence dated 18th August 2009.

4. The plaintiff filed a reply to the 1st and 2nd defendant's defence on 9th September 2009.

5. PW1, Nelson Mwangi Ndungire the plaintiff adopted his witness statement and the list of documents dated 20th December 2019. He told the court that he was allocated plot 12B which measures approximately 25" by 80". The same is situated at the corner of the road going to Kikuyu and the one to Kefri. He said he was allocated the plot on 1978. He put up a one storey building, which has shops occupied by tenants. He further told the court that the 2nd defendant put up a building measuring 24" x 37" instead of putting up a temporary structure. The 2nd defendant's letter of allocation was for plot no. 35 Nderi for purpose of a lock up of sixe 15" x 15".

6. That the 2nd defendant's structure has blocked his building as four of his (plaintiffs) rooms are blocked. He said the 2nd defendants' building also interfered with his sewerage system. As a result also the plaintiff has no access to the loading and offloading zone. He has no

parking for vehicles. Further that the 2nd defendant's structure is on the road reserve. The plaintiff made a report to the 1st defendant but they took so long to act. He therefore filed this a suit in Kikuyu court being RMCC No. 308 of 2005, and later this suit. He said he wrote to the 1st defendant vide a letter dated 7th February 2006 but the 2nd defendant's building was not removed.

7. He prays that the structure be demolished, General damages plus costs of the suit. He produced the documents in his bundle of documents as exhibit in this case.

8. PW2 George Munene a quantity surveyor told the court he got instructions from the plaintiff's to measure and analyse his building. He did and prepared a report dated 27th August 2015. He said he relied on the structural drawing of 1980. The plaintiff's building measures 75 ft by 25 ft with a canopy which is 5 ft has a front on two sides with shops. It had a septic tank and a soak pit. He stated that the plans have a stamp from Kiambu County Council dated 20th December 1980. He further stated that there was a structure in front of the plaintiff's building measuring 48 ft by 21 ft. The said structure had shut off part of the plaintiff's building. Further that the other structure cut into the plaintiff's building foundation. The plaintiff's building was impacted negatively in terms of accessibility, lighting, ventilation and parking. The other structure is on a road reserve hence illegal and a nuisance to the plaintiff and the community around Nderi shopping center. He produced his report as an exhibit in this case. He further stated that a lock up plot is meant for a mobile kiosk or is temporary in nature. That the 2nd defendant's structure was illegal.

9. DW1. Musa Munyi Onesmus, a surveyor, told the court that Plot NO. 35 is not on road reserve. That plot 12B and 35 are two different plots with a common boundary. That plot 35 has not encroached on plot 12 B. that the structure on plot 35B is within 15 feet by 15 feet and does not exceed what was allotted. That the only authority on the issue of boundary is the County Government of Kiambu. That the plot 35 does not affect the lighting passage on plot 12B. He produced his report as exhibit in this case.

10. DW2 John Kamau Ndere, the 2nd defendant told the court he is the owner of a lock up plot in Nderi Shopping Center. He adopted his witness statement dated 9th December 2013 and the list of documents dated 4th February 2014. He said he applied for his plot in 1996 and the approval was done on 4th March 1996. He was issued with a letter of allotment dated 11th September 2001. He stated that he has constructed a shop with four stalls after approval. He told the court that his building does not prevent light into the plaintiff's building. That the road is about 40 metres away. That the plaintiff was given a notice to demolish his toilet. Further that he followed the layout plan in putting up his building.

11. The 1st defendant did not avail any witnesses but tendered written submissions.

The plaintiff's submissions

12. They are dated 20th December 2019. The plaintiff is the registered owner of the property known as Plot No. 41/12 Nderi B situated in Nderi Market, Kikuyu township. The said plot is officially referred to as a full plot measuring 25 X 80 square feet. It is a corner plot which enjoys two frontages, one on the Kikuyu Nderi Road and the other on the Kikuyu Kefri Road. The 1st defendant was allowed to operate a mobile kiosk on the frontage and subsequently on 12th September 2001 was allocated a lock up plot measuring 15 X 15 Square feet. The 2nd defendant constructed a permanent building measuring 48 X 21 square feet which is in excess of the allotted size of 15 X 15 square feet thereby blocking 64% of the plaintiff's frontage. The plaintiff's plot is the last at the corner hence there is no other plot that could be allocated to anyone. The minutes of the Works, Town Planning and Markets Committee dated 4th March 1996 approved the 2nd defendant's application for a mobile kiosk. This means it was for a temporary operation.

13. PW2 George Munene a surveyor visited the site and confirmed that the 2nd defendant building measures 48 X 21 square feet and that 64% of the plaintiff's building frontage has been blocked.

14. The 2nd defendant's development has contravened the planning regulations in terms of size as it has exceeded the approved size and has therefore blocked 64% of the plaintiff's building. The photographs provided by PW2 show that the plaintiff's building no longer enjoys direct sunlight and his building has become dark, mouldy and dingy. The tenants have moved out. The plaintiff cannot enjoy the frontage of his building anymore which was used as parking and access. The 2nd defendant's building was built without any supervision from the council.

15. PW2 testified that when he surveyed the suit premises he found that the 2nd defendant's toilet is constructed right at the entrance of the plaintiff's staircase which causes a bad stench/odour to the plaintiff's tenants and the same contributed to their vacation of the plaintiff's property and he has therefore suffered loss and income. The plaintiff has lodged several unresolved complaints with the town clerk Kikuyu Council over the effects he has suffered as a result of the 2nd defendant's construction but he same have remained unresolved and continues to date. The 2nd defendant failed to produce an approval for constructing the latrine from the Ministry of Health and also failed to provide an occupation certificate by a Health Inspector as expressly stated in his allotment letter.

16. The 1st defendant did not participate in the hearing but they allotted both the plaintiff and the 1st defendant the allotment letters for their respective plots. The plaintiff was allocated a full plot in 1978. The 1st defendant acted fraudulently and illegally by allotting the 2nd defendant the lock up plot thereafter subsequent allotment cannot be issued at the expense of another person's rights. The 2nd defendant has infringed on the plaintiff's right of access, lighting and parking. This has therefore tampered and hindered the ultimate use of his plot as he cannot maximize the rent collectable from his development without enjoying the stated right. He prays that judgment be entered as prayed in the plaint.

The 1st defendant's submissions

17. They are dated 17th March 2020. The 1st defendant has never denied that it allocated lock up plot no. 35 to the 2nd defendant therefore making him the legal owner of the property. All the requisite procedures were carried out in accordance with the law. The said plot was never a parking or a road reserve. The 2nd defendant's application for the said plot was approved on 30th November 1999 and a letter of allotment issued dated 12th December 2001. On 9th September 2009, the 2nd defendant applied for space to construct a toilet and the application was allowed.

18. Once the 2nd defendant acquired the property, he is expected to have absolute ownership with rights and privileges appurtenant thereto. It has relied on Section 24 and 25 of the land registration Act, 2012. A restrictive covenant is an interest in land that was developed by equity. Therefore unlike legal interest in land the owner of the dominant land cannot automatically bind a purchaser of the servient land. The plaintiff herein does not have this right, claim as registered. The plaintiff is claiming from this court what the court cannot grant as the same was not registered. No restrictions were transferred by the 1st defendant to the 2nd defendant during the allotment.

19. The plaintiff has failed to prove any allegations that he has made against the defendant. He is therefore not entitled to the prayers sought. It prays that the plaintiff's suit be dismissed with costs to the defendants.

The 2nd defendant's submissions

20. They are dated 14th February 2020. The plaintiff and the 2nd defendant are both in possession of the allotment letters of two distinct plots allocated to them by the 1st defendant. The 2nd defendant's first allotment was for a mobile kiosk but later approved for a permanent structure. The 2nd defendant's building does not encroach on the plaintiff's building, a road reserve or other public open space. The plaintiff has not challenged the decision to allocate the 2nd defendant lock up no. 35 at all. He has put forward the case of **John Mukura Wachuhi vs Minister for Lands & Others HC Pet No. 82 of 2010; Joseph Arap Ngok vs Justice Moljo Ole Keiwua CA Civil Appeal NO. 60 of 1997; Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another HCCA 9 of 2004.**

21. The 2nd defendant is the proprietor of lock up plot no. 35. DW2's evidence is that the 2nd defendant's structure does not in any way interfere with the road reserve, open space and the plaintiff's easements at all. It has not exceeded the approved site. The 1st defendant is the issuing authority. Its decision can only be challenged through judicial review. He prays that the plaintiff's suit be dismissed with costs.

22. 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 issue for determination are:-

(i) Whether the 2nd defendant's building is a nuisance to the plaintiff.

(ii) Whether the plaintiff has suffered loss and damage.

(iii) Is the plaintiff entitled to the reliefs sought?

(iv) Who should bear costs?

23. It is not in dispute that both the plaintiff and the 2nd defendant were allocated plots by the 1st defendant. The 2nd defendant was allotted lock up plot no. 35 vide the minutes of the town council of Kikuyu in a meeting held on 30th November 1999 where it was resolved:-

"That the application for a lock up size 15" by 15" at Nderi market by John Kamau Ndere is hereby approved"

This confirms that lock up plot no 35 measures 15" x 15". It is the plaintiff's case that the 2nd defendant's building sits on an area of more than 15" x 15".

24. PW2 when cross examined by Mr. Arum for the 2nd defendant admitted that he had not seen the plan or the map for the building on Plot No. 35. He also admitted that the staircase and the toilet were not on the road reserve. He further admitted that the 1st defendant had the mandate to deal with issues of the boundary between the said plots.

25. **Section 24(a)** of the Land Registration Act, 2012 provides that:-

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto

PW2 claimed the 2nd defendant's building has encroached on the plaintiff's building extending beyond the 15" X 15".

26. DW1 Musa Munyi Onesmus a surveyor told the court the 2nd defendant structure is within the measurements of 15 ft by 15 ft. He confirmed that the 2nd defendant's structure has not caused any blockage to the plaintiff's building. This evidence is not challenged by the plaintiff. It is the 1st defendant's submissions that plot no. 35 is not on a road reserve nor is it on a parking.

27. I find that the plaintiff has failed to demonstrate that the 2nd defendant's building is on the road reserve. PW2 stated that the 2nd defendant's structure is 3 meter from the road instead of 6 metres. His evidence has not been disapproved by the 1st defendant's submissions

that the 2nd defendant's structure is not on the road reserve. DW1, Musa Munyi Onesmus told the court that the application by the 2nd defendant to construct a toilet was approved by the 1st defendant under the minutes of the meeting held on 5th November 2009. I find that the allocating authority which is the 1st defendant has confirmed that the 2nd defendant's building is property constructed. The plaintiff has not proved the allegations of fraud and/or illegality attributed to the 1st defendant. It therefore means that lock up plot 35 was properly allocated to the 2nd defendant.

28. All in all I find that the plaintiff has failed to establish his case against the defendants on a balance of probabilities. The plaintiff's suit is dismissed as the plaintiff and the 2nd defendant own the neighbouring plots. I do order each party to bear his own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant