



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

ELC NO.1364 OF 2014

ESTHER NYAWIRA MUCUNU.....PLAINTIFF

VERSUS

JOHN MWANGI KARIUKI.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide a plaint dated 21st October, 2014. The Plaintiff claimed that she was lawfully allocated Plot No.3/161 Kayole/Soweto Squatters Resettlement Scheme Phase II in 1990 and has since then been in occupation of the plot as the owner.

2. She averred that the defendant between the months of August and October, 2014 trespassed onto the Plot and demolished her structures thereon with the intention of evicting her from the plot. The Plaintiff thus prayed for judgment against the defendant for:-

(a) A permanent injunction restraining the Defendants, his servants and or agents from entering trespassing, claiming and developing the Plaintiff's Plot No. 3/161 Soweto Squatters Resettlement Scheme Phase II.

(b) A declaration that the Plaintiff is the lawful owner of plot No. 3/161 Soweto Squatters Resettlement Scheme Phase II.

(c) Any other or further relief as the courts may deem fit and just to grant.

3. The defendant filed a statement of defence on 1st March, 2017. The defendant denied the Plaintiff was the owner of Plot No. 3/161 Soweto Squatters Resettlement Scheme Phase II as alleged in the Plaint. The Defendant asserted that he was the lawful owner of Plot No. 3/161 and 3/162 having legally and regularly purchased the same from the original allottees M/s Philip Ahichio and Margaret Oyieli Ayaya (husband and wife) on 16th February, 2006. The defendant averred that before purchasing the plots he had carried out the appropriate due diligence and had verified the sellers were the owners of the plots. The defendant averred the Plaintiff did not hold any varied ownership documents for Plot No. 3/161 and prayed for the dismissal of the Plaintiff's suit.

4. The suit was heard before me on diverse dates when I was doing service week at Nairobi Milimani Environment and Land Court. The plaintiff and one other witness testified in support of the Plaintiff's case. The defendant testified as DW1 and called on Francisco Murugi Nganga who testified as DW2. At the instance of the Court DW3 Abud Ochola Assistant Director, Nairobi County Government in charge of Site and Services Schemes in the Department of Lands at Dandora testified as DW3.

The Plaintiff's Case

5. The Plaintiff in her evidence testified that she was one of the squatters who were evicted from Muoroto. She stated that the Government opted to resettle the evictees on land set aside at Soweto. She stated she was allocated Plot No. 3/161 vide a letter of allotment dated 20th September, 1990 which was exhibited in the Plaintiff's bundle of documents. The Plaintiff stated that she had occupied the said Plot No. 3/161 ever since being allocated and had effected development on the plot including connecting water and sewerage to the property. She stated she had also been paying land rates and rent for the plot. She explained she has a mabati structure comprising of 3 rooms and that her son was residing on the plot. The Plaintiff stated she did not know Margaret Ayaya and had never met her. She denied that she had at any time sold her plot to anybody.

6. In Cross examination by counsel for the defendant, the Plaintiff stated she had earlier sued her chief, one Anunda for interfering with her plot and in the case Nairobi CMCC No. 3858 of 2000 the Chief had filed a defence and he stated the letter of offer she held was forged. The

Plaintiff reiterated her letter of allotment was genuine and stated she could not tell how Margaret Ayaya got her letter of allotment.

7. PW2 Danson Ndungu Muiruri stated he was a *Nyumba Kumi* elder and that he was a resident of Soweto. He said he had known the Plaintiff since 1986. He stated after their houses in Muoroto were demolished by the government they were allocated plots at Soweto and that the Plaintiff was one of the allottees. He stated as the *Nyumba Kumi* elders they would normally be aware when an allottee sold their plot. He stated he had no knowledge the Plaintiff had at any time sold the plot she was allocated.

8. The witness stated sometime after 1990 one Margaret Ayaya started claiming ownership of the same plot belonging to the plaintiff and that the Chief used devious means to remove the Plaintiff from the plot. The witness further stated he was not aware whether there was an allocation list showing all the persons who had been allocated plots at Soweto.

The Defendant's Case

9. DW1 John Mwangi Kariuki the defendant herein testified that he purchased Plot No. 3/161 and 3/162 Soweto from Margaret Ayaya and her husband Philip Alucho respectively through a Sale Agreement dated 16th February 2006 exhibited in the bundle of documents filed by the defendant. The defendant explained that he purchased both plots for the consideration of Ksh.280,000/= and that before he bought the plots he verified the ownership. The vendors showed to him the letters of allotment that they held and that he on the same day that they signed the agreement had the transfer of the plots effected to him at the D.O's Office. He stated he confirmed at the City Council Offices that the allotments were genuine. The Surveyor who had shown the allottees the plots was present when the transfers were effected and he confirmed the plots had been genuinely allocated. The surveyor had countersigned the allotment letters when the allocation of the plots was done.

10. The Defendant stated that he took possession of the plots and constructed some temporary houses. He explained he had not known the Plaintiff before she sued him and after he was sued he sought clarification from the persons who had sold the plots to him who informed him that the Plaintiff had unlawfully entered onto the plot in 1999 leading to the dispute being investigated by the Chief and the OCPD Kayole. The Defendant referred to the correspondences exchanged between the Chief's Office and the sellers stated that the investigations revealed that the person who sold the plot to him were the genuine owners.

11. He stated that the surveyor confirmed to the Chief vide a letter dated 10th December 1998 that Margaret Oyieli Ayaya and P. A Aluchio were the allottees of Plot Nos 3/161 and 3/162 Soweto Squatters Resettlement Scheme respectively. The defendant stated the surveyor was the same one who had counter signed the letters of allotment. The defendant further stated the OCPD after the investigations confirmed the ownership of the disputed plot(s) and authorized the removal of the Plaintiff from the plots. The plaintiff filed a suit against the Chief at the Chief Magistrate's Court Milimani CMCC No. 3858 of 2000 but later withdrew the suit.

12. The defendant further stated he had been paying the rates for the plot and had paid upto 2017. He stated after he had constructed temporary structures on the plot his children were staying thereon. He stated the plaintiff demolished a stone perimeter fence that he had erected.

13. DW2 Francisco Murigi Nganga testified that he witnessed the sale agreement between the defendant and Margaret Ayaya and Philip Aluchio on 16th February 2006. He explained the defendant was purchasing 2 plots at Kayole being plot No. 3/161 and 3/162 owned by Margaret Ayaya and Phillip Aluchio respectively. He explained that after signing the agreement they proceeded to the D.O's Office where the ownership was verified and Transfer effected to the defendant. He stated the surveyor was present who confirmed the plots indeed belonged to the persons who were selling. The witness stated that he was a caretaker of the plots before the defendant purchased them. He stated Philip Aluchio had asked him to look after the plots in 2003.

14. As explained earlier in this judgment Abud Ochola of the Nairobi County Lands Department stationed at Dandora was summoned to testify at the instance of the Court to shed light on the records held by the County. He testified as DW3 and it was his evidence that Soweto Squatters Resettlement Scheme was created out of City Council Land ostensibly for settlement of squatters from Ex Muoroto and Kibagare/Spring Valley sometimes in 1990. He explained the allottees were vetted by the Provincial Administration and that the City Council only provided infrastructural services. He stated initially the allotments were on a temporary basis but when the allottees started putting up permanent structures the council started collecting rates.

15. The witness testified that plot No. 3/161 was initially allocated to Margaret Ayaya but she subsequently sold the plot to John Mwangi Kariuki and a transfer effected on 16TH February 2006. He affirmed the current owner as per their records is John Mwangi Kariuki and he was the one who had been paying rates under A/C No. 511281 which was in his name. He stated there was an official register that was maintained and all allottees were recorded. He explained the surveyor was recording the name of every person who was allocated a plot and such person was shown the plot. The witness showed the original register to the court and the Court noted that against plot No. 3/161 the original allottee was shown as Margaret Oyieli Oyaya. An abstract copy of the record was produced as D.Ex7.

16. The witness in cross examination by Counsel for the Plaintiff affirmed that the register did not show the dates when the entries were made. The witness further stated the allotments were formalized in 2012 and that the allottees started paying rates from then. Further cross examined by counsel for the defendant the witness confirmed as per their records John Mwangi Kariuki was presently the registered owner of plots Nos 3/161 and 3/162. He affirmed Margaret Oyaya was the original allottee of plot No. 3/161. He stated before the formalization of the allocations by the council it was the D.O's office and the surveyor who were authenticating the transactions. The transfer to John Mwangi Kariuki was duly authenticated. He affirmed the name of the plaintiff did not appear anywhere in the records held by the County. He stated after formalization of the allocations the allottees were issued with plot cards and that the defendant was issued with a plot card which he uses to pay rates.

Analysis evaluation and determinations.

17. The parties filed their final closing submissions as directed by the Court. I have reviewed the pleadings, the evidence and I have considered the submissions by the parties and the following issues emerge for determination

(i) Whether the plaintiff was the lawful allottee of plot no. 3/161 Kayole Soweto Settlement Scheme?

(ii) Whether the defendant validly purchased plot No. 3/161 Kayole Soweto Settlement Scheme from one Margaret Ayaya?

(iii) What reliefs and/or orders should the Court grant?

18. In the present suit what is really in issue is who between the plaintiff and Margaret Ayaya from whom the defendant claimed to have purchased the contested plot No. 3/161 Kayole Soweto Settlement Scheme was the allottee of the Plot. The plaintiff claimed to have been the person who was allocated the plot as a former squatter of Muoroto. The defendant for his part claimed to have purchased the plot from Margaret Ayaya who apparently was equally allocated the plot. Both the plaintiff and the defendant have exhibited what they claimed to be the letters of allotment. The letter of allotment exhibited by the plaintiff is dated 20th September, 1990 the same as the one exhibited by the defendant. Though the letters were supposedly issued on the same day by the same person a close scrutiny of the two letters shows some variations. The letter exhibited by the plaintiff appears to have been typed by a different typewriter than the one that typed the letter of allotment exhibited by the defendant. The font and impressions in regard to the two letters is different. The layout of the first paragraph of the plaintiff's letter varies and compared to the letter of allotment to Margaret Ayaya the letter held by the Plaintiff was rather '**clumsily filled**'. For instance where the plot No. should have been inserted in the plaintiff's letter it is her ID No that has been entered while plot No. 3/161 is just noted on the body of the letter where there is some open space.

19. The defendant in his evidence stated that when he was served with the suit papers in the instant suit he sought to know from the persons who sold the plots to him what the issue was as related to the claim by the plaintiff. The defendant explained that Margaret Ayaya and Philip Aluchio informed him the Plaintiff had trespassed onto their plots and that the dispute was duly investigated by the chief and the OCPD Kayole who duly confirmed the plots did not belong to the plaintiff. The defendant availed correspondence exchanged between the previous owners and the local administration between the period 1998 and 2000 and it was evident that the plaintiff and the previous owners indeed had a dispute over the ownership of the plots. Amongst the documents availed was a handwritten letter dated 10th December 1998 from the surveyor to the chief where the surveyor confirmed the allottee of plot No. 3/161 was Margaret Oyieli Ayaya.

20. It would appear after the dispute relating to ownership was administratively handled the plaintiff nonetheless went ahead and filed a suit vide Nairobi Milimani CMCC No. 3858 of 2000 (Esther Nyawira Mukunu Vs James Anunda) where she claimed to be the owner of plot No. 3/161. In the suit she averred the defendant had demolished her house on the plot resulting in a Ksh100,000/= damage and sought damages and an order of restraint against the defendant. In the statement of defence filed in the suit the defendant averred that he was acting in his capacity as the Chief and that in such capacity he had investigated a claim by Margaret Oyiela Ayaya that the plaintiff had encroached onto her plot No. 3/161 Kayole Soweto Resettlement Scheme. The defendant in the suit stated that investigations revealed that the plot No. 3/161 Kayole Soweto belonged to the said Margaret Ayala. The plaintiff withdrew the suit before it was heard.

21. The court faced with the dilemma of the two contrasting letters of allotment opted to have DW3 summoned to clarify who the owner of the disputed plot was on the basis of the records held by the County Government. DW3's evidence was to the effect that the defendant was the owner of plot No.3/161 as per their records. He furnished the court with the register of the allottees and as per the register Margaret Ayaya is shown to have been the original allottee of plot No.3/161 Soweto Resettlement Scheme and the register further showed she transferred this plot to the defendant on 16th February 2006. The Court scrutinized the original register and there was nothing to suggest the register was not authentic. The register carried details which included plot number, the name of the allottee and their identify card numbers.

22. An abstract of the page of the register carrying the particulars of plot No3/161 was certified and produced as "DEX7". DW3 explained that at the time of allocation of the plots, the surveyor was showing the allottees their plots and entering their names in the allocation register . He stated they did not have the plaintiff's name anywhere in their records. DW3 further stated that the allottees as per the register were regularized and were issued with plot cards. He confirmed the defendant was issued plot cards for plot Nos 3/161 and 3/162 and that he had paid rates and ground rent for the same.

23. On the basis of the evidence I am satisfied that Margaret Ayaya was allocated plot No.3/161 Kayole Soweto Resettlement Scheme and that she lawfully and validly sold the plot to the defendant. I hold that the letter of allotment tendered in evidence by the plaintiff is suspicious and could have been irregularly issued. While the plaintiff may have been a squatter in Muoroto, she has not proved that she was indeed allocated plot No.3/161 Soweto. It is not lost to the court that in 1998 there was a dispute involving the ownership of the same plot between the plaintiff and Margaret Ayaya and upon investigations the local administration resolved that the plot belonged to Margaret Ayaya.

24. The plaintiff has submitted that Margaret Ayaya was not a squatter and that she did not therefore qualify to be allocated a plot that was meant for squatters who were evicted from Muoroto. No evidence was led regarding the criteria that was used to allocate the plots and the Court cannot determine who was qualified and/or not qualified to be allocated a plot in the scheme . The plaintiff had further made extensive submissions on the presumed rights of the plaintiff under the constitution in regard to right to property, right to a clean and health environment, right to and access to adequate housing and right to have her dispute appropriately adjudicated. I have reviewed and considered her submissions in that regard and with respect, I do not consider the constitutional provisions referred to in the submissions have any application in the context and circumstances of this matter. For a right to be protected, it has to be right that actually exists. In the present matter the plaintiff has failed to prove that she was indeed allocated the disputed plot and in those circumstances she cannot assert she has a right that ought to be protected in regard to the subject property.

Conclusion and decision.

25. From my above discussion and evaluation of the evidence it must have become evident that I have to answer the first issue in the

negative. It is my determination therefore that Margaret Ayaya was the lawful allottee of plot No.3/161 Kayole Soweto Settlement Scheme. Having made that determination it follows that the defendant validly purchased plot No.3/161 Kayole Soweto Settlement Scheme from Margaret Ayaya. There was a sale agreement between the parties dated 16th December 2006 and the plot was thereafter transferred to the defendant who has continued to pay the rates and ground rent for the same. I am conscious that the plaintiff testified that she had water and sewerage connected to the plot. Notably the payment for water and sewerage connection was made on 17th March 2017 as per the receipts tendered in evidence by the plaintiff. It is noteworthy these payments were made during the pendency of this suit and it cannot be ruled out these payments may have been made with this case in mind to boost the plaintiff's case. The plaintiff in her evidence stated she has not made any payment to the City Council on account of rates and land rent.

26. When the defendant purchased the plot he exercised diligence as he verified with the office of the DO who were the persons who held the records and the plot was registered in the name of Margaret Ayaya. The surveyor who was involved in the allocations was present and he confirmed that ownership. The evidence by DW2 was clear as to how the transfer was effected to the defendant. The official register held by the County Government corroborated the evidence of the defendant and DW2.

27. Considering the entirety of all the evidence it is my decision that the plaintiff had failed to prove her case on a balance of probabilities and she is therefore not entitled to the reliefs she seeks as per the plaint. I order the plaintiff's suit dismissed with costs to the defendant.

28. Orders accordingly.

Judgment dated, signed and delivered electronically at Nakuru this 7th day of July 2020.

J M MUTUNGI

JUDGE