



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 411 OF 2012**

**GODFREY G. GICHANA AKUMA.....PLAINTIFF**

**=VERSUS=**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> DEFENDANT**

**SARAH WANJIRU KUNGU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

In 1987, the 1<sup>st</sup> defendant allocated to one, Joseph Mwanzia Kilonzo and his wife, Eva Loko Mwanzia (hereinafter referred to only as “the Kilonzos”) all that parcel of land known as Plot No. D2-268, Kayole Site and Service Scheme (hereinafter referred to as “the suit property”). The Kilonzos and other persons who were allocated plots at Kayole Site and Service Scheme were to pay for the plots by monthly instalments. Many of the allottees fell into arrears in their monthly payments. The Kilonzos were among the allottees who failed to keep up with their monthly payments. On 17<sup>th</sup> October, 2001, the 1<sup>st</sup> defendant gave notice to the allottees concerned to clear their respective arrears within 30 days failure to which their plots would be repossessed by the 1<sup>st</sup> defendant. Several allottees including the Kilonzos did not clear the arrears within the period that was given by the 1<sup>st</sup> defendant as a result of which their plots were repossessed by the 1<sup>st</sup> defendant and re-allocated to new people. The suit property that had been allocated to the Kilonzos was among the plots that were repossessed by the 1<sup>st</sup> defendant. The same was re-allocated to the plaintiff herein through a letter of allotment dated 28<sup>th</sup> November, 2001.

In a meeting that was held by the 1<sup>st</sup> defendant’s Housing Development Committee on 20<sup>th</sup> June, 2012, the repossession and re-allocation of the said plots including the suit property were approved. The plaintiff paid the charges that were required by the 1<sup>st</sup> defendant and took possession of the suit property that was vacant and commenced development thereon. In August, 2004, about 3 years after the plaintiff was allocated the suit property, the Kilonzos resurfaced and sought to claim back the suit property from the plaintiff. After the plaintiff failed to repulse the onslaught by the Kilonzos who had the support of the 1<sup>st</sup> defendant which had repossessed and re-allocated the suit property to the plaintiff, the plaintiff filed a suit at the Chief Magistrate’s Court at Milimani Commercial Court namely, CMCC No. 3478 of 2006 against the 1<sup>st</sup> defendant and the Kilonzos. This suit was filed on or about 18<sup>th</sup> April, 2006. In that suit, the plaintiff sought a temporary injunction to restrain the 1<sup>st</sup> defendant and the Kilonzos from interfering with the plaintiff’s quiet possession, evicting the plaintiff, disposing of, alienating or transferring the suit property. Unknown to the plaintiff, as at the time he filed the said suit, the Kilonzos had already sold the suit property to the 2<sup>nd</sup> defendant herein on 22<sup>nd</sup> February, 2006 at a consideration of Kshs. 200,000/=. The plaintiff’s application for interlocutory injunction in the lower court was dismissed on 7<sup>th</sup> July, 2006. The plaintiff appealed against the said decision of the lower court in the High Court at Nairobi in Civil Appeal No. 529 of 2006 on 4<sup>th</sup> August, 2006. During this period, the plaintiff was in possession of the suit property.

On 2<sup>nd</sup> April, 2011 and 21<sup>st</sup> April, 2011, the plaintiff was summoned to appear before the Chief Kayole of Location on a complaint by the 2<sup>nd</sup> defendant and was directed by the Chief to stop any further construction on the suit property and the use of the property as a church since the property had a dispute. On 28<sup>th</sup> June, 2012, the 1<sup>st</sup> defendant served the plaintiff with an enforcement notice requiring him to demolish the structures that he had put up on the suit property. The plaintiff has contended that the said notice was issued maliciously and unlawfully and that the same was intended to enrich the 2<sup>nd</sup> defendant. On 15<sup>th</sup> July, 2012, the suit property was invaded and the structures that the plaintiff had put up thereon demolished in an operation that the plaintiff has claimed was carried out by the defendants herein.

The plaintiff brought this suit on 13<sup>th</sup> July, 2012. In his plaint dated 12<sup>th</sup> July, 2012, the plaintiff averred that the 2<sup>nd</sup> defendant had no claim over the suit property and that the actions by the defendants aforesaid amounted to harassment and interference with the plaintiff’s peaceful occupation of the suit property. The plaintiff sought a permanent injunction restraining the defendants, their agents, servants, representatives and assigns from trespassing on, selling, transferring, alienating or otherwise dealing with the suit property. The plaintiff also sought a declaration that he was the legal owner of the suit property.

The 1<sup>st</sup> defendant filed a statement of defence on 4<sup>th</sup> October, 2013 in which it denied the plaintiff’s claim in its entirety. The 1<sup>st</sup> defendant averred that the acts complained of by the plaintiff were carried out under the Physical Planning Act. The 1<sup>st</sup> defendant averred that it was

not a party to the dispute between the plaintiff and the 2<sup>nd</sup> defendant and urged the court to dismiss the plaintiff's suit with costs.

The 2<sup>nd</sup> defendant filed her statement of defence on 22<sup>nd</sup> July, 2013. The 2<sup>nd</sup> defendant denied that the plaintiff was lawfully allocated the suit property by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that if there was such allocation, the same was fraudulent. The 2<sup>nd</sup> defendant averred that the suit property was allocated by the 1<sup>st</sup> defendant to the Kilonzos from whom she purchased the property on 22<sup>nd</sup> February, 2006. The 2<sup>nd</sup> defendant averred that the suit property had been transferred to her and that she was the legal owner thereof.

The 2<sup>nd</sup> defendant averred that the plaintiff had sued the Kilonzos over the suit property in the Chief Magistrates Court and that the suit was still pending. The 2<sup>nd</sup> defendant termed this suit incompetent and prayed that it be stayed pending the outcome of the earlier suit. The 2<sup>nd</sup> defendant averred further that this suit had abated due to the plaintiff's failure to serve summons to enter appearance. The 2<sup>nd</sup> defendant urged the court to dismiss the suit with costs.

At the trial, the plaintiff narrated to the court how he was allocated the suit property by the 1<sup>st</sup> defendant after the same was repossessed by the 1<sup>st</sup> defendant from the Kilonzos and attempts that were made by the defendants to evict him from the property. He told the court that the suit property had not been developed after the structures that he had put up on the property were demolished.

The 1<sup>st</sup> defendant did not tender evidence in its defence while the 2<sup>nd</sup> defendant gave evidence and called one of the Kilonzos, Joseph Mwanzia Kilonzo as a witness. The 2<sup>nd</sup> defendant told the court that she purchased the suit property from the Kilonzos in good faith at KShs. 200,000/=. She stated that she was the owner of property. She told the court that when she went to take possession of the property, she was chased away by hooligans who claimed that the property belonged to the plaintiff. She stated that the plaintiff had put up structures on the property which were demolished by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant stated that the suit property had been transferred to her name by the 1<sup>st</sup> defendant and that she was the one recognized by the 1<sup>st</sup> defendant as the owner of the suit property.

The plaintiff's witness, Joseph Mwanzia Kilonzo (DW2) told the court that the suit property belonged to his wife and he and that the same was allocated to them by the 1<sup>st</sup> defendant in 1987. He confirmed selling the suit property to the 2<sup>nd</sup> defendant. He stated that when they sold the property to the 2<sup>nd</sup> defendant, they still owned the same. He confirmed that the suit property had been repossessed by the 1<sup>st</sup> defendant but claimed that the same was returned to them after they paid the amount that they owed to the 1<sup>st</sup> defendant. He admitted that he had not made payment to the defendant for some time.

After the end of evidence, the parties were directed to make closing submissions in writing. None of the parties filed submissions. I have considered the evidence tendered by the parties. The issues arising for determination in this suit in my view are the following;

1. Whether the plaintiff is the lawful owner of the suit property.
2. Whether the plaintiff is entitled to the reliefs sought.
3. Who is liable for the costs of the suit?

#### Whether the plaintiff is the lawful owner of the suit property.

It is common ground that the suit property was first allocated to the Kilonzos by the 1<sup>st</sup> defendant. What is in dispute is whether the property was repossessed by the 1<sup>st</sup> defendant and allocated to the plaintiff and if so, whether the allocation was lawful. I am satisfied from the evidence placed before the court by the plaintiff that the 1<sup>st</sup> defendant lawfully repossessed the suit property from the Kilonzos and re-allocated the same to the plaintiff. The plaintiff placed before the court minutes of the 1<sup>st</sup> defendant's Housing Development Committee meeting held on 22<sup>nd</sup> June, 2012. In the minutes, the committee was informed that the Kilonzos among others had defaulted in making payment for their plots and had not cleared the payments that were in arrears even after being given 30 days notice. The committee was also informed that as a result of that default, the plots had been repossessed and re-allocated. The suit property according to those minutes was re-allocated to the plaintiff. The committee approved the repossession and re-allocation. DW2 admitted that they fell into arrears in the monthly payments that they were to make to the 1<sup>st</sup> defendant for the suit property. DW2 also admitted that the suit property was repossessed by the 1<sup>st</sup> defendant. DW2 claimed however that he was not aware that the property had been re-allocated to the plaintiff. He claimed that he paid to the 1<sup>st</sup> defendant the monthly instalments that were in arrears and had the property returned to them.

The suit property having been lawfully repossessed by the 1<sup>st</sup> defendant and re-allocated to the plaintiff who had taken possession thereof, the 1<sup>st</sup> defendant could not in my view purport to return the property to the Kilonzos. DW2 did not place any evidence before the court on how the suit property was returned to them particularly the process that was followed in giving them back the property that had already been sold to the plaintiff and was in the plaintiff's occupation. There is no evidence that the plaintiff was involved in the alleged returning of the suit property to the Kilonzos. There is no evidence that the plaintiff's letter of allotment was cancelled and that the payments that he had made were refunded to him.

Due to the foregoing, it is my finding that the purported cancellation of the re-allocation of the suit property to the plaintiff and the purported return of the property to the Kilonzos was illegal, null and void. It was also high handed. In his own admission, DW2 unlawfully used the help of the 1<sup>st</sup> defendant to demolish the structures that the plaintiff had put up on the suit property and in respect of which the plaintiff had sought and paid for planning approval.

The plaintiff having acquired the suit property lawfully, he could only be divested of his title to the suit property in accordance with the law. I have already made a finding that the purported return of the suit property to the Kilonzos was a nullity. In the circumstances, the Kilonzos

had no valid interest in the property that they could pass to the 2<sup>nd</sup> defendant. The suit property belonged to the plaintiff and only the plaintiff could dispose of the same. Since the whole process through which the plaintiff was purportedly divested of his title was illegal, null and void, it is my finding that the plaintiff remains the lawful owner of the suit property. Issue number one is therefore answered in the affirmative.

Whether the plaintiff is entitled to the reliefs sought.

From the findings above, I am satisfied that the plaintiff has proved his case against the defendants to the required standard. The plaintiff has established that he was at all material times the lawful owner of the suit property and that he was subjected to illegal harassment by the defendants. The plaintiff is entitled to the order of injunction sought. The plaintiff is also entitled to a declaration that he is the lawful owner of the suit property.

Who is liable for the costs of the suit?

Costs are awarded at the discretion of the court. As a general rule, costs follow the event. In this case, the plaintiff has succeeded in his claim against the defendants. In the absence of any reason to warrant a departure from the general rule on costs, I will award the plaintiff the costs of the suit.

Conclusion:

In conclusion, judgment is entered for the plaintiff against the defendants jointly and severally for;

1. A permanent injunction restraining the defendants, their agents, servants, representatives, assigns and/or otherwise from trespassing on, selling, transferring, alienating or otherwise dealing with all that parcel of land known as Plot No. D2-268, Kayole, Nairobi.
2. A declaration that the plaintiff is the lawful owner of all that parcel of land known as Plot No. D2-268, Kayole, Nairobi.
3. The costs of the suit.

**Dated and Delivered at Nairobi this 15<sup>th</sup> Day of October 2020**

**S. OKONG'O**

**JUDGE**

**Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Plaintiff

Mr. Monda for the 1<sup>st</sup> Defendant

N/A for 2<sup>nd</sup> Defendant

Ms. C. Nyokabi - Court Assistant