



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1025 of 1998

VINCENT KAMAU GICHOMO..... PLAINTIFF

versus

J. MUIRURI GITAU..... DEFENDANT

JUDGMENT

I would have thought that the Court Registry is presently handling this suit irregularly in that after the entering of an interlocutory judgment on 8th June 1998 and the starting of the process of formal proof, by the Registry, the same Registry should not have allowed the filing of the Defendant's written statement of defense on 10th July 1998. That statement was filed and on 30th September 1998 the same Registry fixed the case for formal proof assigning it the date 18th November 1998.

It appears the defendant's written statement of defence was not served upon the Plaintiffs advocates who, after being given the hearing date of 18th November, 1998, did not care to serve a hearing notice upon the Defendant's advocates who may not also have served their notice of appointment upon the plaintiff's advocates.

At the formal proof before me on 18th November 1998 therefore, there was no appearance by the Defendant and I got the impression that that was alright on the basis that the Defendant had not cared to enter appearance and file a defence. Indeed the Plaintiff went on telling me he was not aware if the Defendant had filed a defence.

It was after the hearing had been closed and I was perusing the case file in the absence of the parties that I discovered the Defendant's defence had been filed. I do not understand how the Registry allowed it to be filed without leave of this court for that defence to be filed out of time.

In any case, that is the position. I have heard the formal proof and must deliver my judgment in accordance with the schedule I gave to the Plaintiff and his advocate. Moreover, I do not think the irregularities so far committed lead to injustice in this matter.

Now turning to the substance of the case before me, the plaintiff moved this court by way of a plaint dated 5th May 1998 and filed on same date praying for judgment and orders against the Defendant for:

(a) A permanent injunction restraining the Defendant, his agents or servants from harassing and/or in any way interfering with the Plaintiffs quiet enjoyment of the suit premises known as PLOT NO. 90 - KAHAWA WEST.

- (b) General damages for malicious damage.
- (c) Costs of this suit
- (d) Interest on (b) and (c) at Court's rates.

Evidence in support of those claims is that by a letter of allotment dated 9th February 1996, the Plaintiff Vincent Kamau Gichomo a businessman in Nairobi, was allocated the aforesaid PLOT NO.90 - Kahawa West by Nairobi City Council who required him to pay stand premium and Annual Rent at Shs. 14,000/= and Shs. 1,400/= respectively. Having accepted the allotment and having paid the required fees on 20th August 1996 the Plaintiff entered into an agreement for lease with the City Council dated 23rd November 1997 whereby it was stated that the plaintiff had agreed to be the lessee of the suit plot from the City Council.

Following that agreement for a lease the Plaintiff started building a perimeter wall round the suit plot using material and labour costing Shs.400,000/=. But on 25th April 1998 the Defendant who is the Kahawa West Councilor without any colour of right and for no apparent reason employed people who demolished the wall. The Plaintiff claims the Defendant had no color of right and caused the demolition with no apparent reason and that the Defendant was motivated by malice and that the action was unlawful. The Plaintiff, however, says that the people who demolished the wall told him that they were demolishing it because it was on a public utility land. He says it is not correct to say the plot he was allocated was a public utility plot. It was only next to a police station. He claims he is the lawful owner of the suit plot and goes on to point out that following that demolition, he reported the matter to Kasarani Police Station. During investigation by the Police, they wrote to the City Council which replied through its letter dated 11th May 1998 stating:

"This is to advise you that our records indicate that VINCENT KAMAU is the rightful allottee of the subject plot vide letter of allotment Ref. TC/HO/9/74/96 dated 9th February 1996."

The Plaintiff goes on to point out that at the City Council's Town Planning Committee held on 21st August 1998 the Defendant raised the issue of the suit plot calling it a public utility plot which had been grabbed. The Plaintiff produced an extract from that Committee's minutes at page 2242 where the Director of City Planning and Architecture in reply reported that public utility plots had not been grabbed. The minutes go on to state:

"Councilor J.M. Gitau stated that plots Nos.X90, X91, X92, X93, X94 and plot Nos. 1,2,3,4,5,6,7,8,9,10, 11 had been cut from the land that was supposed to be a play field and a police station site.

The Director of City Planning and Architecture reported that plans for the above mentioned plots were made in 1992 and that the said plots had been re-planned and allocated legally."

Since all that was said in a formal proof, there was no evidence from the Defendant to challenge what was said and it was left upon me, at that stage, to consider and evaluate the evidence so far before me. I am doing that now. I think the problem here is being caused by people who, without keenly observing the due process of the applicable law, begin behaving as if they lawfully own property which, in actual fact, they do not lawfully own.

I begin by looking at the letter of Allotment dated 9th February 1996. The suit plot is simply referred to as "KAHAWA WEST PLOT NO. X90." That is all and one would straight away begin to wonder whether that numbering is derived from the Commissioner of Land's record.

Secondly, the "Term" of the allotment is stated to be "Residue of Council's term of lease of 99 years less the last 3 days thereof."

The Plaintiff told me the agreement for lease dated 23rd November 1997 gave him a lease for 99 years. When I asked him to show me where that is stated in the Agreement for lease which is Exhibit 3, he could

not show it to me. He subsequently accepted the document did not have 99 years anywhere in it.

What is apparent is that the City Council is anticipating that the Central Government or the Commissioner of Lands or the President will give the Council a 99 year lease in respect of the suit plot which the City Council has carved out of a larger parcel of public utility land. The City Council is further anticipating that after it is given that 99 year lease, the Plaintiff will have the Residue of that lease less the last three days. It means the lease the City Council intends to give to the Plaintiff will be one with a "Term" less than 99 years. In other words, the City Council will be having the head lease of 99 years from the Commissioner of Lands or the President and the City Council will give to the Plaintiff a sub lease of a "term" less than 99 years.

That term has not yet been determined. The sub lease has not been drawn. None has therefore been issued or given to the Plaintiff. What the Plaintiff has got is an agreement between him and the City Council to be given the aforesaid sub lease. But the agreement refers to that sub lease as a lease and perhaps that is why the Plaintiff could tell me that he has a 99 year lease. He says he has the lease. But when I asked him to show me the lease, he could only look at the agreement for lease which is exhibit 3. He could not show me the lease. Yet he insists he is the legal owner of the suit plot.

Conveniently the Plaintiff has kept the City Council away from this suit. He has not joined the City Council as a party in this suit and has not even bothered to call the City Council as a witness in this matter. It was important for the City Council to come to this court to let me know its legal land title from which it has allotted the suit plot to the Plaintiff at the time the same City Council is saying that the President is unable to issue a Grant to the City Council because the affected piece or parcel of land has not yet been surveyed. See what is stated from middle of page 1 of the Agreement for Lease dated 23rd November 1997. It states: "WHEREAS

(a) The Council is entitled to a grant of a lease for a term of Years from the President of the Republic of Kenya of ALL THAT piece of parcel of land situate in the City of Nairobi in the Nairobi Area of the said Republic of Kenya known as KAHAWA WEST but the said President is unable to issue a Grant thereof to the Council in the form prescribed by law as the said piece or parcel of land has not yet been surveyed;

(b) The Council has agreed to issue and the lessee has agreed to accept a lease of a portion of the said piece or parcel of land known as PLOT NO. 90 - KAHAWA WEST in consideration of the sum of Kenya Shillings 15,400/= the lessee has agreed to pay to the Council on or before the execution of the agreement (the receipt of which sum the Council herewith acknowledges).

WHEREBY IT IS MUTUALLY AGREED as follows:-

1. The Council shall issue and the lessee shall accept a lease of ALL THAT piece or parcel of land known as PLOT NO. 90 KAHAWA WEST for the purpose of identification on the Clock plan registered in the Registry of Documents at Nairobi in volume (Herein after called "the premises") being part of the

For a term to be granted by the Government of the Republic of Kenya to the Council (less the last three days thereof) at an annual ground rent to be determined by the Council SUBJECT to the terms and conditions contained or implied by the Head Title to be granted to the Council in respect of the said piece of land... "

The agreement for lease stipulates at page 4 that once the Plaintiff has executed the agreement and has paid the purchase price, he shall be let into possession of the suit plot and be responsible of everything as owner or occupier.

The plaintiff has told me he executed the agreement and paid the purchase price and all the necessary fees to the City Council. As a result he moved into the suit plot to carry out the developments he now says the Defendant used some people to destroy.

Clearly it was the City Council which made the Plaintiff take possession and started the development works that the plaintiff now says have been destroyed. The City Council did all that knowing very well that it had not yet been granted the requisite head lease from the Government and that there was no way the City Council could have passed legal title or legal ownership in the suit plot over to the Plaintiff even if elaborate documents were used and the transaction was approved by the Town Planning Committee and confirmed by the City Council itself. The City Council could not pass to the Plaintiff a legal title the City Council did not possess and if surveying was the only thing which stood in the way of acquisition of that legal title or ownership by the City Council, I do not understand why surveying could not be done before the purported allotment of the suit plot to the Plaintiff. That should have avoided the present problems. Why hasn't that survey been done to date?

In the circumstances therefore, bearing in mind that no evidence has been adduced before me to prove that the City Council of Nairobi has been given a grant to the suit plot which is within KAHAWA WEST, I hold that the legal ownership of that plot remains with the Government. As such the plot is public land and the City council was not entitled to allot it to anybody, including the Plaintiff, to the exclusion of the Public. It follows that the purported allottee, the Plaintiff, had no good title to exclude the public from the suit plot. If he took personal developments to that plot, he did so at his own risk and therefore even if it is proved that the Defendant was the one responsible for the demolition complained of, it having been said that the demolishers said were demolishing the Plaintiff's perimeter wall because the plot is a public utility, I will not grant the orders prayed for against the Defendant as the fundamental questions are:-

- (a) Who started failing to observe the law in the first place?
- (b) Is there legal title or legal ownership to be protected by this court? Things can only be rectified if strict observation of and compliance with the law are adhered to starting from the top downwards.

I said earlier that the problem in this case is being caused by people who, without keenly observing the due process of the applicable law, begin behaving as if they lawfully own property which, in actual fact, they do not lawfully own. When the allottees or beneficiaries come to court, they leave out a very important partner. The person who granted the disputed allotment. The person who started it all. The main architect of the problem. In the instant suit, the City Council of Nairobi. Courts should not be used to rubber stamp legal authority on irregular or illegal allotments of pieces or plots of land. I should not therefore rubber stamp this court's legal authority on this irregular or illegal allotment by the City Council of Nairobi to the Plaintiff in respect of the suit plot as there is no legal title or legal ownership for this court to protect.

Accordingly, the Plaintiffs suit herein be and is hereby dismissed.

As the Defendant did not defend himself before me, there be no order as to costs.

Dated and delivered at Nairobi this 27th day of November 1998.

J.M. KHAMONI

JUDGE