



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 178 OF 2017

GODFREY MWANGI KAMAU PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MURANGA..... DEFENDANT

JUDGMENT

1. By an amended plaint filed on the 24/4/17, the Plaintiff filed suit and sought orders directing the Murang'a County Government to accept relevant payments relating to the plot and for specific performance to approve his development plans, regularize any outstanding issues to pave way development of the suit land without further delay. The Plaintiff also sought costs of the suit with interest at Court's rate.

2. The Plaintiff averred that he was allocated plot No 54 at Kanjoya Market (suit land) by the then Murang'a Municipal Council vide Letter of Allocation Ref. No LOCL/15/KIMATHI/781/54/1 dated 21/7/98. In consideration of the said allocation, he paid to the County Council Ksh 15,395/= interalia being stand premium, conveyance fees, rent and survey fees and other related charges. That he made subsequent visits to the Council offices to pay land rent when he was informed that he had been relocated from Plot 54 to plot 251 Kianjoya Market. He avers that the new plot was shown to him and the beacons duly pointed out by the county Surveyor whereupon he paid Kshs. 20,000/- being rent for the said plot. That on or about 14/3/2013 he paid to the Defendant a total sum of Kshs. 7,080/- being ground rent for the years 2011, 2012 and 2013. Further that on the 18/2/14 he paid rent in the sum of Kshs. 2,000/- to the Defendant.

3. Further the Plaintiff stated that in pursuit of his plans to develop the new plot 251, he submitted the development plans to the council but he was told to wait for the completion of computerization of records at the county which was allegedly ongoing. On March 2015 he sent his representative to pay rent for the year 2015 but the same was declined without any explanation. In the month of March 2016, the same was also declined. This perturbed the Plaintiff as he interpreted this as a form of denial of use and access of his plot by the Defendant without assigning any reason. He then filed suit.

4. The Defendant denied the Plaintiff's claim and stated that letters of allotment were given by individual councils and were not final proof of ownership. The Defendant further averred that local councils could reallocate plots in accordance to its developmental needs and circumstances. That development of a plot is permissible upon full compliance by the allottee. The Defendant undertook to raise a preliminary objection that the suit is bad in law and raises no cause of action against the Defendant.

5. As fate would have it the Plaintiff passed on 18/10/17 and vide an application dated 12/4/2018 the Plaintiff was substituted by his legal representative one Jane Waithira Mwangi. This necessitated another amendment to the plaint which was filed on 29/5/18 to cater for substitution.

6. PW1 – Charles Peter Chege Gatia testified and informed the Court that he was the caretaker of the late Godfrey Mwangi Kamau until his death in October 2017. That his role included paying plot rents and supervising the construction at the plot. He informed the Court that the suit land is situate at Kanjoya market. That the Plaintiff was allotted plot No 54 in 1998 he paid the requisite payments to the council to wit rent, conveyancing stamp duty interalia amounting to Kshs 15,395/- in 1999. That on 30/6/2010 he was again sent by the Plaintiff to pay the rents when he was orally informed that the plot has been relocated from Plot No 54 to 251 at Kianjoya market and that the Plaintiff was to pay Kshs 20,000/- in order to be shown the site. That he accompanied the council surveyor where he was shown the new plot (251) and the beacons were affixed. That he did this on behalf of the the late Godfrey Mwangi Kamau. That on 14/3/2013, he was sent to pay the rents for 2011, 2012,2013 amounting to Kshs 7080/- for the new plot. On 18/2/14 he again paid 2000/- being rent for the year 2014.

7. That when he approached the council for purposes of submitting development plans for the plot he was asked to inform the owner to wait for computerization to be completed. From 2015 – 2016 the Defendant declined to accept rents for the plot without any explanation.

8. On cross examination, the witness confirmed that the original allottee was Godfrey Mwangi Kamau. That Kamau swore an affidavit that the names Godfrey K Mwangi and Geoffrey Mwangi refer to the same person. He informed the Court that he had no documentary evidence to explain the change of plot No.s from 54 to 251. He stated that he had no involvement if at all there were indeed any documents to evidence the change of plot number. He informed the Court that he has not been shown any lease for the suit land and that he does not know if any exists.

9. At the close of the Plaintiff's case the Plaintiffs' counsel on record sought leave to place certain of the original documents stated in the list of documents dated 21/2/17. The Defendant's counsel expressed no objection. According to the record the said documents were filed on the 2/10/18.

10. The Defendants counsel informed the Court that they did not wish to call any witnesses and entirely relied on its statement of defense as filed.

11. Parties elected to file written submissions which I have read and considered.

12. The Plaintiff submitted that the suit arises from a contractual agreement which was partly written, oral and partly by performance. That the Plaintiff was allocated a plot vide letter of allotment Ref No LOC15/KIMATHI/781/54/1 dated the 21/7/98 (and approval of council Minute No 3/98 (PAC) at Kanjoya market. That the Plaintiff accepted the said allotment and paid. That the letter of allotment was misspelt as Geoffrey K Mwangi instead of Godfrey K Mwangi. That the Plaintiff accepted and signed the letter of allotment in his correct names Godfrey K Mwangi. That the Plaintiff swore an affidavit dated 28/6/10 clarifying the issue of the names.

13. The Plaintiff submitted that in compliance with the conditions of allotment he paid rents for the period upto 2014 when the council declined to accept the rents and was asked to await computerization that was ongoing. This went on for 2015 and 2016 forcing the Plaintiff to file suit.

14. The Plaintiff relied on the case of **Mbau Saw Mills Limited Vs AG and 2 others (2014) ECLR** where the Court stated that ownership of land commences with the letter of offer/ allotment, acceptance, compliance with the conditions, payments and thereafter a title is issued. The Plaintiff submitted that upon being allotted the plot, accepted and continued to make payments for rents until the council without explanation stopped receiving the rents. The last payments were made in 2014 and therefore the claim is not time barred either under limitation of time or contract as the suit was filed 3 years after the last payment was tendered in 2014. He submitted that a claim for land has a limitation of 12 years while under contract is 6 years.

15. Relying on the case of **Reliable Electrical Engineers Vs Mantra Kenya Limited (2006) ECLR** the Plaintiff submitted that specific performance is premised on the existence of a valid contract. Specific performance will not be granted if the contract suffers from some defects such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable or where there is adequate and alternative remedy. The Plaintiff submitted that he complied fully with the requirements under the allotment letter and even agreed to be allocated a different plot (251) in the neighborhood. The Plaintiff paid the requisite payments which were accepted thus creating an irrevocable contract. That he has had the land for which he paid valuable consideration for a period of over 16 years before the cause of action arose.

16. The Defendant submitted that the Plaintiff has not proved that he owns the suit land. That the letter of allotment is not proof of ownership. That the Plaintiff has not demonstrated that other agencies such as National Environment Management Authority, Health department and security have given consent for the building plans before coming to the council. That if the Plaintiff was aggrieved by the action of the Defendant he should have filed judicial review to enforce performance of such statutory duties as the Plaintiff is accusing the Defendant of failing to perform. The Defendant faulted the names on the letter of allotment and submitted that the two names refer to different persons. That the Plaintiff was unable to produce the original letter of offer.

17. Contending that the Plaintiff failed to prove his claim the Defendant submitted that the Plaintiff's failure to testify was fatal to her case. Failure to produce minutes supporting the change of plot from 54 to 251 rendered the suit irredeemable beyond repair. The deceased had severally been requested to produce supporting documents in respect to his claim but he did not. That the plaintiff's witness who sated he was a caretaker informed the Court that there was no lease for the plot.

18. The issues for determination are;

- a. Which plot was allotted to the Plaintiff?
- b. Is the Plaintiff entitled to an order for specific performance?
- c. Who meets the costs of the suit

19. Before delving into the issues, the Defendant has argued that the names of the original plaintiff differ and that they do not refer to the same person. I have examined the letter of offer dated 21/7/98 which is addressed to Geoffrey K Mwangi. The letter from the Defendant to the Plaintiff dated the 30/11/98 as well as the payment receipt dated 17/2/99 states the name as Godfrey Mwangi Kamau. According to the Affidavit dated the 28/6/2010 by the said original plaintiff he has deponed that his official names as stated in his Identity card No 0975306 are Godfrey Mwangi Kamau and that the names Godfrey Mwangi Kamau, Geoffrey K Mwangi and Godfrey Mwangi Kamau refer to one and the same person. The Court is of the view that the names as stated in the three documents refer to the said Godfrey Mwangi Kamau.

20. It is not in dispute that the late Godfrey Mwangi Kamau was allocated a plot no 54 on the 21/7/98. This is supported by the letter of offer on record dated the 21/7/98. In the said letter the Plaintiff was required interalia to pay to the council annual plot rents at such rate as may at any time be set by the council. Further that the Council was expected shortly to offer a 33 year lease for the plots in the market and if the Plaintiff was unwilling or unable to take out the lease the plot would automatically be forfeited to the council and become unavailable. The Defendant attached the terms and conditions of the terms of the lease to the letter of allotment. On the 30/11/98, the Defendant wrote to the Plaintiff informing him that the plot has been surveyed and now required him to pay for the stand premium, survey fees planning fees and rent interalal which he duly paid on the 17/2/99.

21. From the preceding paragraph the Court is of the view that the Plaintiff was allocated (offer) plot No 54 for which it was accepted and consideration made and accepted by the Defendant.

22. The Plaintiffs witness PW1 led evidence that the plot was later changed to Plot No 251. The change was communicated to him orally when he went to pay rent for the plot 54. Further that he led uncontroverted evidence that he was shown the beacons of the new plot 251 by the county surveyor. From the evidence on record it would appear that the Plaintiff proceeded to make further payments for survey fees and rents for 2011-2014 as shown on the receipts dated the 14/3/13, 18/8/14. These payments were duly accepted by the Defendant and receipted. The Plaintiff took possession and in 2016 being desirous of commencing development on the new plot 251 sought to clear the rent arrears and have the building plans approved but the Defendant declined to accept the plaintiff's payments without any explanation in 2015-2016. His building plans were also not received for processing as he was told to await computerization of the Defendants records. In response the Defendant has denied that the Plaintiff was reallocated the new plot 251 and challenged the Plaintiff to table any documentary evidence in respect therefore.

23. It is the Courts finding the Plaintiff has failed to proof how he became allocated plot No 251. PW1 stated that he was informed orally. One would have expected that the Plaintiff should have followed up with a request in writing or at the very least be given a new letter of allotment in writing indicating Plot No. 251. The witness did not explain how the Plaintiff proceeded to make payments without the necessary legal documentation. It is on record that the Defendant wrote to the Plaintiff to provide details of proprietorship in respect to Plot No 251. It is not clear from the record whether the Plaintiff complied with the request. It is trite law that dispositions in land must be in writing so much so that it is the duty of the Plaintiff to prove proprietary rights by way of documentary evidence. It is the view of the Court that he failed to discharge this duty.

24. As to whether the Plaintiff is entitled to an order for specific performance, the Court has made a finding that the claim of the Plaintiff has not been proved and supported by the relevant documentation and specific performance being an equitable remedy, a claimant must come to equity with clean hands. A key requirement for the granting of specific performance is that there must be a valid contract capable of enforcement. In the absence of any contract between the Plaintiff and the Defendant specific performance cannot be granted in as afar as Plot No 251 is concerned.

25. The upshot is that the suit fails and is dismissed with costs to the Defendant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF JANUARY 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimemia for the Plaintiff present

Mboha HB for Kimwere for the Defendant

Irene and Njeri, Court Assistants