



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC SUIT NO. 346 OF 2017**

**STEPHEN WANJAU MWANGI, OBADIAH KARIUKI MWANGI AND**

**DAMARIS WANJIKU MWANGI (Administrators**

**of the Estate of Moses Mwangi Wanjau.....PLAINTIFF**

**-VERSUS-**

**PATRICK TUMUTI KIMUTWE.....DEFENDANT**

**JUDGEMENT**

**Introduction**

1. The Plaintiffs are administrators of the estate of the late Moses Mwangi Wanjau (deceased) who was and is the registered owner of LR No. 8285/981 (suit property). The plaintiffs brought this suit against the defendant in which they seek an order of eviction against the defendant, demolition of illegal structures on the suit property, a permanent injunction as well as damages for trespass and costs of the suit.
2. The defendant filed a defence to the plaintiffs' claim and raised a counter claim in which he seeks a declaration that the suit property belongs to him.

**Plaintiffs' Case.**

3. The plaintiff's case is that the suit property was allocated to the deceased following an application by the deceased for the same. After the application for allocation by the deceased was allowed, the deceased met all the requirements and the suit property was registered in his name and a grant duly issued which remains to date. In or around 2007, the defendant invaded the suit property and put up structures. The plaintiffs made a formal complaint to the then Nairobi City Council and asked the defendant to move out but he has remained defiant and is still on the suit property.

**Defendant's case.**

4. The defendant's case is that the suit property was allocated to his late father Kimutwe Kiburu in 1992. His father later transferred the suit property to him. He entered into an assignment with the City Council of Nairobi in 2007. He has since then been paying rates to the City Council of Nairobi and lately Nairobi City county. The defendant contends that the plaintiffs never laid any claim to the suit property when his father was alive and that the plaintiffs are merely attempting to grab the suit property.

**Analysis of evidence .**

5. I have carefully gone through the evidence adduced by Obadia Kariuki Mwangi on behalf of his co-administrators as well as that of the defendant and the respective documents held by the plaintiffs and the defendant. The issues which emerge for determination are firstly who is the owner of the suit property and secondly what order should be made on costs. Both the plaintiffs and the defendant are claiming ownership of the suit property.
6. The suit property is located at Kariobangi North estate along Kamunde Road off Outer Ring Road. Allocation of plots within Kariobangi North Shopping Centre were advertised in the Kenya gazette Notice No. 2811 of 21<sup>st</sup> September 1973. One of the successful applicants was the deceased Moses Mwangi Wanjau . The plaintiffs produced minutes of the Nairobi plot allocation committee meeting held on 11<sup>th</sup> March 1974. It is clear from these minutes that the deceased was allocated plot No. 4. When survey was carried out, plot No.4 became LR

No.8285/981 (suit property). The plaintiffs also produced a letter dated 22<sup>nd</sup> March 1974 from the Department of lands which was addressed to the deceased. This letter contained the terms of the allotment. The deceased met all the conditions in the letter and a grant was issued in favour of the deceased on 15<sup>th</sup> August 1974 for a period of 99 years with effect from 1<sup>st</sup> April 1974.

7. An official search conducted on 8<sup>th</sup> December 2016 shows that the suit property is still in the name of the deceased. The deceased's family is still paying rates to Nairobi City County as per the documents produced. When the suit property was invaded by the defendant, the plaintiffs made a formal complaint to the Nairobi City Council. The invasion was deliberated in a meeting held at City Hall on 26<sup>th</sup> November 2007. The director of city planning was tasked to follow up the issue. The issue was followed up and from the documents produced in these proceedings, it appeared that this was a case of double allocation which could only be resolved by court.

8. The defendant's documents show that the suit property was allocated to his deceased father on 28<sup>th</sup> February 1992. Further documents show that an assignment was made between the defendant and Nairobi City Council on 2<sup>nd</sup> October 2007. By this assignment, the defendant's father relinquished his interest in the suit property to the defendant. The defendant claims that he has since been paying land rates to the city council and lately the Nairobi city county.

9. The suit property was allocated to the deceased in 1974 and a grant duly given. There was therefore nothing to be allotted to the defendant's father 18 years later. I have examined the documents produced by the defendant. The documents appear doubtful. For instant the assignment dated 2<sup>nd</sup> October 2007 was not witnessed. There is no evidence that the defendant's father complied with the conditions in the letter of allotment dated 28<sup>th</sup> February 1992. A receipt dated 2nd October 1998 issued to the defendant's father is doubtful. It was issued by Nairobi council and not Nairobi City Council. Some of the receipts which the defendant produced are for house rent and not rates for the suit property. Most of the receipts which the defendant produced were issued after 2007 when he invaded the suit property. The issue here may not even be a case of double allocation but an attempt to make documents in a bid to grab the suit property from its genuine owner. Even if it turns out that the allotment to the defendant's father was genuine, this allotment cannot supersede the first one. The suit property had already been allotted to the deceased who obtained a grant over it in 1974. The Nairobi County Council could not again purport to allot the same land to another individual. I therefore find that the rightful owner of the suit property is the deceased and his estate is entitled to the same.

### **Conclusion.**

10. Having found that the deceased was the rightful owner of the suit property, it follows that the defendant's claim must fail. It is hereby dismissed with costs to the plaintiffs. On the other hand the plaintiffs have proved their case on a balance of probabilities. The plaintiffs have been kept off the suit property since 2007 when the defendant illegally trespassed to the same. It is even confirmed through some documents by the defendant such as payments for occupation certificate which was made on 12<sup>th</sup> July 2007. The defendant had earlier on placed a container on the suit property in 2005. These were initial attempts to move into the suit property which was finally actualized in 2007. The plaintiffs are entitled to damages for trespass which I assess at **Kshs.1,000,000/=**. I therefore enter judgement for the plaintiffs against the defendant as follows:-

***1. An order directing the defendant to remove the structures erected on LR No. 8285/981 within 30 days failing which the same to be demolished and the defendant evicted therefrom.***

***2. A permanent injunction is hereby issued restraining the defendant either by himself, his agents ,servants and or representatives or any person claiming under him, from continued trespassing , encroaching, remaining on or in any other way interfering with the plaintiffs use enjoyment and occupation of LR No.8285/981.***

***3. Kshs.1,000,000/= damages for trespass***

***4. Costs and interests of the suit***

**Dated, Signed and delivered at Nairobi on this 17<sup>th</sup> day of January 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Mwangi for Plaintiff

Defendant though represented is present in person

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**