



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMIMANI LAW COURTS

ELC NUMBER 338 of 2009

MARY MWELU MUYA & ANOTHER.....PLAINTIFFS

=VERSUS=

ALIO IBRAHIM HASSAN & 2 OTHERS.....DEFENDANTS

JUDGEMENT

1. The Plaintiffs through a further amended plaint dated and filed on 26th May 2010 sought the following reliefs from the defendants:-

a. General damages

b. A permanent Order of injunction restraining the 1st, 2nd, and 3rd defendants by themselves and or their agents or servants or employees from interfering with the 1st plaintiff's entitlement and ownership of plot No.419 (formerly plot No.419 B) on the map and on the ground as well as the 1st plaintiff's quiet enjoyment and possession of that plot known No.419 (formerly plot No.419 B).

bb. A declaration that the 2nd plaintiff is the owner of plot No.418 and an injunction to restrain the 2nd defendant from interfering with it.

c. Costs of this suit

2. The 3rd defendant filed a defence and raised a counter-claim in which he seeks the following reliefs:-

a) General damages

b) Special damages in the sum of Shs.209,950/= with interest thereon.

c) A permanent order of injunction restraining the plaintiff from occupying or interfering with the site allocated to the 3rd defendant.

d) Costs

3. The first plaintiff is a wife to the 2nd plaintiff. In or around 2001, the plaintiffs joined Kwa Ndege Self Help Group who purported to have land at Tassia area in Embakasi which it could allocate to its members. The plaintiffs were allocated one plot each measuring about 33 ftx66ft. The 1st plaintiff was allocated plot 419 B which later became plot 419. The 2nd plaintiff was allocated plot 418. It later turned out that the plots which Kwa Ndege Self Help Group purported to allocate its members were actually not their property. The land belonged to the National Social Security Fund (NSSF).

4. The NSSF put up advertisements in the press calling those who had encroached into their land to come forward and have the plots which they were occupying regularized by making payments under their tenant purchase scheme. The plaintiffs had their plots regularized and their positions on the ground did not change. There were however cases of those on the ground missing plots due to planning carried out to comply with the Nairobi City Council Planning regulations. The NSSF had to create some plots from the road reserve to accommodate those who missed out. That is how the 3rd defendant was allocated plot 388/1.

5. The name of the 1st defendant was struck out of the proceedings on 30th July 2009 as he had no claim to any of the plots in issue in this

case. The further amended plaint therefore wrongly named him as the 1st defendant during the amendment.

6. It is the first plaintiff's case that she took possession of her plot 419 and scooped clay soil in preparation for construction but the 3rd defendant came into the plot and attempted to construct on it. There was also a second attempt by the 3rd defendant to take possession of plot No.419 but the 1st plaintiff repulsed him and stationed guards whom she used to protect her plot. It is after this that she came to court and obtained an injunction restraining the 2nd and 3rd defendants from interfering with her plot.

7. It is the 1st plaintiff's evidence that though the 3rd defendant was allocated plot 388/1, this plot falls on the same ground as plot 419 which belongs to her. The first plaintiff testified that's he hired guards to protect the plot. She used to pay between Kshs.30,000 to Kshs.35000 per month. She testified that she was paying about Kshs.250/- per day.

8. The 2nd plaintiff's case is that he has already developed his plot No.418 which is next to that of the 1st plaintiff. He has put flats on the same. He stated that he filed this suit after the 1st plaintiff had been asked by the NSSF to move from her plot No.419 to 418 which he had already developed. During the hearing he stated that he filed for a declaration that plot 418 belongs to him in case there are problems which may arise later.

9. The 2nd defendant stated its case through Silas Ngiela who testified that according to their records, plot No 419 belongs to the 1st plaintiff whereas plot 418 belongs to the 2nd plaintiff. He stated that NSSF has never interfered with the ownership of the plots held by the plaintiffs. He went on to state that during re-planning, some persons missed plots. The NSSF was forced to create plots from road reserve for those who missed out. This is how plot 388/1 which belongs to the 3rd defendant was created. He stated that plot 338/1 is next to plot 419 which belongs to the 1st plaintiff.

10. The 3rd defendant's case is that he was initially allocated plot 078 by the NSSF. He was later re-located to plot 388/1. The NSSF confirmed that he had fully paid for the plot which had been allocated to him. He took possession of the allocated plot and took building materials to the plot and started building a perimeter fence. The 1st plaintiff hired goons who went and chased his contractor from the ground. The materials which he had accumulated on the ground were carried away by people he suspects did that at the instigation of the 1st plaintiff. He stated that he incurred loss estimated to be Kshs.209,000/= which he attributes to the 1st plaintiff and claims the same from the 1st plaintiff .

11. I have carefully considered the evidence adduced by the plaintiff as well as the evidence adduced by the 2nd and 3rd defendants. There is no doubt that the plaintiffs were allocated plots by Kwa Ndege Self Help group in or around 2001. These plots were later regularized by the NSSF who were the true owners of the same. The NSSF does not deny that the 1st and 2nd plaintiffs were allocated plot Nos.419 and 418 respectively. The issues which emerge for determination are firstly, whether the 3rd defendant was allocated plot 388/1 and if so whether that plot exists on the ground. Secondly, whether the defendants have interfered with the plaintiffs plot as to call for issuance of injunction. Thirdly, has the 3rd defendant suffered any general or special damages attributable to the plaintiff? Fourthly, is the 1st plaintiff entitled to general damages from either the 2nd or 3rd defendants? Lastly which order should be made on costs?

12. The 3rd defendant stated that he had been allocated plot 078 which happened to fall on a road reserve. He was re-located and was given plot 388/1 which he maintains is on the location where the 1st plaintiff's plot is located. During cross examination by the counsel for the 2nd defendant, the 3rd defendant stated that there is no vacant plot next to the one which he was allocated. This means that the plot which the 3rd defendant is claiming is the same plot which the 1st plaintiff is claiming. While still under cross – examination by the advocate for 2nd defendant, the 3rd defendant stated that the allocation which was made to him was subject to approval of the city council of Nairobi. Though the 2nd defendant stated that plot 388/1 was created from a road reserve, the evidence emerging is that the plot may not be existent on the ground. The 1st plaintiff's evidence is that she has not developed her plot. The 3rd defendant is claiming the same location where the 1st plaintiff is claiming. It cannot be possible that two people can be claiming one ground using two different plot numbers.

13. If the 3rd defendant had been given a plot which fell on a road reserve, he could not again be given another road reserve. There are various maps which were filed in these proceedings. One map shows that plot 388/1 was created by blocking an entire road, whereas the other map shows that plot 388/1 has partly blocked a road leaving what can be called a foot path. The other map shows that there is a road to which plot 419 abuts. It is irregular to create a plot from a road reserve. Plot 388/1 may not be existing on the ground. Otherwise if it was existing, there could be no conflict between the 1st plaintiff and the 3rd defendant. The parties went to the ground and a surveyor showed them their respective plots. If plot 388/1 was on the ground, it would have been identified and the dispute would not have come to the court. I find that plot 388/1 does not exist, on the ground.

14. The 1st plaintiff has adduced evidence which has not been controverted that the 3rd defendant tried to take over her property. The 1st plaintiff used self-help before she came to court to obtain injunctive orders. The 2nd defendant has not in any way interfered with the 1st plaintiff's ownership of plot 419. The 1st plaintiff confirmed this fact during cross examination by 2nd defendant's advocate when she categorically stated that the NSSF has not interfered with her plot. It is therefore clear that the suit against the 2nd defendant is misconceived and no injunction can be granted against the 2nd defendant. As for the 3rd defendant there is evidence that the 3rd defendant tried to build on the 1st plaintiff's property. The 3rd defendant still insisted that the plot which the 1st plaintiff claims still belongs to him. It is therefore clear that the 1st plaintiff is entitled to protection against the 3rd defendant by way of injunction.

15. The 3rd defendant claimed that his building materials worth 209,000/- were carted away by people believed to be associated with the 1st plaintiff. There was no evidence adduced to show that he accumulated material worth that much. It is the 3rd defendant who trespassed to the 1st plaintiff's land. He cannot therefore claim any general or special damages.

16. The 1st Plaintiff has maintained her plot since she repulsed the 3rd defendant who attempted to build on it. The 1st plaintiff has been in control of her plot. Though the 1st plaintiff claimed that she incurred loss of about Kshs.30,000 to 35000/=, that loss was not pleaded or proved . There is no basis upon which the 1st plaintiff can either claim special or general damages from the defendants.

17. From the analysis hereinabove it is clear that the only prayer which can be granted in the 1st plaintiffs claim is an injunction. It is also clear that the 2nd plaintiff's case cannot succeed. The 2nd plaintiff stated that he only filed the suit to secure his future interest in case there is a problem. Neither the 2nd nor the 3rd defendant is claiming his plot. The suit against them for a declaration is misconceived. One cannot seek a declaration as to ownership where there is no dispute over the property.

18. I make the following final orders:-

a. A permanent injunction is hereby granted restraining the 3rd defendant by himself, servants or agents from interfering in any way with the 1st plaintiff's plot No. 419 (formerly known as plot 419 B).

b. The 1st and 2nd plaintiff's suit against the 2nd defendants is dismissed with costs to the 2nd defendant.

c. The 3rd defendant's suit by way of counter-claim is dismissed with costs to the 1st plaintiff.

d. The 3rd defendant shall pay the 1st plaintiff costs of the main suit.

Dated, Signed and delivered at Nairobi on this 14th day of February 2019.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Mburu for Mr Muhia for Plaintiffs

M/s Koki for Mrs Mbabu for 2nd Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE