



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 616 OF 2017

ROSE MUTHONI SARAGO.....PLAINTIFF

VERSUS

COUNTY SECRETARY

KAJIADO COUNTY GOVERNMENT.....1ST DEFENDANT

EUNICE NJAMBI WANGORA.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 16th September, 2013 and filed in Court on 17th September, 2013, the Plaintiff prays for Judgement against the Defendant jointly and severally for:

- a) A permanent injunction restraining the Defendants by themselves, their servants and/or agents from removing, trespassing, entering, evicting dispossessing or in any other way interfering with the Plaintiff's peaceful enjoyment of PLOT No. 579 RESIDENTIAL Ongata Rongai.
- b) A permanent injunction restraining the Defendants', their agents/servants and/or from touching, destroying, demolishing or in any other way interfering with the Plaintiff' house and structure built and standing on Plot No. 579 RESIDENTIAL Ongata Rongai.
- c) Cost of this suit.
- d) Any other or further relief that this Court may deem appropriate to grant.

The 1st Defendant filed its Defence where it averred that the plot in dispute is No. 1014/ Residential Ongata Rongai which belongs to the 2nd Defendant Eunice Njambi Wangora and not the Plaintiff as alleged. It confirmed that the Plaintiff's plot is No. 579/ Residential Ongata Rongai. Further, that the Plaintiff's plot is available but at a different location.

The 2nd Defendant denied the averments in the Plaint except for the descriptive and jurisdiction of the court. She categorically denied that she has embarked on an unlawful scheme to dispossess and evict the Plaintiff as well as demolish structures she claims to have put up on the suit plot.

The matter was set down for hearing and the Plaintiff called two witnesses while the Defendants each had one witness.

Evidence of the Plaintiff

The Plaintiff through the evidence of PW1 and PW2 contended that their plot No. 579 was the 6th Plot from the road. The Plaintiff confirmed having purchased the plot 579 from Gitao Nganga and she was issued with a transfer by the Ol Kejuado County Council. Plaintiff claimed the 2nd Defendant had encroached on their plot and sought to demolish the structures thereon. She averred that the 2nd Defendant colluded with the 1st Defendant to attempt to take the plot number 579 from her. She explained that Plot No. 579 has since been validated by the County Government of Kajiado and she has been issued with the new Letter of Allotment.

Evidence of the 1st Defendant

The 1st Defendant was represented by an Assistant Surveyor who testified as DW1. He confirmed that plot no. 1014 was the 6th Plot and belonged to the 2nd Defendant. He stated that the Plaintiff's plot No. 579 was the last plot on the row, next to the Riparian Reserve. He

confirmed participating in site visits as well as preparing reports where he confirmed that plot numbers 579 and 1014 are distinct.

Evidence of the 2nd Defendant

The 2nd Defendant called one witness DW2 who confirmed that she owns plot 1014 Ongata Rongai which was allocated to her by the Ol Kejuado County Council in 1989. DW2 denied that the 2nd Defendant had encroached on the Plaintiff's plot and insisted that the suit plot belong to the 2nd Defendant.

All the parties herein filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented herein including pleadings, testimonies from the witnesses and parties submissions, the following are the issues for determination:

- What are the locations of plot numbers 579 and 1014, which belong to the Plaintiff and the 2nd Defendant respectively.
- Who should bear the costs of the suit?

Both the Plaintiff and the 2nd Defendant produced Letters of Allotment issued by the 1st Defendant in respect of plot numbers 579 and 1014 respectively. From the documents produced as exhibits, the Plaintiff purchased plot 579 from one Gitau and has since been issued with a new Letter of Allotment by the 1st Defendant. The 2nd Defendant was issued with her Letter of Allotment by the defunct Ol Kejuado County Council on 7th July, 1989. The main issue in dispute is the location of the Plaintiff and the 1st Defendant's plots respectively. The Plaintiff claims the 2nd Defendant has encroached on her plot and is trying to take it over. She contended that she had been on the said plot for over thirty years. The Plaintiff averred that her plot is the 6th in the row. At the behest of the Court, a site visit was conducted to confirm the location of the two plots belonging to the Plaintiff and 2nd Defendant respectively. From the court records, the site visit was conducted twice as the Plaintiff declined to attend the first one due to the short notice. During the second site visit that was presided over by the Deputy Registrar, ELC Nairobi in the presence of all the parties herein including their respective counsels, it emerged that the two plots were different as per the PDP as well as on the ground. During the site visit the Plaintiff's Surveyor Meshack Ngaho admitted to counting the plots as opposed to relying on the Part Development Plan (map). In his evidence, DW1 who is the Assistant Surveyor for the 1st Defendant who was present during the site visit confirmed in Court that plot 579 was at the end of the row and abuts a river, but plot 1014 was the 6th one in the Row. According to the extract of the Part Development Plan, which was produced by both the Plaintiff and the 2nd Defendant as exhibits, it confirms that plot 579 is not plot 1014. It was the Plaintiff's evidence that there is no plot no. 1014 but did not controvert the Letter of Allotment issued to the 2nd Defendant by the 1st Defendant and neither did she furnish court with any evidence to prove her assertion. The Plaintiff further stated that her Surveyor Meshack Mugo Ngaho from Messrs. Hekima Land Surveyors Company Limited counted the gates and arrived at the conclusion that her plot was the 6th one on the row. PW2 averred that the DW2 was chased away by irate neighbours to their plot and a Committee informed him that plot number 1014 is non-existent. She however did not bring a witness or a member of the Committee to prove this averment. Further, the 1st Defendant that is the allotting authority which was representing by DW1 did not dispute the existence of the 2nd Defendant's plot no. 1014. PW2's averment on the nonexistence of plot number 1014 is contrary to the Deputy Registrar's report on the Site Visit conducted in 2014 at the behest of the Court. According to the Deputy Registrar's report from the Site Visit, at page 5, it stated as follows: ' Mr. Wesley Risancho, the Deputy Registrar, the parties and their advocates proceeded to physically measure the plots from the road/junction and identified the plots as follows: ' 1). The road is 12 metres wide; 2) 1st plot 100 feet by 80 feet – 385 plot; 3) 6 metre service lane; 4) 2nd plot 100 feet by 80 feet – No number; 5) 3rd plot 100 feet by 80 feet – No number; 6) 4th plot 100 feet by 80 feet – plot 515; 7) 5th plot 100 feet by 80 feet – no number; 8) 6th plot 100 feet by 80 feet – plot 1014; 9) 7th plot 100feet by 80 feet – plot 785; 10) 8th plot – last plot- plot 579 borders a stream; 11) Riparian reserve then a stream.

He stated that the last plot, that is plot 579 measures 14.1 metres, was the smallest of all plots as it bordered a stream, but before the stream, there is a riparian reserve of 10 metres wide'

In the said Site Visit report, Mr. Risancho confirmed during the said visit that according to the Area Development Plan, both plots exist but some of the boundaries of the plots were not in line with the measurements because the development were done before planning and survey. Further, that there was a difference between what was on the ground and on the plan and the plot boundaries did not fall according plan.

From the evidence presented by all the parties, to my mind it seems the confusion as to the two plots arose because of failure by some of the plot owners to adhere to the locations of their respective plots as per the Area Development Plan which was the official document that guided the County on the development and use of land in that particular area. I note there was a verification undertaken of the plot during the pendency of the suit culminating in the Plaintiff being issued with a new Letter of Allotment indicating her plot number is 579 now B75. I note from the new Letter of Allotment it did not allocate the Plaintiff plot no. 1014 but her original plot, which she purchased from Gitau Nganga in 1979. From the evidence presented herein, it is my considered view that plot No. 579 and 1014 are distinct. As to their location, I find that as per the Development Plan of the Ongata Rongai Area which all the parties relied on, it showed that the two plots are in different sections of the said plan. I hold that plot no. 1014 is the 6th plot which is at the dispute site while plot 579 is the 8th Plot which abuts the river. I find that the 2nd Defendant has not interfered with the Plaintiff's plot as claimed and it is actually the Plaintiff who is responsible for the confusion created, has no reasonable cause of action against the Defendants; and should be restrained from interfering with the 2nd Defendant's possession of her plot.

On the issue of costs, section 27 of the Civil Procedure Act has provided the general rule as to the award of costs and stipulated as follows: '**Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine**

by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers'

Further in the case of Republic Vs Rosemary Wairimu Munene, Ex parte Applicant Vs Ihururu Dairy Farmers Cooperative Limited, the Court held as follows: ' **The issue of costs is a discretion of the court and provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.'**

In relying on the aforementioned legal provisions and being persuaded by this case law, I note the Plaintiff sued the Defendants and from my findings I have held that her plot was distinct from the 2nd Defendant's plot and it is actually the 2nd defendant's plot which was at the disputed site. Since I have also found that she did not have any reasonable cause of action against the Defendants, I will award the Defendants the costs of this suit for the inconvenience caused.

It is against the foregoing that I find that the Plaintiff has failed to prove her case on a balance of probability and will proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 25th day of March, 2019.

CHRISTINE OCHIENG

JUDGE