

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 731 of 2017

HEMEDI KURIA ITALI ALI

PLAINTIFF

VERSUS

DEFUNCT OLE KEJUADO COUNTY COUNCIL.....1ST

DEFENDANT

ELIZABETH NYAMBURA WOLF.....2ND

DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....3RD

DEFENDANT

JUDGEMENT

1. By way the plaint dated 15th May 2009. Amended on 23rd October 2014 and **Further Amended on 26th November 2021** the Plaintiff claims that he is the registered allottee of plot No. 3/Business Kware Trading Centre Ongata Romgai having been allotted by the 1st Defendant. On 13th May 2009, he claims that he was

summoned by the 1st Defendant together with the 2nd Defendant to ascertain their specific plots for purposes of issuing them with titles. He claims that during the exercise, the 2nd defendant stated that the property partly belonged to her and proposed that the same be divided into two portions. The Plaintiff claims that the defendants were fraudulently and unjustifiably trying to dispossess him of his portion of land which. He outlined the following as particulars of fraud against the Defendants.

- **Portraying on their records that the plots were two while it was only one.**
- **Receiving payment of rates from the Plaintiff in the guise that he was the owner and later revealing that a third party was the owner.**
- **Indicating that there was a dispute on the said property while the same had earlier been resolved.**
- **Attempting to enter and carry out an improper survey on the suit property**

2. It is the plaintiff's case that the Defendants actions were acts of trespass which would cause him great financial loss since he had greatly developed the property.

3. He thus seeks the following reliefs;

a) An order of mandatory injunction restraining the 1st and/or 3rd Defendants from issuing any title to a third party save for the Plaintiff as a bonafide owner of the said plot.

b) An order of permanent injunction restraining the Defendants either by themselves, their servants, agents, employees or anyone claiming under them from dealing, alienating, trespassing/subdividing or issuing any title documents on the suit property being plot No. 3/Business Kware Trading Centre Ongata Rongai.

c) A declaration that the suit property rightfully belongs to the Plaintiff and title

documents if issued should be in favour of the Plaintiff alone and in her names.

d) Costs of the suit.

4. The **2nd Defendant in her Statement of defence and counterclaim** acknowledged that the Plaintiff was the owner of plot No. 3/ Business Kware Trading Centre Ongata Rongai and she was the owner of plot No. 783/ Residential Kware Ongata Rongai Trading Centre which share a common boundary. And that the claim that the 2nd defendant was trying to fraudulently dispossess of the plot or had trespassed upon the suit plot was frivolous. She claimed that it was the Plaintiff who was trying to dispossess her of her plot 783 Residential Ongata Rongai and should be ordered to vacate. She therefore sought for the following reliefs;

a. An order for vacant possession of plot No. 783 Residential Ongata Rongai (Kware) Trading Centre.

b. Damages for loss of use of plot No. 783 Residential Ongata Rongai (Kware) Trading Centre.

c. Costs of this suit.

d. Interest on 9(b) and (c) above.

5. The **3rd Defendant** in its defence denied the Plaintiff's claim.

Evidence of the Plaintiff

6. **PW1, Hemedi Kuria Italia Ali**, the Plaintiff and brother to Halima Wairimu Ali, adopted his witness statement as his evidence in chief and produced his bundle of documents as evidence. It was his testimony that plot No. 3/ Business Ongata Rongai belonged to his sister Halima from the year 1981 and had developed it fully by putting up a business premises. She was in peaceful possession until 2003, when the 2nd defendant claimed that she had encroached on her plot and they were both summoned for hearing and determination of the dispute.

7. **On cross examination** he stated that the dispute began when the 2nd Defendant claimed that the plaintiff had encroached on her plot. He stated that they applied for a change of user on 8th May 2001 which was approved and the plaintiff developed her plot. It was his testimony that Plot No. 565 Residential and plot No. 3 Business were one

and the same plot and the plaintiff has been in occupation from 1981. He however indicated that he could not tell whether the change of user was Gazetted or not and confirmed that he had seen the 2nd Defendant's gazetted PDP which had been challenged by their surveyor. He went on to testify that his sister's plot and the 2nd defendant's plot were different and that the disputed area was about 0.084Ha while they had occupied 0.0505Ha. He stated that if the court orders for a site visit and finds that they had occupied a larger portion, he was willing to move.

8. **On re-examination** he stated that the was allocated new number being plot No.3 Bus after the change of user converting plot No. 565 Residential from residential to business.
9. **PW2 Hussein Shariff Ali** who is also Halima's brother, adopted his witness statement as his evidence in chief and relied on the documents produced by PW1 as his exhibit.
10. **PW3 Daniel Felix Onyango** a land surveyor, produced the survey report dated 8th December 2017

which had been drawn by John Obel (now deceased). He indicated that the Plaintiff was in occupation of 0.0505Ha while her letter of Allotment stated that the plot was sixe 0.0538. It was his testimony that the 2nd Defendant's plot was not demarcated on the ground and if the 2nd Defendant's plot Part Development Plan was implemented, it would be inside the Plaintiff's plot.

11. **On cross examination** he stated that a Part Development Plan was only effective if approved indicating that the Plaintiff's Part Development Plan was approved on 2nd May 2002 but from the Survey records, it was not gazetted. He went on to state that a Part Development Plan was the first document before an allotment letter could be issued. Since the letter of allotment for plot No. 3 Business was issued on 8th May 2001, then the PDP dated 2002 did not apply this parcel of land. It was his testimony that of the two PDPs KAJ/1527/01.05.2001 and KAJ/1527/01.06.2002, the former had been approved but the latter was not approved. He stated that they also saw the 2nd Defendant's plot but did

not make any determinations on it since their instructions were on the Plaintiffs plot.

12. **On re-examination** he clarified the process of issuance of a letter of allotment pointing out that the 2nd Defendant's Part Development Plan did not indicate its author. And that it was possible for a Part Development Plan to be prepared but not approved.

Evidence of the Defendants

13. **DW1 Elizabeth Nyambura Wolf**, the 2nd Defendant adopted her witness statement and as her evidence in chief. She produced her bundle of documents which was marked as D. Exhibit 1-3. It was her testimony that she purchased her plot No. 783 from one Richard Sitonik Mossonto after undertaking due diligence. She visited the plot and it was vacant and the same was not fenced. The transfer was undertaken and the plot registered in her favour in 2001. The dispute arose in 2004 when she was informed that a boundary wall had been erected on her plot. Upon filing the complaint with the county Council, the Plaintiff was informed that she had encroached on her plot and was asked to vacate, but did not. The report from the

County Council confirmed existence of both plots and confirmed that the Plaintiff's plot had encroached on plot 783.

14. **On cross examination** she stated that before purchasing plot No. 783 she confirmed its existence. However, the Plaintiff fenced it off and due to opposition from the Plaintiff she could not have her surveyor visit the site to ascertain the encroachment.

15. **DW2 Festus Mbaabu Rimbere**, a land surveyor produced his survey report as exhibit. He stated that as per the records held by the 3rd Defendant, Ms. Elizabeth's (2nd Defendant) plot was in existence. He indicated that PDP KAJ/1527/01.05.2001 had details of plot No. 783 and in the PDP KAJ/1527/01.06.2002 plot No. 3 contradicted the PDP for plot no. 783 and this was the cause for the boundary dispute.

16. **On cross examination** he indicated that he was not present at the court ordered site visit, but if this was done, then it would provide conclusive report to the dispute.

17. **DW3 Joshua Lemaikai** the County Surveyor, produced his report dated 5th January 2024 as an exhibit in

this case. He confirmed that both plots were alienated and allocated by the 3rd Defendant and they both existed on the Kajiado Development Plan prepared by the 1st Defendant. He indicated that they marked the two plots as disputed in their records in 2016 but were awaiting the outcome of this case.

18. **On cross examination** he stated that the two plots were identifiable although from the letter of allotment issued by Kajiado the sizes were not indicated, but the documents would show the sizes approved by the survey. It was his testimony that the proper sizes would be ascertain from the 3rd defendant of the two plots was 60ft by 80ft and that is why the encroachment had taken place because one plot was bigger than its actual size.
19. At the close of the oral testimonies, the parties filed their final written submissions.

Submissions of the Plaintiff

20. Counsel for the Plaintiff submitted that the issue for determination was whether the Plaintiff herein is entitled to the reliefs sought in the Further Amended Plaintiff.

21. It was submitted that Halima Ali Wairimu was allotted the suit property on 8th May 2001 and there were correspondences between her and the Ministry of Lands on her efforts to secure necessary approvals to secure title to the property. It was also submitted that the Surveyor's report dated 8th December 2017 confirmed the size of the property on the ground was equal to the size claimed by the Plaintiff. Further, the Surveyor confirmed that the Plaintiff's PDP was on record at the 3rd Defendant's offices which equally confirmed the Plaintiff's claim. As such, the Plaintiff having met the conditions set in the Allotment letter including lodging development documents for approval meant that the suit property was no longer available for allotment as held in **Lagat v Kabut, African Line Transport Co. Ltd v The Hon AG and Republic v City Council of Nairobi & 3 Others (2014) eKLR.**

22. Counsel therefore prayed for the reliefs sought together with costs submitting that the Plaintiff had proved her case as required by **Section 197 of the Evidence Act** and that she was entitled to the injunctive

reliefs sought as established in **Giella v Cassman Brown & Company Limited [1973] E.A.**

Submissions of the 2nd Defendant

23. On whether the Plaintiff had proved lawful entitlement to Plot No. 783 (Residential), Kware, Ongata Rongai- Kajiado County, either independently or as part of Plot No. 3 (Business), on a balance of probabilities, it was submitted that both allotment letters were valid and authentic as evidenced. However, the PDP produced by the Plaintiff was neither gazetted nor approved by relevant authorities and it contradicted the 2001 development plan whereas the 2nd Defendant's PDP was in tandem with the development plan. As such, the 2nd Defendant's PDP being the first in time and fully compliant with the established procedures was superior and legally valid adding that the Plaintiff's PDP having not complied with established regulations was null and void.

24. It was also submitted that the allegation that the 2nd Defendant's plot had been subsumed within the Plaintiff's plot was false between the two parcels were distinct and it

was the Plaintiff who had unlawfully encroached onto the 2nd Defendant's plot and erecting unauthorised structures.

25. Reference was made to several cases including **Dina Management Ltd v County Government of Mombasa & 5 Others [2023] KECS 30 (KLR)**, **Attorney General v Halal Meat Products Limited [2016] KECA 306 (KLR)** and **Wilson Ankaine Kisemei v Mercbima International Ltd & 2 others [2017] KEHC 3501 (KLR)**, among others.

26. She prays that the suit should be dismissed and the 2nd Defendant's counterclaim allowed as prayed together with costs.

Submissions of the 3rd Defendant

27. It was submitted that plot No. 3 and plot No. 783 validly existed as per the allotment letters issued by the 1st Defendant. And the Surveyor's report dated 5th January 2024 evidenced as such. However, both plots measured 60ft by 80 ft but the Plaintiff had fenced a ground area of 0.084Ha thus fencing the 2nd Defendant's plot in the process. Therefore, the mandatory injunction sought by the Plaintiff would render the 2nd defendant plotless and

that no evidence had been provided to warrant the sought prayers. It was also submitted that to warrant an injunction against the 3rd Defendant would limit its mandate to survey, plan and issue title documents to the disputing parties and should be disallowed.

Analysis and Determination

28. I have considered the pleadings, the evidence on record, the written submissions, and the authorities cited. I find that the issues for determination are:

- i. Whether the Plaintiff has proved that the 2nd Defendant has encroached and trespassed on her plot No. 3 Business Ongata Rongai Trading Centre.***
- ii. Whether the 2nd Defendant has proved her case and if so, is she entitled to the prayers sought in the counterclaim?***
- iii. What orders should issue.***
- iv. Who should bear costs of the suit?***

29. It is the plaintiffs case that she bought the plot from Ms. A.J. Majaun who was allocated the plot sometimes in

1981. The plot was transferred to the plaintiff on the 24th April 1981.

30. She also demonstrated that she fulfilled all the conditions in the letter of allotment as evidenced by the bundle of receipts for payment of rent which were produced as exhibits in this case.

31. On the 8th May 2001, the plaintiff Halima Wairimu Ali was issued with a letter of Allotment for Plot No.3/Business Kware Ongata Rongai (Formerly No.565 Residential) The plaintiff has produced all the documents to demonstrate the above.

32. After the dispute arose there is a letter from the clerk to council dated 5th November 1991 which confirmed that the plot belonged to the plaintiff. There are several letters from the 1st Defendant which confirm the plot belongs to the plaintiff.

33. At this point, the question before court is whether the plot No. 783 Residential claimed by the 2nd Defendant exists on the ground. It is here case that she bought the plot from Richard Sitonik Mossonto and the same was

transferred to her on 7th January 2004. She produced some documents as exhibits.

34. By Consent order, parties to agreed that a joint survey be undertaken. The order was issued on the 8th May 2013 by Lady Justice. Gitumbi (as she then was). The survey was conducted. PW3, Daniel Felix Onyango, who participated in the said survey produced the Report dated 8th December 2017 as an exhibit in this case.

35. The Report confirms the existence of plot NO.3 Business, Kware Ongata Rongai including centre. The same is fenced and fully developed with business premises. The report also confirms that the 2nd Defendant was not able to point out the boundaries and/or beacons of her plot. It appears that the plot does not exist on the ground.

36. DW2 Festus Mbaabu Rimbere a land surveyor, produced his report as an exhibit in this case. He said he visited the site alone upon the request by the 2nd defendant's advocate. He told the court that the dispute was as a result of the part development plan KAJ/527/0206

which should be amended to conform with the development of Ongata Rongai.

He confirmed that he did not hold a joint survey with the surveyors of the plaintiff and the 3rd defendant.

He also stated that he could not ascertain the size of the 2nd defendant's plot. He also admitted that a development plan cannot be used to ascertain the sizes of the plot.

37. The question before this court is what were the sizes of the two plots?

DW4, Joshua Lemaikai, the county surveyor told the court that the two plots exist on the Part Development Plan but not on the ground.

He further stated that the sizes could only be ascertained after survey which records are kept at the survey of Kenya.

He stated that the plots currently being allocated by the 3rd defendant measures between 60 feet by 80 feet but no evidence was adduced to confirm this. Was this the standard and size in the 1980's, when the plots were allocated?. This question was not answered by the said County Surveyor.

38. His view that the two plots existed was not be supported by any evidence from the 3rd defendant. Given that the sizes of the two plots were not stated in the letters of Allotment, the 3rd Defendant ought to have assisted the court by availing the records to confirm the sizes of the plots allocated in the 1980s. They did not.
39. I note that the plaintiff's plot was allocated earlier than the one which the 2nd defendant bought. The plaintiff has been in occupation of her plot since the 1980s. The same is fully developed. I am convinced by the above facts that the plaintiffs plot was the first to be allocated in time.
40. There were several letters from the 1st defendant proposing that the 2nd defendant be allocated an alternative plot. It is not clear if she followed up on this issue.
41. I am convinced that the plot No. 783 Residential as claimed by the 2nd Defendant does not exist on the ground. The 3rd defendant is advised to show her an alternative plot.

42. It is my view that the 2nd defendants plot does not exist on the ground, the three survey reports confirm this position. I find that her counter claim fails and the same is dismissed with costs.

43. I find that the plaintiff has proved her case as against the defendants on a balance of probabilities.

44. Accordingly judgement is entered for the plaintiff as against the defendants as follows:

a) That a declaration is hereby issued that plot No. 3/Business Kware Ongata Rongai trading centre belongs to the plaintiff and title documents ought to be issued in her favour.

b) That a permanent injunction is hereby issued restraining the defendants either by themselves, their servants, agents, employees, or anyone claiming under them from dealing, alienating, trespassing, sub-dividing or issuing any title documents in respect of plot NO. 3/Business Kware Ongata Rongai trading centre to any other party.

c) That a permanent injunction is hereby issued restraining the 3rd defendant from issuing any title to any other party save for the plaintiff in respect of Plot No. 3 Business/Kware/Ongata Trading Centre.

d) That costs of this suit shall be borne by the Defendants.

Dated, Signed and Delivered virtually at Kajiado this 11th day of December 2025.

L.KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Mumbi for Mr. Saad for the Plaintiff.

N/A for the 1st Defendant.

Mr. Sankale for the 2nd Defendant.

N/A for the 3rd Defendant.

Court Assistant – Peter.