

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 352 OF 2016

PETERSON OMAYO BWOMA

PLAINTIFF

VERSUS

GABRIEL KARIUKI MWANGI 1ST

DEFENDANT

CITY COUNTY OF NAIROBI 2ND

DEFENDANT

SUSAN WAIRIMU KABERERE 3RD

DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit vide a plaint dated 7th April 2016. He contended that he is the beneficial owner of **Plot No. 2 Kariobangi South Shopping Centre** vide purchase from the 3rd Defendant who was in turn allocated the plot by the 2nd Defendant. It is his case that the 1st Defendant has

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trespassed thereon, and has thus deprived him of his peaceful enjoyment of his property. He seeks the following Orders:

- a) A declaration that the Plaintiff is the legal proprietor of the property being Plot No. 2 Kariobangi South Shopping Centre and the 1st Defendant has no power or right to interfere with his peaceful and/or quiet possession of the same.**
- b) A perpetual and permanent injunction restraining the Defendants, their agents, servants, employees and or assignees from further trespassing, destroying, claiming, and or interfering with the Plaintiff's property being Plot No. 2 Kariobangi South Shopping Centre in any manner inconsistent with the Plaintiff's right of possession.**
- c) Eviction of the 1st Defendant from the property and general damages from the Defendants.**
- d) Cost of the suit.**

e) Any relief that this Honourable court deems fit to grant.

2. The 1st and 3rd Defendants did not enter appearance.
3. The 2nd Defendant filed a defence in opposition to the suit, in which it denied allegations levelled against it by the Plaintiff.
4. The case was canvassed through viva voce evidence.

The Plaintiff's evidence

5. The Plaintiff as PW1 testified as the sole witness in his case. He stated that after conducting due diligence and establishing that the 2nd Defendant had allocated the suit plot to the 3rd Defendant, he purchased it from her for kshs.350,000/=. Subsequently, she donated to him a beneficial right of ownership by way of a Specific Power of Attorney registered at the Ministry of Lands on 27th July 2008. He testified that he then fenced the suit plot and continued to pay ground rent to the 2nd Defendant in the 3rd Defendant's name pending processing of title in his name.

6. He claimed that on 11th June 2008, the 2nd Defendant issued him with a Beacon Certificate No. 2559 clearly defining his plot's boundaries. However, in April 2016, strangers started claiming ownership of his plot. One of them was the 1st Defendant who had a Part Development Plan for the same plot but he was referring to it as **Plot No. 3**.
7. He averred that on 15th April 2013, he alerted the 2nd Defendant regarding the claim on the same plot by the 1st Defendant but his complaint did not elicit a response and in October 2013, strangers started delivering construction material to the suit plot, action he reported to the area chief but when the chief invited him and the 1st Defendant to a meeting to discuss the issue, the 1st Defendant failed to show up. Further, that on the night of 12th October 2013, the 1st Defendant invaded his plot, pulled down his fence and erected his own fence, then dug trenches and commenced construction without approved plans. He produced his list and bundle of documents dated 7th April 2016 as P. Ex 1-11.

8. In cross-examination by Counsel for the 2nd Defendant, PW1 confirmed that he has no Lease or Title Deed to the suit plot but he insisted that he paid transfer fees to the 2nd Defendant after which he was issued with a Beacon Certificate. He could not confirm whether the 3rd Defendant paid Stand Premium to the 2nd Defendant but he claimed to have verified that she was the original allottee and insisted that she transferred her rights to him though he had no evidence to that effect save for the Special Power of Attorney.
9. While he insisted that he put up a fence around the suit plot in 2008, he confirmed that he did not have a permit in court authorizing such construction but he stated that it was just a simple fence. He insisted that his ownership is based on the Allotment Letter and the Beacon Certificate signed by the Chief Land Surveyor. He also admitted that he filed **Milimani CMCC No. 1632 OF 2013** on the same issue and later withdrew it. He confirmed the suit plot is not public land.

- 10.** In re-examination, PW1 clarified that he is yet to process a Lease because of the 1st Defendant's claim to the suit plot. Further, that he confirmed that the 3rd Defendant had paid stand premium through his documents produced herein and that he has not received any communication from the 2nd Defendant to the effect that the suit plot is public land.
- 11.** The 2nd Defendant closed its case without calling a witness. The parties thereafter filed written submissions.

Submissions

- 12.** The Plaintiff submitted that he demonstrated that the 3rd Defendant was the initial allottee of the suit plot and that she had met all the requirements before transferring it to him. Further, that the 2nd Defendant having not adduced evidence to the fact that the allotment to the 3rd Defendant was cancelled, then he is entitled to the suit plot. To this end, he relied on the following decisions: **Gerishom Ndege Erima v Trans-Nzoia County Land Adjudication & Settlement Officer & another; Maronda Nicholas Ongera**
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(Interested party) [2020] KEELC 141 (KLR) and Kimuyu v City Council of Nairobi (now Nairobi City County) (Environment & land case 170 of 2011) [2023] KEELC 16288(KLR) (21 February 2023) (judgement).

- 13.** He also submitted that since the 2nd Defendant failed to call a witness, its pleadings remain mere statement of facts and unsubstantiated, whereas his evidence remains unchallenged. Further, that having proved ownership, he is entitled to vacant possession, a perpetual permanent injunction and an eviction order.
- 14.** On damages, he submitted that having been deprived of his right to develop and use the suit plot, he is entitled to compensation in general damages, of which kshs.3.5 million would be adequate. He also urged the court to find that the 2nd Defendant violated his right to property as it was in breach of its duty of care by failing to clarify ownership of the suit plot despite being the custodian of allotments letters.

15. To buttress his averments, the Plaintiff also relied on the following decisions: **George Kamau Wakanene & 2 others v City Council of Nairobi [2017] KEELC 3771 (KLR), Kenya Power & Lighting Co. Ltd v Sherriff Molana Habib [2018] eKLR** and **Ndiege v Amuse & 59 others [2024] KEELC 6869(KLR)**.
16. On his decision to withdraw **Milimani CMCC No. 1632 OF 2013** which came up in cross examination, he submitted that he withdrew the said suit because of the legal limbo occasioned by the advent of specialized courts and the question whether magistrate's court had jurisdiction to determine land matters, which question was later settled after he had withdrawn the matter.
17. On its part, the 2nd Defendant submitted that while the Plaintiff bore the onus of proving that he is the lawful proprietor of the suit property, the absence of a registered title or lawful transfer means he failed to discharge the said burden.

18. It also submitted that its duty under Sections 30(1) and 33 of the Physical Planning Act is regulatory and does not extend to resolving private ownership disputes between individuals thus it does not owe the Plaintiff any duty of care to intervene in the dispute between the 1st Defendant and himself.

19. On the Plaintiff's claim for damages, it submitted that it cannot be financially liable for the consequences of a private land dispute for which the Plaintiff has failed to secure and prove lawful title. It also submitted that the plaintiff's withdrawal of **Milimani CMCC No. 1632 OF 2013** highlights the repetitive and unsubstantiated nature of the present litigation.

20. To buttress its averments, the 2nd Defendant relied on the following decisions: **Joseph Kipchirchir Koech v Philip Cheruiyot Sang [2018] eKLR; Nairobi Homes Limited v Rengwa & 5 others [2014] KEELC 41879(KLR), Ndungu**

**v Nairobi City Council [2014]eKLR and R v Attorney
General Ex Parte Ngang'a [2015] eKLR.**

Analysis and Determination

- 21.** Upon consideration of the pleadings including the exhibits, testimony of the witness and rival submissions, the issue for determination is whether the Plaintiff has proved ownership of Plot No. 2 Kariobangi South Shopping Centre and if he is entitled to the Orders as sought in the Plaint.
- 22.** The Plaintiff claims ownership of **Plot No. 2 Kariobangi South Shopping Centre** vide purchase from the 3rd Defendant who was in turn allocated by the 2nd Defendant. It is his case that the 1st Defendant now claims the same plot and has a PDP which refers to the said Plot as No.3.
- 23.** By reason that none of the Defendants called any witness in evidence, the Plaintiff contends that his prayers in the plaint should be granted since the suit is unchallenged.

24. On its part, the 2nd Defendant contends that its duty is regulatory and does not extend to resolving private ownership disputes between individuals.

25. In **Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & Another [2016] eKLR**, the Court stated that:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

26. In the foregoing, I opine that the Plaintiff is still expected to discharge his burden of proof, to demonstrate ownership of the suit plot irrespective of whether the suit is defended or not.

27. It emerged that the suit plot is not registered. In **Mohamed v Duba & another [2022] KECA 442 (KLR)**, the Court of Appeal stated as follows on proof of ownership where land is not registered:

“Our analysis has been guided by the principles that apply to evidence of title in respect of unregistered land as provided in the text by Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition at page 185 as follows: “Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time. These historic documents of title (or 'deeds bundles') are privately controlled, being retained normally within the custody of the proprietor of the estate to which they relate. These deeds provide the “essential indicia of title” since the information contained in them, when coupled with the fact of undisturbed possession, generally identifies the person who currently has the best 'title' to any relevant estate in the land. Title to an estate can also be claimed, however, by one

who holds no supporting documentary evidence but relies instead on the sheer fact of his own possession.”

28. Further, in the case of **Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR**, it was stated as follows:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It

is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in Sen v Headley [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

29. The Plaintiff relies on an allotment letter dated the 21st September, 2001, allegedly issued to the 3rd Defendant, by the 2nd Defendant as proof of his ownership to the suit plot. He contended that since the 2nd Defendant did not tender evidence disputing that the allotment letter was issued to the 3rd Defendant and further in absence of evidence that the said allotment letter was cancelled, then he had proved ownership. In **Republic v City Council of Nairobi & 3 others [2014] eKLR**, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004 once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was outrightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

30. During cross examination, PW1 confirmed that he has no Lease or Title Deed to the suit plot. Even though PW1 claimed he paid transfer fees to the 2nd Defendant, I note the said receipt is dated 5th May, 2008, yet the Special Power of Attorney from 3rd Defendant to Plaintiff, which he claimed

granted him ownership over the suit plot is dated 16th July, 2008. Further, the Beacon Certificate in the name of the Plaintiff is dated 21st September, 2001. I note in the Letter of Allotment, the allottee was supposed to pay Stand Premium and Ground Rent amounting to Kshs. 17, 940 within 30 days from the 21st September, 2001. However, the alleged Stand Premium, Survey fees, Annual Ground Rent were all paid in one day, on the 24th January, 2008, which was more than six years later. It is further worth noting that all those receipts bear the number CT/608 and are written in one handwriting. I note PW1 confirmed that the 1st Defendant is in possession of the suit plot and has put up illegal structures thereon. There was no demonstration that the Plaintiff indeed confirmed from the 2nd Defendant that the 3rd Defendant was the Original Allottee of the suit plot.

- 31.** On perusal of a letter dated the 15th October, 2013 from the Chief of Kariobangi South Location where the suit plot is situated, to the Director, City Planning, Nairobi County, he

stated thus: **‘The above named plots are in dispute between Peterson Omayo Bwoma and Gabriel Kariuki Mwangi. Both parties have allotment letters from your office on the said plot and are fighting over the same on the ground.’** From this statement alone, noting that the Plaintiff admitted that the 1st Defendant even had a PDP for the suit plot, which is indicated as plot No. 3, I opine that it was incumbent upon him to confirm that the 3rd Defendant indeed owned the suit plot, which he failed to do.

32. While the Plaintiff insisted that he put up a fence around the suit plot in 2008, PW1 confirmed that he did not have a permit in court authorizing such construction but he insisted that it was just a simple fence. Insofar as PW1 insisted that his ownership is based on the Allotment Letter and the Beacon Certificate signed by the Chief Land Surveyor, I find that he has not demonstrated possession nor occupation of the suit plot. Further, there are glaring inconsistencies on

the dates in the exhibits produced by the Plaintiff which are not explained.

33. Based on the facts as presented while associating myself with the decisions cited, I find that the Plaintiff has failed to demonstrate his ownership of the suit plot.

34. As to whether the Plaintiff is entitled to the Orders as sought in the Plaint. The Plaintiff sought to be declared as the legal proprietor of the property being Plot No.2 Kariobangi South Shopping Centre, an injunction restraining the 1st Defendant from the suit plot, general damages as well as eviction orders.

35. In **Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR**, the court held that;

“The defendant has constructed on the plaintiff's land. This in itself is damage and wastage of the plaintiff's land. The plaintiff is entitled to general damages for trespass. The issue which arises is as

to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See Hostler v GreenPark Development Co. 986 S. W 2d 500 (No. ct App. 1999)."

- 36.** From the testimony of PW1, there was no indication that the Plaintiff was in possession of the suit plot. I note PW1 admitted that the 1st Defendant has a Deed Plan to his plot which referred to it as No. 3. Since the Plaintiff failed to prove possession, I find that he cannot claim that the 1st Defendant interfered with his peaceful and/or quiet possession of the same. It is my considered view that the Plaintiff cannot claim a perpetual and permanent injunction restraining the Defendants, their agents, servants, employees and or assignees from further trespassing,

destroying, claiming, and or interfering with his property, as it is only a proved owner of suit plot that can be entitled to eviction orders including general damages, which the Plaintiff has not proved.

37. In the foregoing, I find that the Plaintiff has failed to prove his case on a balance of probability and I will proceed to dismiss it but make no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
22ND DAY OF APRIL, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Onderi for Makori for Plaintiff

Court Assistant: Vena