REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 230 OF 2010

CHARLES NYAKUNDI...PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI..1ST DEFENDANT

ANNE KHASOA...2ND DEFENDANT

JUDGEMENT

1. By an amended plaint filed on 21/6/2012, the Plaintiff brought this suit against the Defendants over plot number D5B/Block 82/1765/1767 (“the Suit Property”) seeking a permanent injunction to restrain the Defendants, their agents, servants or employees from entering upon, taking possession, demolishing, damaging, alienating and or in any other way interfering with the Plaintiff’s use, quiet possession of the Suit Property. He also seeks a declaration that he is the legal owner of the Suit Property; general damages; special damages of Kshs. 38,650,425/= and costs of the suit.

2. The Plaintiff averred that he was allotted the Suit Property through by the 1st Defendant with the help of the 2nd Defendant, who at the time was the Chairperson of Savannah Jua Kali Association, of which the Plaintiff was a member. The Plaintiff claimed that he paid rent for the Suit Property and thereafter applied to the 1st Defendant for approval to construct a school on the Suit Property which approval was granted. The Plaintiff constructed and completed a school on the Suit Property. The Plaintiff claims that on or about 25/3/2010 and 6/5/2010, the 1st Defendant acting in collusion with the 2nd Defendant, illegally demolished the school buildings which housed over 300 students using the 1st Defendant’s bulldozer registration number KAW 842Z.

3. It is the Plaintiff’s case that the Defendants ignored the allotment letter they issued to the Plaintiff and destroyed his property and interfered with his use and quiet possession of the Suit Property despite having acknowledged the Plaintiff’s proprietary rights by accepting rent and rates payments from him all the while. Further, that the destruction of his property was undertaken without giving the Plaintiff a fair hearing or an opportunity to salvage his investment.

4. The 1st Defendant denied issuing a letter of allotment over the Suit Property to the Plaintiff and further denied any dealings between itself and the 2nd Defendant pertaining to the issuance of a letter of allotment to the Plaintiff. It also denied that it had approved the Plaintiff’s development plans. The 1st Defendant averred that the Plaintiff’s occupation of the Suit Property was illegal and that the construction on the Suit Property was done irregularly without valid approved plans from the 1st Defendant.

5. Further, that it was the Directorate of City Planning Department and the Town Planning Committee that were mandated to approve building plans and that the Plaintiff’s construction did not meet the criteria prescribed in the Physical Planning Act. The 1st Defendant averred that it acted within its mandate to issue the Plaintiff with the enforcement notice dated 4/11/2009 and denied illegally demolishing his developments on the Suit Property. The 1st Defendant contended that the Plaintiff’s payment of land rates and ground rent neither legitimised the illegal transaction over the acquisition of the Suit Property, nor did it give the Plaintiff any interest in it. The 1st Defendant prayed for dismissal of the suit with costs.

6. In the 2nd Defendant’s defence to the amended plaint, she denied colluding with the 1st Defendant and admitted that the 2nd Defendant was aware that the Plaintiff’s developments and structures on the Suit Property were destroyed, demolished and damaged by agents, servants or employees of the 1st Defendant. Further, that the compensation for the value of the damage caused to the Plaintiff should be the responsibility of the 1st Defendant. The 2nd Defendant stated that there were several suits arising from the allotments from the original title which are pending in court and prayed that the Plaintiff’s suit against her be dismissed with costs.

7. The advocates for the Plaintiff and the 2nd Defendant arrived at a consent to have the matter disposed of by way of written submissions after parties adopted the written statements of the witnesses. The Plaintiff filed his statement which reiterated the contents of his amended plaint.

8. The Plaintiff filed his submissions on 28/2/2019 outlining two issues for determination. Firstly, whether the Plaintiff was the registered owner of the Suit Property. The Plaintiff submitted that the documents he exhibited showed that the 1st Defendant confirmed his ownership of the Suit Property and the receipts showed that he had paid land rates for the land from 2004 until 2009. There was a beacon certificate issued to the Plaintiff, a survey report from the Survey Department together with approvals of the building plans.

9. On the issue of whether a letter of allotment amounts to title, the Plaintiff relied on the cases of **Stephen Mburu & 4 others v Comat Merchants Ltd & another [2012] eKLR; Republic v Principal Immigration Officer [2012] eKLR** and **Rukaya Ali Mohamed v David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004.**

10. The Plaintiff submitted that the Gazette Notice dated 9/11/2018 issued by the Chief Land Registrar directed the County Government of Nairobi to compensate the Plaintiff in respect of the illegal demolition of his school on the Suit Property. The Plaintiff contended that that notice should be construed as an admission of liability by the 1st Defendant and confirmation that the Suit Property legally belonged to the Plaintiff.

11. The second issue for determination is whether the demolition of the buildings on the Suit Property was done illegally and who should be held responsible for the demolition. The Plaintiff submitted that the 1st Defendant has not proved to the court that an enforcement notice dated 4/11/2009 was served upon the Plaintiff. On the importance of service of the enforcement notice for it to constitute fair administrative action and legitimate expectation, the Plaintiff relied on the cases of **George Kamau Wakanene & 2 others v City Council of Nairobi [2017] eKLR, R v Devon County Council *Ex parte* P Baker [1955] 1 All ER** and **Republic v Kombo & 3 others *ex parte* Waweru.** The Plaintiff also relied on what **De Smith, Woolf & Jowell** wrote about the importance of the protection of legitimate expectation in "Judicial Review of Administrative Action" 6th Edition, Sweet & Maxwell, at page 609**.** He also relied on Section 38(1) and (2) of the Physical Planning Act on enforcement notices.

12. The 2nd Defendant's submissions dated 17/4/2019 centered on whether the Plaintiff had proved his claim against the 2nd Defendant to the required standard. The 2nd Defendant submitted that she was the Chairperson of Savannah Jua Kali Association, of which the Plaintiff was a member. She confirmed that the members of the association were allottees of various plots from the 1st Defendant. She added that the 2nd Defendant, the Plaintiff and several other members of Savannah Jua Kali Association were all victims of the illegal acts of the 1st Defendant. The 2nd Defendant submitted that since there is no nexus between the Plaintiff and the 2nd Defendant in so far as the issues for determination are concerned, the prayers sought in the suit can only lie against the 1st Defendant. She added that since the 2nd Defendant is also entitled to be compensated, the costs of the suit should be borne by the Plaintiff. The 2nd Defendant produced a report by the National Land Commission (NLC) on the Commission's findings on the status of the Suit Property and prayed that the court adopts NLC's findings.

13. The Court has considered the pleadings, documents, witness statements and submissions filed by the parties. The court has also looked at NLC's report dated 23/3/2018 under the reference NLC/CHAIRMAN/VOL. XXIII/648. The court notes that the Plaintiff produced documents from the Town Clerk's Department of Nairobi City Council over the allocation of the Suit Property, a beacon certificate from the Housing Development Department, provisional approval of plans for buildings on the Suit Property and a letter from the 1st Defendant dated 29/5/2009 confirming ownership of the Suit Property. The Plaintiff also produced receipts issued by the 1st Defendant on payment of rates for the Suit Property. The 2nd Defendant conceded that the Plaintiff was allotted the Suit Property as a member of the association which she chaired.

14. The 1st Defendant in its defence averred that it acted within its mandate by issuing the enforcement notice dated 4/11/2009 to the Plaintiff and craved leave of the court to rely on the notice. However, the 1st Defendant did not produce the enforcement notice in evidence.

15. Section 38 of the Physical Planning Act requires a local authority that notices that a development has been done without the required permission to serve an enforcement notice specifying the contraventions. A party served with such a notice can appeal if they are aggrieved by the notice. By the 1st Defendant allocating the Suit Property to the Plaintiff, receiving the required payments, issuing a letter of allotment to the Plaintiff and then approving the Plaintiff's construction plans, the Plaintiff had a legitimate expectation that he would enjoy and use the Suit Property. The 1st Defendant's act of demolishing the property without notice or giving the Plaintiff an opportunity to air his grievances amounts to denial of the Plaintiff's right to fair administrative action as protected by law.

16. The 2nd Defendant deponed in the replying affidavit dated 28/5/2010 that prior to the demolition of the Plaintiff's developments, there had been a dispute over the Suit Property between members of the Savannah Jua Kali Association and Shepherd's Group of Companies Limited who also laid claim to the entire block of land. She annexed a copy of the order issued on 12/1/2006 in **HCCC No. 377 of 2002** following the 2nd Defendant's application to vary and vacate the orders granted on 25/4/2002 and to restrain the Respondent (Shepherd's Group) from evicting the applicant. On the face of the order, it can be seen that the 2nd Defendant and another party were involved in a land dispute with the Shepherd's Group of Companies Limited. The 2nd Defendant also annexed a copy of an enforcement notice said to have been issued by the 1st Defendant as a consequence of that court order. The notice is dated 15/3/2009 and refers to a temporary illegal perimeter wall on plot no. 13 Komarock which was to be demolished.

17. The report on the determination of the review of grants and disposition of land reference numbers Nairobi Block/ 82/6192, 6194, 1765, 1767, 1764, 6044, 7375, 7333 and 7813-7856 dated 23/3/2018 was prepared by NLC in exercise of the powers conferred on it by Article 68 (c)(v) of the Constitution of Kenya and Section 14(4),(5),(6),(7) and (8) of the National Land Commission Act, 2012. After conducting a preliminary information gathering exercise, NLC narrowed down two issues for determination. Firstly, was the legality and propriety of the grants and dispositions of the subject land and the secondly, was whether other interested parties claiming ownership of the property were innocent purchasers for value without notice of any defect in the title. After conducting its investigations, considering submissions of various parties, examining several memos and letters as well as the decisions in Nairobi High Court ELC no. 55 of 2002, Nairobi CMCC no. 7942 of 2007 and Nairobi HCCC no. 377 of 2002, NLC arrived at a determination of the matter. On page 24 of the report, the Commission stated

“3. Nairobi Block 82/1767. Total 3 hectares. Oyster Village to compensate members of Savannah Jua Kali at current market rate of the land lost and structures that were illegally demolished including; Mother of Mercy Rehabilitation Centre, Jordan Friends Ministry, New Life Temple Redeemed Church, 12 Residential Houses and an Airtel mast. Subject to payment of the above compensation, thereafter a title to be processed in favour of Oyster Village.”

18. The findings of NLC confirms that the structures on the Suit Property were indeed illegally demolished and that the Plaintiff has a claim for compensation and damages for the damage to his property by the 1st Defendant. However, NLC determined in its report that after payment of the compensation, the title to the Suit Property should be registered in the name of Oyster Village and not the Plaintiff or members of Savannah Jua Kali Association. The effect of NLC’s determination is that the Plaintiff will ultimately not be registered as the owner of the Suit Property after its restoration to the intended use.

19. Consequently, the court cannot therefore grant prayers (a) and (b) sought in the amended plaint. What is left for determination is the issue of general damages, special damages and costs of the suit. It has been proven that the Plaintiff was allotted the suit land and was in possession of the Suit Property. In addition, the Plaintiff’s building plans to put up the school on the suit land were approved by the 1st Defendant, and so the Plaintiff is entitled to compensation from the 1st Defendant.

20. The Plaintiff sought special damages of Kshs. 38,650,425.00/-. It is trite law that special damages must not only be pleaded, but must also be proved before they can be awarded by a court. This has been stated in many cases including the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716.** The Plaintiff filed a valuation report ref AVL/AO/2012/041/HM.km dated 21/5/2012 prepared by Amazon Valuers Limited. The report was not challenged. The basis of the valuation report was the current market value on the amount given per item. The land was valued at Kshs. 16,500,000/=; the value of the various development materials was given as Kshs. 13,500,000/=; external works and loose assets were valued at Kshs. 2,500,000/= and Kshs. 6,150,425/= respectively bringing the total claim to Kshs. 38,650,425/=.

21. The Court notes that the figures arrived at for the land and development were itemised and specified. However, the external works were not specified, hence it is not clear what works these were and how the value of 2,500,000/=was arrived at. As for the loose assets a schedule is given at page 10 of the valuation report where the assets are itemised. The figures of Kshs. 140,000/= given for kitchen and Kshs. 160,000/= for food items are ambiguous. For the rest of the items, that is, school desks, lab equipment, furniture and fittings, text books, exercise books, library books, office stationery and lab chemicals, the Plaintiff should have demonstrated the quantities and costs for each, seeing that the award sought for the items is inordinately high. The development items listed as setting out and clearance at Kshs. 270,000/=, floor finishes at Kshs. 405,000/=, sundries at valuer’s discretion at Kshs. 270,000/=, walling below DPC at Kshs. 810,000/=, door joinery at Kshs. 675,000/=, concrete shelving at 270,000/- and roof covering at 945,000/= appear high and should have been better particularised to justify the high costs quoted. The Court therefore subtracts the value of these items from the grand total and awards the Plaintiff Kshs. 26,355,000/= as special damages.

22. On general damages, the Plaintiff did not submit the amount that the court ought to consider. Taking into account the demolished property and the loss and inconvenience caused to the Plaintiff, the court is of the view that an award of Kshs. 5,000,000/- is fair compensation. The Plaintiff is awarded the costs of the suit which shall be borne by the 1st Defendant.

Dated, signed and delivered at Nairobi this 8th day of August 2019.

K. BOR

JUDGE

In the presence of: -

Ms. M. Nyambane holding brief for Mr. G. Imanyara for the Plaintiff

Mr. V. Owuor –Court Assistant

No appearance for the Defendants