



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 493 OF 2015**

**PETER WILLS O. SIMBA.....1<sup>ST</sup> PLAINTIFF**

**JOHN BOSCO MBOGA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARIA GESARE SAGWE.....1<sup>ST</sup> DEFENDANT**

**LAWRENCE OMARIBA NYAATA.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Background and the Pleadings:**

1. In this suit the plaintiffs claim they were lawfully allocated Plot No. 27 Nyakoe Market (“**suit property**”) on or about 20<sup>th</sup> February 1968. During the month of May 2012 the plaintiffs stated they discovered the suit property had unlawfully and fraudulently been subdivided into Plot Nos. 27A and 27B Nyakoe Market by the defendants without their (plaintiffs) knowledge. The defendants caused the transfer of the subdivided sub plots to be effected to themselves fraudulently necessitating the institution of the present suit.

2. The plaintiff vide the plaint dated 3<sup>rd</sup> November 2015 filed in court on 4<sup>th</sup> November 2015 sought judgment against the defendants jointly and severally for:-

**i. Declaration that the subdivision of the original suit plot and the transfer of the resultant portions, namely, Plot Numbers 27A and 27B, Nyakoe Market in favour of the defendants, was fraudulent, illegal, null and void and recovery of the suit plot ME/299 in favour of the defendant, was fraudulent, illegal, null and void.**

**ii. An order for cancellation and/or rectification of the register in respect of Plot Number 27A and 27B, Nyakoe Market, respectively and restoration of the original plot card, that is Plot Number 27, Nyakoe Market.**

**iii. Permanent injunction restraining the defendants either by themselves, agents and/or servants from entering upon building on, depositing materials, taking possession of, interfering with and/or dealing with the suit plot, that is, Plot Number 27, Nyakoe Market in any manner adverse and/or detrimental to the interests of the plaintiffs.**

**iv. General damages for trespass.**

**v. Costs of the suit be borne by the defendants.**

**vi. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

3. The 1<sup>st</sup> defendant filed a defence dated 15<sup>th</sup> December 2015 and denied the averments by the plaintiffs. The 1<sup>st</sup> defendant averred that her late husband, Sagwe Nyakundi bought the suit property from one Okiamba Nyagoe in 1968 and took possession thereof and constructed structures thereon. The 1<sup>st</sup> defendant and the Gusii County Council in 1989 instituted a suit vide Kisii CMCC No. 328 of 2000 against the 1<sup>st</sup> defendant’s husband and Okiamba Nyakoe respecting the suit plot which suit was dismissed for want of prosecution. The 1<sup>st</sup> defendant stated that the instant suit was res judicata. She further stated that the subdivision of the suit property was approved by the County Council and that she had been paying all levies for the plot to the Council.

4. The 2<sup>nd</sup> defendant filed a defence dated 14<sup>th</sup> April 2016 and equally denied the plaintiff's allegations as per the plaint. He also like the 1<sup>st</sup> plaintiff averred that the suit property was subdivided into two subplots in 1989 with the approval of the council and both he and the 1<sup>st</sup> defendant's husband were in possession of the plot. He pleaded the instant suit was res judicata by reason of Kisii CMCC No. 328 of 2000 which had been instituted against them by the plaintiffs and the council but was dismissed for want of prosecution.

#### **Evidence by the Parties;**

5. The 1<sup>st</sup> plaintiff testified as the sole witness in support of the plaintiffs case while the 1<sup>st</sup> and 2<sup>nd</sup> defendants testified in support of their defences and called no other witnesses. The 1<sup>st</sup> plaintiff testified that on 20<sup>th</sup> February 1968 he and the 2<sup>nd</sup> plaintiff were allocated Plot No. 27 Nyakoe Market by Gusii County Council following their application. He stated that at the time of allocation the plot was vacant and that they took possession of the same. He stated the size of the plot was 50feet by 100feet.

6. The 1<sup>st</sup> plaintiff further testified that in May 2012 they discovered that their plot had been subdivided into two portions and renumbered as Plot 27A and 27B without consultation with them as the owners and without any notification to them. The plaintiffs sought verification of the status of their plot from the County Clerk and wrote the letter dated 29<sup>th</sup> May 2012 (“PEX.3”). The clerk to the Council vide letter dated 6<sup>th</sup> December 2012 (“PEX.5”) summoned both the plaintiffs and the defendants but on the appointed date for the meeting the defendants did not attend. The witness stated they never made any application to subdivide their plot and maintained whoever made the application to have the plot subdivided must have had fraudulent designs. The plaintiffs stated that after the Council investigated the matter, they confirmed the subdivision was fraudulently done as per minutes of the Council meeting of 20<sup>th</sup> February 2013 (“PEX.7”). The Council further vide minutes of meeting of 8<sup>th</sup> August 2014 (“PEX.10”) affirmed the plot belonged to the plaintiffs. The witness produced in evidence a plot card for the plot issued on 21<sup>st</sup> February 1979 “PEX.2” in the plaintiffs names by the Gusii County to confirm their ownership of the plot.

7. In cross examination the 1<sup>st</sup> Plaintiff reiterated that they applied for a plot and were allocated one in 1968 vide Minute No. 12/68 (B) (16) and they were issued with a plot card. He restated the plot was 50ft by 100ft and was vacant and remained unfenced. The witness explained that the defendants had been interfering with their plot and affirmed that they had earlier filed a case in the Chief Magistrate's Court concerning the ownership of the plot but the case was dismissed for want of prosecution.

8. DW1 Maria Gesare Sagwe in her testimony denied having encroached onto the plaintiffs plot stating that the plot belonged to her. The witness relied on her witness statement made on 15<sup>th</sup> December 2015 and on the bundle of documents filed as per the list dated 15<sup>th</sup> December 2015. The 1<sup>st</sup> defendant stated that she has occupied the suit plot since 1980 when she constructed a structure thereon. She explained her late husband was the owner of the plot and that he gave a portion thereof to Omariba before he died. She stated the Council gave her a plot card for plot 27'A' and the 2<sup>nd</sup> defendant a plot card for plot 27'B'. She maintained she owns the plot and stated the plaintiffs have no interest whatsoever in the plot.

9. DW1 in cross examination stated that her husband had purchased the plot from one, Okiamba Nyakoe as per the agreement dated 1<sup>st</sup> July 1968 (“DEX.1”). She admitted the agreement did not specify the number of the plot the subject of the sale. She stated the only document she had to support her ownership of the plot is the plot card for No. 27'A' which she was given by the Council. The 1<sup>st</sup> defendant stated it was the vendor who showed them the position of the plot. On the plot she stated there is a structure where there is a butchery. She further stated there was a church operating on the plot. She conceded the developments on the plot have not been approved. The witness further stated she did not attend the meeting when she was summoned by the Council as she feared they would take the plot card away from her.

10. In his defence the 2<sup>nd</sup> defendant who testified as DW2 relied on his written witness statement. He denied the allegations of fraud made against him by the plaintiff. He stated he was not involved in the subdivision of Plot No. 27. He testified that he was in occupation of Plot No. 27 where he was carrying on business on a structure that he had constructed thereon. He claimed he had been allocated the plot by the Council but he had misplaced the documents.

11. In cross examination the 2<sup>nd</sup> defendant stated he and the 1<sup>st</sup> defendant occupied Plot No. 27 Nyakoe Market and he maintained he was not aware of any submission of the plot into plot nos. 27A and 27B. The witness stated though he had been given a plot card by Gusii County Council he did not have the same.

#### **Issues, Analysis and Determination;**

12. The plaintiff and the 2<sup>nd</sup> defendant filed their final written submissions as directed by the court. The 2<sup>nd</sup> defendant did not file any submissions in spite of being afforded the opportunity to do so. I have reviewed the pleadings, the evidence and considered the submissions filed by the parties and the following are the issues that arise for determination:-

**(i) Whether the plaintiffs were lawfully allocated Plot No. 27 Nyakoe Market and if so, whether the plot has been lawfully subdivided into Plot Nos. 27A and 27B?**

**(ii) Whether the defendants have any proprietary interest over Plot No. 27 Nyakoe Market?**

**(iii) Whether the defendants are trespassers on the suit property?**

**(iv) What reliefs and/or orders should the court grant?**

13. On the evidence adduced by the plaintiff there is irrefutable evidence that the plaintiffs were jointly allocated Plot No. 27 Nyakoe Market vide Committee Minute No. 12/68 (B) (16) of 20-21/2/68 and a plot card issued to them on 21/2/1979. The plot card shows Peter Omosa and

John Mboga the plaintiffs herein were allocated the plot to carry on business of a retail shop and bar. The plaintiffs in their evidence stated that it was in May 2012 that they learnt that their plot had been illegally and unlawfully been subdivided without their knowledge, consent or authority. When the plaintiffs made inquiry from the County Council respecting the subdivision the County Council after investigations affirmed that the subdivision had been unlawfully and fraudulently effected. The Council vide the letter dated 19<sup>th</sup> December 2012 (“PEX.6”) wrote to the 1<sup>st</sup> defendant’s advocates and inter alia stated in the letter thus:-

**“Your clients used fraudulent means of signing subdivision documents pretending that the original allottees Peter Omasa Simba and John Bosco Mboga had transferred ownership of the aforesaid property to them when at no one time have the two parties been before the Town Planning Committee of the Council for approval. Accordingly the Council invited the two parties on 13<sup>th</sup> December 2012 to attend a meeting of Town Planning and Markets Committee with their ownership documents.**

**Your clients failed to attend while the other parties attended and produced their ownership documents.”**

14. When the issue of Plot No. 27 Nyakoe Market was deliberated upon at a special Town Planning and Markets Committee meeting of the council on 13<sup>th</sup> December 2010 it was resolved under Minute 4/2012 Plot No. 27 Nyakoe Market:-

**(i) That the transaction was fraudulently done and the plot should be returned to the original members immediately who are Omasa Simba and John Mboga.**

**(ii) That the minute which transferred the said plot Minute 5/2011 stand nullified.**

**(iii) That Maria Gesare Sagwe and Onyaata Lawrence Omariba should officially launch a claim to be reimbursed the money which they have paid the Council.**

**(iv) That Omasa Simba and John Mboga should clear the arrears.**

15. In reaching the above resolutions the Council found that the original allottees (the plaintiffs) did not execute the instrument of transfer and that it was only the defendants who signed the form. This was irregular and ineffectual and it was on that account the transfer was rescinded for having been procured fraudulently.

16. The defendants did not apart from the plot cards (27A and 27B) which the Council had declared to be a nullity produce any other documents to support their ownership of Plot No. 27 Nyakoe Market. The application to subdivide the plot included in the bundle of documents filed by the 2<sup>nd</sup> defendant on 14<sup>th</sup> April 2016 was not signed by the plaintiffs who were the owners of the plot and neither was it approved by the Council as required. The plaintiffs denied having been party to the application. The court having perused the application to subdivide plot no. 27 Nyakoe Market is satisfied that the plaintiffs did not make the application as they did not sign the same and neither was the same approved by the Council. The court therefore finds the consequent subdivision of Plot No. 27 Nyakoe Market was irregular and null and void for all purposes.

17. On the evidence the court is satisfied the plaintiffs were the original allottees of Plot No. 27 Nyakoe Market and that the plaintiffs as the owners did not sanction and/or consent to any subdivision of the same. Therefore the subdivision of the Plot into portions 27A and 27B was unlawfully done.

18. The defendants claim ownership of Plot Nos. 27A and 27B Nyakoe Market. The court has held that the subdivision of Plot No. 27 Nyakoe Market to create Plot Nos. 27A and 27B was unlawfully done. The 1<sup>st</sup> defendant’s evidence was to the effect that her late husband purchased the plot the subject of the sale from one Okiamba Nyakoe pursuant to an agreement dated 1<sup>st</sup> July 1968 exhibited as “DEX1”. The agreement makes no reference to Plot No. 27 Nyakoe Market or indeed any particular plot. No evidence was adduced by the defendants to show that the said Okiamba Nyakoe in fact owned any plot at Nyakoe Market. The records of the Council are consistent that Plot No. 27 Nyakoe Market belonged to the plaintiffs. The clerk of the Council vide a letter dated 24<sup>th</sup> September 1984 (exhibited in the 2<sup>nd</sup> defendant’s bundle of documents) addressed to the defendants inter alia under paragraph 2 stated:-

**“I wish to inform you that the plot I demarcated was intended for Mr. Peter Omasa who had been issued with plot card no. 27 and he was allocated the plot as far back as 1968.”**

19. On the basis of the evidence, I am satisfied that the defendants have failed to demonstrate they had a legal proprietary interest over Plot No. 27 Nyakoe Market. The subdivision and the subsequent transfer of the subdivisions to the defendants was unlawful and therefore null and void and of no legal effect. The defendants are therefore in unlawful and illegal occupation of the plaintiffs plot and they ought to vacate. It is my determination that they are trespassers onto the suit property.

20. The plaintiffs have made a muted claim for damages for trespass. It cannot be denied that the defendants’ occupation of the suit land has prevented the plaintiffs from making use of the plot as they may have wished. The plaintiffs I am aware have made no basis upon which mesne profits/damages could be assessed. The plaintiff in spite of having been allocated the plot in 1968 do not appear to have put the same to any use and the same remained vacant. It was in May 2012 that they discovered the plot had been illegally subdivided. However, trespass is actionable per se once it is proved and no proof of damage is necessary. In the instant case, I have determined the defendants are trespassers on the plaintiffs plot and are therefore liable to pay general damages for trespass to the plaintiffs. In awarding damages the court has to be guided by the size, location and the value of the property. The subject property is a commercial plot within a fast growing suburb of Kisii Municipality. I award damages in the sum of KShs. 100,000/= to the plaintiffs being damages for trespass.

21. The upshot is that I find and hold that the plaintiffs have proved their case on a balance of probabilities and I enter judgment in their favour against the defendants jointly and severally. I grant prayers (i) – (iii) of the plaint and award general damages of Kshs.100,000/= to the plaintiffs together with interest thereon at court rates from the date of judgment until payment in full.

22. I award the costs of the suit to the plaintiffs.

**JUDGMENT DATED AND SIGNED AT NAKURU THIS 9<sup>TH</sup> DAY OF OCTOBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**JUDGMENT DELIVERED AT KISII THIS 23<sup>RD</sup> DAY OF OCTOBER 2019.**

**J ONYANGO**

**JUDGE**