



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 163 OF 2016**

**LAWRENCE MITHIKA & 26 OTHERS.....PLAINTIFFS**

**VERSUS**

**SOLOMON MUTEA NCHEEBRE & 6 OTHERS.....DEFENDANTS**

**JUDGMENT**

1. This suit was instituted by way of a plaint filed on 15.9.2016 which was amended on 29.6.2018 against the defendants where the following orders have been sought:

*a) A declaration that the plaintiffs are the rightful allottees of the various particularized portions of Land Parcel No. MERU MUNICIPALITY BLOCK II/762.*

*b) An order that the plaintiffs be compensated for the loss, harm and consequential damage occasioned due to closure of the premises by the defendants from the date of filling the case to the date of full payment.*

*b) A permanent mandatory injunction restraining the defendants by themselves, their agents or assignees from demolishing, preventing the plaintiffs from further development and interfering in any way with the quiet possession of the portions of land.*

*c) Cost and interest of this suit.*

2. Through their amended statement of defence filed on 28<sup>th</sup> August 2018, the defendants generally denied the allegations set forth in the plaint.

3. The suit proceeded for hearing and each side called one witness, PW1 being Jediel Gikundi Ambutu while DW1 is Solomon Mutea Nchebere.

4. **PW1 Jediel Gikundi Ambutu** adopted his statement of 14<sup>th</sup> September 2016 as his evidence. He avers that two plaintiffs (6<sup>th</sup> and 7<sup>th</sup> plaintiffs) withdrew their case and now they are 24 plaintiffs. In his recorded statement, PW1 has stated that the association, Meru Jua Kali Artisans was allocated the land parcel Meru/Municipality Block11/762 in 1994 (the suit land) by the commissioner of lands where they got a lease of 99 years. They have another parcel of land where jua kali buildings were constructed but the members who did not get a share there were allocated the Suit Land. Once they got money, they put up some infrastructures and they started developing the place and that defendants did not assist in these developments.

5. According to PW1, in 2016, there was a change of leadership and the new leaders came to evict them from the Suit Land. They locked up the gate with a chain and padlock and chased the watchman. He affirmed that the eviction was illegal as there was no general meeting called to deliberate on the eviction. PW1 averred that the authority to evict them from the land emanates from the treasury as at that time they were the trustees of the suit land.

6. In support of the plaintiff's case, pw1 produced documents in their list dated 14.9.2016 as exhibits 1-3 respectively.

7. The defence side relied on the testimony of **Solomon Mutea Nchebere (DW1)**, who adopted his two statements dated 27<sup>th</sup> and 30<sup>th</sup> May 2017 as his evidence. He stated that he has been a chairman of the association since year 2016 and his term is not yet over. Upon election, the management committee visited the Suit Land in August 2016 where they found the plaintiffs having a meeting and at least 3 unfinished temporary kiosks structures had been put up. One of the plaintiffs' asked them (defendants) to leave as they claimed that the land belonged to them. Defendants then realized that the plaintiffs wanted to put up structure's contrary to the rules and regulations so they locked up the premises to avoid vandalism.

8. DW1 further stated that the two plaintiffs, namely Jediel Gikundi M' Ambutu and David Kiriinya Michael are determined to ensure that the

association does not run its mandate. He asserted that the two plaintiffs had filed earlier suits against the defendants and they were not successful, and that is why they changed tact and initiated this suit. DW1 also stated that the two plaintiffs collected money from unsuspecting members and promised them that they would allocate them plots absolutely.

9. In support of defence case, DW1 produced the 14 documents in their list dated 30.5.2017 as defence exhibits 1-14 respectively.

10. The plaintiffs and defendants filed their respective submissions of which the court has thoroughly perused and given due consideration thereof.

11. The issue for determination is ***whether the Suit Land was allotted and allocated to the plaintiffs and whether plaintiffs should be compensated for the closure of the Suit Land***

12. I find that plaintiff's exhibit 1 is the same document as Defence exhibit 2, which is the certificate of lease of the Suit Land. This document shows that the proprietor of the suit land is the permanent secretary to treasury of Kenya as a trustee of Meru Jua Kali Artisans Association of Nairobi. This means that the nature of interest in the Suit Land is lease hold, in the hands of the permanent secretary to national treasury holding in trust for Meru Jua Kali Artisan Association.

13. **Section 107 of the Evidence Act stipulates as follows:**

***"1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".***

In addition, **Section 109 of the Evidence Act** provides that:

***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

14. In the case of **China Wuyi and Co Limited v Samson K Metto [2014] eKLR** it was held that:

***"The cardinal principle of law that, 'he who alleges must prove' is also well captured in Sections 107 to 109 of the Evidence Act ..."***

15. Therefore, since the plaintiffs seeks this court to deem that the Suit Land was allotted and allocated to them and judgment to be delivered in their favour, then it goes without saying that the burden lies on them to prove such allegations.

16. According to PW1's recorded statement, the association got the title from the commissioner of lands as a lease of 99 years. However, the title availed by all the parties does not support this averment. PW1 also averred that those members who did not get the houses are the ones who got the suit land. He has availed a sketch plan of the Suit Land (*P. Exh. 2*) and a list of names showing which members had been allotted which portion (*P. Exh. 3*). Looking at the two documents, I find that they are unregistered and one cannot tell their origin. There is no evidence to indicate that the alleged subdivision of the suit land and allocation thereof was sanctioned by the permanent secretary to treasury of Kenya or the jua-kali association itself. PW1 also confirmed that the alleged allocation and subdivision of the suit land was not sanctioned by the Micro and Small Enterprise Authority (MSEA) and he had no resolutions or minutes from the association. However, during cross examination, PW1 admitted having issued the receipts on pages 11,12 and 13 in defence bundle of documents. His explanation regarding those receipts was as follows;

***"The money was for the sub lease.....I was paid the money in order to prepare the leases".***

17. This is a clear indication that indeed PW1 had been collecting money from some people in order to allocate them the land, hence the sketch plan. However, PW1 and the other plaintiffs had no legal mandate and no basis at all to sub divide and allocate to themselves the suit land.

18. The defence has submitted that the dispute herein is between members of the association which falls under the ambit of section **54 of the Micro and Small Enterprise Act No.55 of 2012**, the association being an enterprise. The defence therefore avers that the suit is in the wrong forum and must fail for want of jurisdiction. I have no doubts that the association appears to have factions pitting plaintiffs on one hand and defendants on the other hand. That dispute did spill over in courts via **Meru case C.M.C.C. NO.63 of 2016** (see page 17 of defence bundle) and **Meru C.M.C.C.NO. 188 of 2016** (see page 21 of defence bundle) of which the plaintiffs allegedly lost in the two suits. However, I will desist from determining the issue of jurisdiction seeing that the same was not raised in the pleadings, nor was it canvassed during the trial, save to add that during the trial, DW1 had only stated that they were helped by Micro and Small Enterprise Office in Meru in stopping the mischief which was being perpetrated by the plaintiffs.

19. As far as the dispute is concerned, I find that the suit land belongs to the government but the beneficial interests lies with the association. Further, I do note that PW1 recognizes DW1 as the chairman of the association when he says that **"The chairman is still Solomon Mutea..."**. Thus the association through its officials is the one with the mandate to determine the use and occupation of the suit land, where as any subdivision of the land must be sanctioned by the government.

20. The plaintiffs have not given a legal basis as to how they were allotted and allocated the suit land. I therefore find that the plaintiffs have not discharged their burden of proof to warrant this court to grant orders in their favour.

21. On the issue of compensation for loss, harm and consequential damage due to the closure of the Suit Land, I find that the plaintiffs are not entitled to any such compensation in view of this court's finding that the plaintiffs have not proved that the suit land belongs to them.

22. Accordingly, I hereby dismiss this suit with costs to the defendants.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 9<sup>TH</sup> DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Gikonyo holding brief for Mwititi for plaintiff

Mwanzia for defendants

Plaintiffs (four of them)

Defendants (five of them)

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**