



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 837 OF 2017

(Formerly Nairobi HCCC No. 203 of 2007 & Machakos ELC No. 194 of 2008)

LILIAN WAMBUI KURIA.....PLAINTIFF

VERSUS

OL KEJUADO COUNTY COUNCIL....DEFENDANT

JUDGEMENT

By a Plaint dated the 10th July, 2007, the Plaintiff prays for judgement against the Defendant for:

- a. A declaration that the Plaintiff's plot number 638 (R) is not on a road reserve and an attempt by the Defendant to mark her building for demolition is illegal and unlawful.
- b. An order of permanent injunction restraining the Defendant, their servants, agents and employees from interfering with the Plaintiff's right of peaceful enjoyment of plot number 638(R) Ongata Rongai.
- c. Costs of this suit.

The Defendant filed its Statement of Defence dated the 13th August, 2007 where it denied the averments in the Plaint except for the description of the parties and jurisdiction of the court. It denied that the Plaintiff is the allottee of the suit plot. It further denied that the Plaintiff had constructed 16 rooms on the said plot which are occupied by tenants. It disputed that on 6th July 2007 its officers marked the premises on the suit plot with an X mark indicating the said premises were targeted for demolition as they were on a road reserve. Further, that the Plaintiff had obtained the relevant map confirming that she had not built on a road reserve. It further disputed that the intended demolition of the Plaintiff's building is illegal, unlawful and an encroachment into her private property. It averred that the Plaintiff as an alleged allottee without title did not have proprietary rights known in law and lacks capacity or locus standi to bring as well as maintain this suit.

The Plaintiff filed her Reply to Defence dated the 31st August, 2007 and lodged in Court on 3rd September, 2007 where she reiterated her claim and explained that she purchased the suit plot from Wilson Kinyanjui and the same was transferred to her on 18th August, 1981 upon payment of Kshs. 1500 transfer fees and Kshs. 500 as Clearance fees, to the Defendant.

The hearing proceeded on 16th May, 2019 with the Plaintiff's case only as the Defendant though duly served on 26th February, 2019 as evident in the affidavit of service sworn on 13th May, 2019 failed to attend court.

Evidence of the Plaintiff

The Plaintiff as PW1 adopted her witness statement dated the 15th July, 2013 as part of her evidence in Chief and explained that she owns plot 638 (R) at Ongata Rongai which she purchased from Wilson Kinyanjui for Kshs. 25,000/=. It was her testimony that upon payment of the purchase price, the said Wilson Kinyanjui transferred the suit plot in her name. She has continued to pay rates for the plot. In 1985 she decided to develop her plot and presented building plans to the Defendant for approval which it did. Further, the Plaintiff constructed sixteen (16) residential units on the plot which are occupied by tenants. In 1982 the Plaintiff was involved in a dispute over the suit plot and in a letter dated the 15th April, 1982, the Defendant confirmed she was the owner of the said plot. In 2007, the Defendant sought to demolish the Plaintiff's plot and its agents put an 'X' mark on it, indicating she had built on a road reserve, which fact the Plaintiff denies. The Plaintiff produced various documents including the Transfer Form of Plot No. 638(R); Letter from the Ol Kejuado County Council dated 15th April, 1982; Payment Receipts issued by Ol Kejuado County Council; Copy of a Map for the Area and Copies of photographs of the buildings as

her exhibits.

The Plaintiff closed her case and filed submissions.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Plaintiff's testimony, Exhibits and Submissions the following are the issues for consideration:

- Whether the Plaintiff is a bona fide owner of plot 638(R) Ongata Rongai.
- Whether the Plaintiff's plot number 638 (R) is on a road reserve.
- Whether the Defendant its servants, agents and employees should be permanently restrained from interfering with the Plaintiff's right of peaceful enjoyment of plot number 638(R) Ongata Rongai.
- Who should bear the costs of the suit.

As to whether the Plaintiff is a bona fide owner of plot 638(R) Ongata Rongai. The Plaintiff claims to have purchased the plot 638(R) from one Mr. Wilson Kinyanjui for Kshs. 25,000/=. PW1 in her testimony confirmed that before Mr. Wilson Kinyanjui could sell the plot to her, he obtained Rate Clearance Certificate for the year ending 31st December, 1981 on 21st August, 1982. After purchase the Plaintiff took possession of the suit plot and commenced paying rates to the Defendant. She produced Payment Receipts issued by Ol Kejuado County Council as her exhibits. The Plaintiff also produced a letter dated the 15th April, 1982, from the Defendant where it confirmed that she was the owner of the suit plot. The Defendant in its Defence contended that the Letter of Allotment did not give the Plaintiff proprietary rights over the suit plot. However, I note that the Defendant indeed effected a transfer from Wilson Kinyanjui to the Plaintiff as evident in the Transfer Form for Plot No. 638 (R), which PW1 produced as an exhibit. It was the Plaintiff's contention that she has been in quiet possession of the suit plot from 1981 and considerably developed the same with the consent and knowledge of the Defendant. The Plaintiff further submitted Development Plans for approval by the PHO District Commissioner and the Clerk to Council which was done. Further, the Transfer of the plot letter from Wilson Kinyanjui to Plaintiff was copied to Revenue Assistants of the Defendant in Ngong as well as the Plaintiff, vide the Defendant's document referenced CCC.LND. 16/OR/TR/TC.1/VOL.11/1981 dated 21st August, 1981. Insofar as the Defendant disputes the Plaintiff's ownership of the suit plot, it failed to explain why it issued her with a Transfer Form, Received land rates from her in respect to the said plot, approved her building plans and not cancelled the said Transfer Form. To my mind, the evidence presented by the Plaintiff in respect to her ownership of the suit plot is overwhelming. In the circumstance, I find that the Plaintiff is indeed the owner of the suit plot.

As to whether the Plaintiff's plot number 638 (R) is on a road reserve.

The fulcrum of the suit herein revolves around the Defendant's marking the suit plot as being on a road reserve. The Plaintiff in her evidence confirmed that it is the Defendant who approved her building plans after which she proceeded to build. As per the map the Plaintiff produced in Court as an exhibit, which was not challenged by the Defendant, it is indeed evident that the suit plot is indeed not on a road reserve.

As to whether the Defendant its servants, agents and employees should be permanently restrained from interfering with the Plaintiff's right of peaceful enjoyment of plot number 638(R) Ongata Rongai. Since I have already held that the Plaintiff is the legal owner of the suit plot and has been in quiet possession of the same with the knowledge and acquiescence of the Defendant. In associating myself with the decision in **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'. I find that the Plaintiff is indeed entitled to protection of the law. I disagree with the Defendant's averment that she has no proprietary rights over the suit plot since they had confirmed she was the owner of the suit plot way back in 1982. In the case of **Samuel Mbugua Gachuhi V City Council of Nairobi & 2 Others (2008) eKLR** the Judge held that:

... the Court had noted that the said first allotment letter to the original plaintiff had never been cancelled. That that the council had no power to allottee the same property against without following the laid down procedure.....'

In associating myself with this decisions, I hold that since the Defendant never adduced any evidence to prove that they had attempted to cancel the transfer form of plot 638 (R) issued to the Plaintiff, I hold that the said transfer is still valid. Further, it has continued to receive rates from the Plaintiff in respect of the suit plot. In the circumstance, I direct that the Defendant or its agents are hereby permanently restrained from interfering with the Plaintiff's peaceful possession and occupation of the suit plot.

The Plaintiff in her submissions sought for damages which he never pleaded nor adduced evidence to. It is trite law that parties are bound by their pleadings and since the same was not pleaded, I decline to grant damages as sought in the submissions.

As to who should bear the costs of the suit. Costs generally follow the cause and since the Plaintiff is the successful party herein, I will proceed to award her the costs of the suit.

It is against the foregoing that I find that the Plaintiff has proved her case on a balance of probability and will proceed to make the following final orders:

- a. A declaration be and hereby issued that the Plaintiff's plot number 638 (R) is not on a road reserve and an attempt by the Defendant to mark her building for demolition is illegal and unlawful.
- b. A permanent injunction do and is hereby issued restraining the Defendant, its servants, agents and employees from interfering

with the Plaintiff's right of peaceful enjoyment of plot number 638(R) Ongata Rongai.

c. Costs of this suit to borne by the Defendant.

Dated signed and delivered in open court at Kajiado this 28th day of November, 2019

CHRISTINE OCHIENG

JUDGE