



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 299 OF 2010

MARTHA WAMBUI KINYUA.....PLAINTIFF

VERSUS

BEATRICE WANJIRU KAMBO.....1ST DEFENDANT

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND.....2ND DEFENDANT

JUDGEMENT

1. The Defendant owned the parcel of land known as Nairobi/Block 97/1163/008/1 which it caused to be subdivided into plots and offered to members of the public for sale. The Plaintiff claims that she purchased plot number Tassia-II-97/1163/008/1 on 21/5/2007, from Zacharia Karanja Ngugi who was the original allottee. She averred that the 2nd Defendant facilitated the transfer of this plot and executed a tenant purchase agreement for the plot at the consideration of Kshs. 315,000/= . The Plaintiff claimed that upon signing the tenant purchase agreement, the plot was pointed out to her and she took possession and fenced it. The Plaintiff paid the consideration in full. The Plaintiff claimed that the 1st Defendant trespassed on the suit plot and constructed a permanent house claiming it to be plot number Tassia-II-97/1163/370/1 which the 2nd Defendant allocated to her.

2. The Plaintiff averred in the Further Amended Plaint filed in court on 28/9/2010 that the Defendants had colluded to deprive her of her plot while pretending that plot number Tassia-II-97/1163/370/1 was different from plot number Tassia-II-97/1163/008/1, which is her plot. The Plaintiff seeks a declaration that plot number Tassia-II-97/1163/370/1 and plot number 97/1163/008/1 is one and the same plot. She also seeks a declaration that she is the lawful owner of plot number 97/1163/008/1, and a permanent injunction to restrain the Defendants or their agents from trespassing, alienating, continuing construction or otherwise dealing with her plot known as 97/1163/008/1. The Plaintiff also seeks an order to evict the 1st Defendant from the suit plot.

3. In its defence filed in court on 10/9/2014, the 2nd Defendant denied the Plaintiff's claim or that it had acted fraudulently as pleaded by the Plaintiff. The 2nd Defendant denied ever allocating plot number 97/1163/008/1 to any other person other than the Plaintiff and denied allowing the 1st Defendant to occupy plot number 97/1163/008/1 belonging to the Plaintiff or that it had altered the approved subdivision and allocation maps.

4. The 1st Defendant did not file a defence. She only filed a replying affidavit on 14/7/2010 in response to the Plaintiff's application for injunction.

5. The Plaintiff testified. She stated that she was the owner of plot number 97/1163/008/1 having acquired it from the 2nd Defendant on 9/4/2008 through a tenant purchase agreement. She paid the consideration in full to the 2nd Defendant through monthly installments. She averred that the 2nd Defendant's surveyor pointed out the plot to her and she took possession of it. Her neighbor informed her in May 2010 that somebody had begun digging trenches and was delivering building materials on her plot in preparation to commence construction. Her attempts to stop the 1st Defendant from developing her plot through the Chief's office were unsuccessful after the 1st Defendant threatened her with physical violence.

6. She produced a copy of the application form for Tassia II and 3 plots prepared by the 2nd Defendant. She also produced a copy of the sale agreement dated 21/5/2007 which she entered into with Zacharia Karanja Ngugi. She produced a copy of the tenant purchase agreement dated 9/4/2008 that she entered into with the 2nd Defendant for the purchase of the suit plot. She produced copies of her statements of accounts for the payments she made to the 2nd Defendant in respect of the plot. She also produced a receipt issued by Geoinfo Surveys Limited dated 14/6/2010 for the payment of Kshs. 3,000/= for plot verification. The report prepared by these surveyors dated 14/6/2010 confirmed that the suit plot had been developed. The Plaintiff produced a copy of the 2nd Defendant's letter dated 17/6/2010 confirming that the Plaintiff had entered into a tenant purchase agreement with the 2nd Defendant and that she had paid a deposit and would pay the balance

of the purchase price through the tenant purchase scheme. The letter noted that the subdivision for the scheme was awaiting approval from the relevant Government department. The Plaintiff produced undated photographs depicting the developments that had been erected on the Suit Property. The Plaintiff stated that the 1st Defendant told her that the 2nd Defendant had sold the same plot to her.

7. Enos Cherono, the Loans Officer in charge of Tassia Project Embakasi gave evidence on behalf of the 2nd Defendant. He stated that in 2001 the 2nd Defendant's property was grabbed and occupied by unknown people who formed groups and purported to sell the plots to unsuspecting members of the public. The Plaintiff bought the suit plot from Zacharia Karanja Ngugi who had been allotted the plot by Kwandege Self Help Group. The Plaintiff applied to be registered in the 2nd Defendant's tenant purchase scheme on 21/5/2007 and was registered on 9/4/2008.

8. On 17/6/2010 the 2nd Defendant received a complaint from the Plaintiff that somebody was developing plot number 97/1163/008/1 while seeking verification from the 2nd Defendant that the suit plot belonged to her. The witness produced a copy of the letter dated 7/6/2010 confirming that the Plaintiff was the owner of plot number 97/1163/008/1. The 2nd Defendant stated that according to its records the Plaintiff was the owner of plot number 97/1163/008/1. The 2nd Defendant maintained that it had been wrongly sued in this case. The witness confirmed that the Plaintiff paid the full purchase price for the suit plot. Title deeds had not been issued.

9. He relied on the 2nd Defendant's letter dated 30/11/2011 addressed to the 1st Defendant in which it stated that in the process of regularising the plan that was approved by the City Council of Nairobi in December 2008, the surveyor informed the 2nd Defendant that plot number Nairobi/Block 97/1163/370/1 did not exist. The witness produced a copy of sale agreement dated 5/5/2009 entered into by Michael Omondi Opiyo and the 1st Defendant for the sale of plot number B370/1 situated in Tassia Estate (Kwandege Self Help Group). The purchase price was Kshs. 1,015,000/=. He also produced a copy of the letter dated 5/5/2009 from Michael Omondi to the 2nd Defendant's Managing Trustee stating that Mr. Omondi had transferred his interest in the plot to Beatrice Wanjiru Kambo.

10. Parties filed submissions which the court has considered. The Plaintiff submitted that she was the rightful owner of the Suit Property having purchased it from the 2nd Defendant and having paid the full purchase price. She submitted that the 2nd Defendant had confirmed her ownership of the plot and that all the documents she held in respect of the suit plot were genuine. The Plaintiff claimed that the 2nd Defendant's act of issuing plot number Tassia-II-97/1163/0370/1 to the 1st Defendant was illegal and fraudulent since on the ground it was the Plaintiff's plot, and was intended to unlawfully dispossess the Plaintiff of her plot.

11. The Plaintiff submitted that she had proved her case on a balance of probabilities and made reference to the 1st Defendant's replying affidavit dated 14/6/2010. She submitted that the Defendant had failed to provide crucial documents such as tenant purchase agreement, provisional letter of allocation or any other documents to confirm her ownership of the property. The Plaintiff relied on Sections 107 and 109 of the Evidence Act in support of the averment that he who alleges must prove.

12. The Plaintiff submitted that she had been denied access to her land by the 2nd Defendant through its failure to furnish her with the necessary documents and to execute the title deed in her favour. She submitted that the 1st Defendant had without lawful consent trespassed onto her property and developed permanent structures and was residing on the land. The Plaintiff sought an award of Kshs. 30,000/= per month for 9 years as mesne profits. In the alternative, she sought to be compensated for the loss and damage she had suffered in terms of the payment of the prevailing market value of the land at Kshs. 10 million.

13. The 2nd Defendant submitted that the Plaintiff had failed to prove the allegations of fraud against it. Further, that the Plaintiff had failed to provide evidence that the 2nd Defendant was allocated plot number Tassia-II-97/1163/008/1. The 2nd Defendant denied that it had colluded with the 1st Defendant to illegally alienate this plot. The 2nd Defendant maintained that the Plaintiff had failed to prove her claim against it and that the Plaintiff did not plead or prove the mesne profit she claims against the 2nd Defendant.

14. The issue for determination is whether the court should grant the orders sought by the Plaintiff. Both the Plaintiff and the 2nd Defendant admit that they entered into a tenant purchase agreement in respect of the plot known as Tassia-II-97/1163/008/1 and that the Plaintiff paid the agreed purchase price. The Plaintiff averred that the 1st Defendant had constructed on her plot and was living there. The bone of contention is the 2nd Defendant's sale of Tassia-II-97/1163/0370/1 to the 1st Defendant.

15. The court is inclined to look at the 1st Defendant's Replying Affidavit filed in court on 14/7/2010 and the documents in support of her claim of ownership of the disputed land. She attached receipts issued by the 2nd Defendant for payments she made on 2/10/2009, 2/10/2009 and 24/4/2010 in respect of Tassia-II-97/1163/370/1. She attached a tenant purchase scheme transaction report for 2/10/2009, a beacon certificate issued by Geoinfo Surveys Limited together with the surveyor's letter dated 28/6/2010 confirming that the 1st Defendant was developing plot number Tassia-II-97/1163/0370/1. She annexed letters from the 2nd Defendant dated 13/10/2009 and 6/11/2009 confirming that she purchased plot number Tassia-II-97/1163/0370/1 from the 2nd Defendant and had been registered as the owner of plot number Tassia-II-97/1163/0370/1.

16. Neither the Plaintiff nor the 2nd Defendant led evidence to show that indeed plot number Tassia-II-97/1163/0370/1 is the same as plot number Tassia-II-97/1163/0370/1 on which the 1st Defendant has constructed her house. No surveyor was called to give evidence of the physical location of the plot claimed by the Plaintiff. What is clear from the documents is that the 2nd Defendant entered into two different sale agreements with the Plaintiff and the 1st Defendant and that the 1st Defendant took possession of the plot she bought and constructed on it.

17. It was incumbent upon the 2nd Defendant to point out the plots it was selling to the Plaintiff and the 1st Defendant and if it ascertained

that the 1st Defendant had built on the Plaintiff's plot; it should have addressed the matter by allocating the Plaintiff a different plot or refunding the purchase price she paid. The Plaintiff sought compensation in the sum of Kshs. 10,000,000/= as the prevailing market rate for the plot in the written submissions filed in court. The Plaintiff neither sought this prayer in her plaint nor did she lead evidence to establish the current value of her plot. In the court's view, the Plaintiff's recourse lies in pursuing the value of the plot she purchased from the 2nd Defendant, which the Plaintiff did not seek in her Further Amended Plaint.

18. Without proof that plot number Tassia-II-97/1163/008/1 is the same as Tassia-II-97/1163/0370/1, the court declines to issue the declarations sought by the Plaintiff and the other reliefs sought in the Further Amended Plaint.

19. The Plaintiff is awarded the costs of the suit to be borne by the 2nd Defendant.

Dated and delivered at Nairobi this 19th day of November 2019

K.BOR

JUDGE

In the presence of: -

Ms. C. Abok holding brief for Kamau Mwangi for the Plaintiff

Ms. M. Adongo holding brief for Ms. Kipruto for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 1st Defendant