



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 121 OF 2017**

**MARGARET NYASIRI GONGI.....PLAINTIFF**

**VERSUS**

**SYLANUS WERE.....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that on or about the 9<sup>th</sup> day of July 1999 she was allocated the two Jua Kali plots number 218 and 219 situated at Jua Kali Phase 11 within Kakamega Municipality. The plaintiff further avers that she acquired the suit property for valuable consideration from one Florence A. Anyango who surrendered the allotment letter thereof. The plaintiff avers that she has been peacefully enjoying her proprietary right over the same suit property since then. The plaintiff avers that in nearly 2017 the defendant without any colour of right whatsoever, entered the suit property and demolished the foundation of a building thereon and commenced erecting structures on the same. The plaintiff avers that her attempts to stop the defendant proved futile as the defendant persisted in his transgressions which prompted the plaintiff to lodge a complaint with the town manager. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant by himself, his servants, agents and/or employees from in any way whatsoever interfering, intermeddling, entering, constructing and/or remaining in the Jua Kali Phase 11 Plot Nos 218 and 219 respectively. The plaintiff prays for the judgement against the defendant for:-

1. A permanent injunction.
2. Costs of this suit and interests herein.
3. Any other relief that this honourable court may deem fit and just to grant.

The defendant avers that no allotment letter was surrendered by one Florence Anyango. The defendant avers that Jua Kali Association is the owner of all that parcel of land known as Kakamega Jua Kali Block 1/40 phase 1 and 11 the said land having been planned, set aside and eventually transferred by the defunct Municipal Council of Kakamega in 2003 to Kakamega Jua Kali Association for use by the Jua Kali artisans who could then purchase the same at a fee from their Association plot numbers 209, 218 and 219 are among the Jua Kali plots. That the plaintiff was issued with an allotment letter on 11<sup>th</sup> October 2003. The plaintiff having taken possession of the property, refused and/or neglected to abide by clauses(a-d) of the allotment letter constraining Jua Kali Association to issue several notices which the plaintiff ignored. The plaintiff did not acquire the suit property from Florence A. Anyango in 2000 and the letter purported to have been issued by the Municipal Council of Kakamega and dated 9<sup>th</sup> July 1999 is suspicious as the purported sale took place on 11<sup>th</sup> February 2000 and further the Municipal Council of Kakamega did not at any time issue allotment to any persons and as such the said letter is a forgery. That clause(f) of the allotment letter provided that failure to abide by the conditions laid down by the association, the association shall have power to repossess the shed and reallocate the same to another artisan automatically and further no notice shall be given for one to construct and operate shed. The defendant avers that Jua Kali Association issued a repossession notice on diverse dates for the plaintiff to show cause why the property should not be repossessed, however the plaintiff ignored the same constraining the said Jua Kali Association to repossess shed numbers 218 and 219 in line with clause (d) and (f) of the allotment letter issued to the plaintiff.

This court has considered the application and the submissions therein. The plaintiff testified that she acquired the suit property for valuable consideration from one Florence A. Anyango who surrendered the allotment letter thereof ( PEx 1 is the sale agreement). The plaintiff further testified that on or about the 9<sup>th</sup> day of July 1999 she was allocated the two Jua Kali plots number 218 and 219 situated at Jua Kali Phase 11 within Kakamega Municipality (PEx 2 is the allotment letter). She avers that she has been paying rates from 2000 to 2017 and she produced a bundle of receipts PEx3. It was only in 2017 that the defendant without any colour of right whatsoever, entered the suit property and demolished the foundation of a building thereon and commenced erecting structures on the same. In the case of Joseph N. K. Arap Ngok... Vs...Justice Moiyo Ole Keiwa & 4 Others, Civil Appl. No.60 of 1996, the Court of Appeal held that:-

*“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.”*

The above position was also held in the case of Wreck Motor Enterprise vs The Commissioner of Lands & Others (1997), where the Court of Appeal also held that:-

*“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”*

This is the position held by the Court of Appeal in the case of Dr. Joseph Arap Ngok Vs Justice Moiyo Ole Keiwa & 5 Others (supra), where the Court held that:-

*“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.*

DW2 the chairman of the Jua kali Association testified that that Jua Kali Association is the owner of all that parcel of land known as Kakamega Jua Kali Block 1/40 phase 1 and 11 the said land having been planned, set aside and eventually transferred by the defunct Municipal Council of Kakamega in 2003 to Kakamega Jua Kali Association for use by the Jua Kali artisans who could then purchase the same at a fee from their Association plot numbers 209, 218 and 219 are among the Jua Kali plots. That the plaintiff was issued with an allotment letter on 11<sup>th</sup> October 2003. The plaintiff having taken possession of the property, refused and/or neglected to abide by clauses(a-d) of the allotment letter constraining Jua Kali Association to issue several notices which the plaintiff ignored (DEx 5 are the various notices). They then repossessed the suit plots and sold it to a third party (DEx6 is the allotment letter). DW2 the Chairman of Wapendanao Self Help group confirms selling the plots to the defendant (DEx1 is the sale agreement). This was after utilizing the plots from 2014 to 2016. The defendant testified that he purchased the plots from DW3 and has developed the same. He produced evidence of approved building plans DEx4. I find that the plaintiff has failed to establish that she complied with terms of the allotment letter by taking possession and developing the same. Clause 1 to 5 of her allotment letter dated 9<sup>th</sup> July 1999 required her to take possession and construct a shed within 12 months. Indeed she never took any steps to recover the same way back in 2014 when the suit plots were re allocated to DW2. Paying rates is not proof of possession or ownership in this case. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DECEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**