



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 756 OF 2012**

**JAMES KIMANI HORERIA.....PLAINTIFF**

**VERSUS**

**JOHN MWAGO WERU.....1<sup>ST</sup> DEFENDANT**

**THE TOWN CLERK, CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated the 25<sup>th</sup> October, 2012, the Plaintiff prays for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and/or severally for:

- a) Special Damages amounting to Kshs. 37, 950/= as prayed in paragraph 15 of the Plaint together with interest at Court rates;
- b) A Declaration that Plot 85 Kariobangi Light Industries Nairobi belongs to the Plaintiff absolutely.
- c) A permanent injunction restraining the 1<sup>st</sup> Defendant, by himself, his Agents and/or servants from in any way dealing with the suit premises or from continuing with any construction of any erections, buildings and/or any structures on the said parcel or piece of land or at all and from preventing the Plaintiff in any manner from entering, using and/or the quiet enjoyment of the suit premises as his land.
- d) An order for eviction of the 1<sup>st</sup> Defendant from the suit land parcel No. 85 aforesaid and for demolition and removal from the suit premises by the 1<sup>st</sup> Defendant of all the structures, erections, building materials and/or other constructions thereon at his cost.
- e) An order compelling the 2<sup>nd</sup> Defendant to issue the Plaintiff with the Beacon Certificate for Plot No. 85 and the Lease for the same.
- f) General Damages against the 1<sup>st</sup> Defendant for Trespass to Land, illegal occupation, Mutation, Damaging, Digging, Excavating and/or interfering with the Landscape of Plot No. 85 aforesaid and putting the suit premises into the same condition in which they were made prior to December, 2011 when the Plaintiff first made a demand and gave the 1<sup>st</sup> Defendant notice, to cease from encroaching and complained to the 2<sup>nd</sup> Defendant, together with interest at Court rates.
- g) Exemplary Damages together with Interest at Court rates
- h) Costs of this suit together with Interest at Court rates.
- i) Such further and/or other Relief as this Honourable Court may deem fit and just to grant in the circumstances of this case in the interests of justice.

The 2<sup>nd</sup> Defendant filed its Statement of Defence on 10<sup>th</sup> December, 2012 where it opposed the Plaintiff's claim herein.

**Evidence of the Plaintiff**

The Plaintiff as PW1 stated that he is the proprietor of Plot No. 85 Kariobangi Light Industries, which was originally allocated by the Nairobi City Council on 23<sup>rd</sup> May, 1979 to Zakayo Makumi. On 19<sup>th</sup> April, 1985, Zakayo Makumi sold the plot to the Plaintiff for Kshs. 35,000/=.

Further, the Town Clerk for the Nairobi City Council confirmed in writing the allotment to the Plaintiff pending the issuance of a Lease. PW1 testified that Plot No. 85 was pointed out to him by a Surveyor from the Nairobi City Council in April, 1985 and given a Map used during the allocation for purposes of identification. Further, according to the Map, the Plaintiff's plot was adjacent to Plot No. 84 and is almost triangular in shape because it is allocated at the point where the direction changes. PW1 received information in March, 2012 that a stranger had encroached on his plot and started excavating it with a view to commencing development thereon. He confirmed that there were workers on his plot who informed him they were constructing on plot No. 87 belonging to the 1<sup>st</sup> Defendant. The said workers ignored his orders for them to cease constructing thereon. He served a notice dated the 22<sup>nd</sup> March 2012 to the 1<sup>st</sup> Defendant to stop constructing on plot No. 85 but he ignored. Further, the Chief of Kariobangi Location served the 1<sup>st</sup> Defendant with a notice dated the 23<sup>rd</sup> March, 2012 to stop construction on his plot until dispute is resolved but he disregarded it. PW1 reported to the 2<sup>nd</sup> Defendant's Planning Department on 2<sup>nd</sup> April, 2012 but 1<sup>st</sup> Defendant failed to stop constructing on suit plot. He wrote a letter dated 11<sup>th</sup> April, 2012 to the Chief Valuer who confirmed vide his letter dated the 19<sup>th</sup> April, 2012 that plot No. 85 belonged to him and requested the Chief Land Surveyor to point to him the physical location of the said plot. Further, the Chief Land Surveyor wrote a Memo dated the 28<sup>th</sup> May, 2012 to the Assistant Director Enforcement asking him to take action and stop construction but the 1<sup>st</sup> Defendant failed to take heed and finished the construction of this building. He produced the Sale Agreement dated 19<sup>th</sup> April, 1985; letter dated 22<sup>nd</sup> March, 2012; Memo dated 28<sup>th</sup> May, 2012; Letter dated 19<sup>th</sup> April, 2012; Summon from Chief dated 23<sup>rd</sup> March, 2012; Letter of Allocation dated 31<sup>st</sup> May, 1979; Scheme Map with Plot No. 85 Highlighted; Sketch Map drawn by P. Kande of City Council Survey Section dated 28<sup>th</sup> August, 1985; Receipts of payment of Beacon Certificate; Letter from Plaintiff's Advocates dated 26<sup>th</sup> March, 2012 applying for Beacon Certificate; Letter dated 28<sup>th</sup> March, 2012 from his advocates to the City Council; City Planning letter dated 16<sup>th</sup> December, 2011; Beacon Certificate for plot. No. 87 as his exhibits.

PW2 who was a valuation clerk in Honoreria & Company Ltd confirmed delivering letters to the 1<sup>st</sup> Defendant, Chief of Kariobangi and Nairobi County Government.

### **Evidence of the 1<sup>st</sup> Defendant**

The 1<sup>st</sup> Defendant failed to attend Court to testify while the 2<sup>nd</sup> Defendant relied on the documents they had filed in respect to the case herein.

The Plaintiff and the 1<sup>st</sup> Defendant filed their respective submissions which I have considered.

### **Analysis and Determination**

Upon consideration of the Plaintiff, Testimonies of the Plaintiff's witnesses', Plaintiff and Defense exhibits the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff sought for various orders including Special Damages amounting to Kshs. 37, 950/=; Declaration that Plot 85 Kariobangi Light Industries Nairobi belongs to him; A permanent injunction restraining the 1st Defendant, by himself, his Agents and/or servants from in any way dealing with the suit premises or from continuing with any construction of any erections, buildings and/or any structures on the said parcel or piece of land or at all and from preventing the Plaintiff in any manner from entering, using and/or the quiet enjoyment of the suit premises as his land; An order for eviction of the 1st Defendant from the suit land parcel No. 85 aforesaid and for demolition and removal from the suit premises by the 1st Defendant of all the structures, erections, building materials and/or other constructions thereon at his cost.; An order compelling the 2nd Defendant to issue the Plaintiff with the Beacon Certificate for Plot No. 85 and the Lease for the same.; General Damages; Exemplary Damages together with Interest at Court rates; Costs of this suit together with Interest at Court rates. The 1<sup>st</sup> Defendant despite filing a replying affidavit to the Plaintiff's application for injunction failed to file a Defence within the requisite period. His application seeking leave to file a Defence out of time was also dismissed. The 2<sup>nd</sup> Defendant participated in the hearing but failed to call a witness to testify. The Plaintiff in his submissions insist that his evidence is uncontroverted hence remains unshaken. He relied on various authorities including **Mortex Knitwear Limited V Gopitex Knitwear Mills Limited Nairobi HCCC 834 of 2002 (unreported); Trust Bank Limited V Paramount Universal Bank Limited & 2 others, Nairobi HCCC No. 1243 of 2001; Interchemie EA Limited V Nakuru Veterinary Centre Limited Nairobi HCCC No. 165B of 2000; Charter House Bank Ltd (Under Statutory Management) V Frank N. Kamau Civil Appeal No. 87 of 2014; Karuru Munyoro V Joseph Ndumia Mungai & Anor Nyeri HCCC No. 95 of 1988; Karugi and Anor V Kaluya & 3 Ors (1987) KLR 347; Departed Asians Property Custodian Board V Issa Bukonya t/a New Mars Ware House CA No. 26 of 1992** to buttress his arguments. On the issue of General Damages, the Plaintiff relied on the case of **Drapery Empire V the Attorney General Nairobi HCCC 2666 of 1996 and Terry Kanywa Maragu V Wells Fargo Ltd Meru HCCC No. 18 of 2013** to support his argument on the quantum of damages.

The 2nd Defendant in its submissions denied any wrongdoing and blamed the 1<sup>st</sup> Defendant for continuing with construction on the disputed site. It denied the allegations of fraud and misrepresentation. It contended that while looking into the dispute herein, the 1<sup>st</sup> Defendant continued to construct on the disputed parcel. It relied on the case of **Vivo Energy Kenya Limited (Initial Party Kenya Shell Limited) V George Karunji (2014) eKLR** to support its arguments.

Insofar as the 1<sup>st</sup> Defendant never filed a Defence and with the Defendants failing to adduce any evidence, I opine that the burden of proof was upon the Plaintiff to prove his case and will proceed to analyze the evidence presented before court. The Plaintiff in his pleadings admitted that the 1<sup>st</sup> Defendant owns plot No. 87 while he owns plot 85. He contended that the 1<sup>st</sup> Defendant had built on his plot No. 85 and that was the reason he filed this suit. In the documents produced as exhibits, I note in the Letter of Allotment, the Plaintiff was allocated an unsurveyed plot No. 85 Kariobangi Light Industries. As per the Beacon Certificate dated 31<sup>st</sup> March, 2011 for Plot 87, the plot diagram and dimensions were indicated thereon. Further the said Certificate is signed by the Chief Land Surveyor for the 2<sup>nd</sup> Defendant wherein it is confirmed that one SM Karani (Original Land Surveyor) surveyed the boundaries, which were pointed out by Nicodemus Oguta (Land surveyor). The Plaintiff has produced various drawings indicating the physical location of plot No. 85 but on a keen perusal of the same, it is not clear where the same originated from as they are not certified. The Plaintiff has further produced an extract of a map to demonstrate the

location of plot No. 85 but I note the said map is also not authenticated. As per the Letter of Allotment dated the 31<sup>st</sup> May, 1979 in respect to Plot No. 85, the Allottee was expected to develop the said plot in two years. Further, in the letter dated the 19<sup>th</sup> April, 2012, the Chief Valuer confirmed that the Plaintiff was the owner of plot No. 85 and directed the Chief Surveyor to point out the physical location of plot Nos. 85 and 87 respectively. The Plaintiff at paragraph 9 of the Plaint has described the shape of both plot nos.87 and 85 and yet his letter of allotment clearly indicated his plot was unsurveyed. Further, he confirms that the 2<sup>nd</sup> Defendant is yet to issue him with a Beacon Certificate but the said plot was pointed out to him by a County Surveyor. However, from the Plaintiff's correspondence to the Nairobi City Council, he confirms that despite paying all the fees, he is yet to be issued with a Beacon Certificate and Deed Plan. These are pointers that the 2<sup>nd</sup> Defendant is yet to ascertain the exact size and dimension of plot 85. I note that without a Beacon Certificate, it would not be possible for the Plaintiff to indeed be categorical on the shape of his plot since the same was yet to be surveyed. From the correspondence including the Memo from the Nairobi County, it seems the mistake on the location of the two plots was caused by the 2<sup>nd</sup> Defendant that is the allocating authority as it failed to properly designate plots No. 85 and 87 respectively. Insofar as the 1<sup>st</sup> Defendant never filed any Defence but based on the Beacon Certificate for plot No. 87 and the fact that the 2<sup>nd</sup> Defendant never provided evidence that it stopped his developments on plot 87, it is clear it is actually the 2<sup>nd</sup> Defendant responsible for the confusion as well as the dispute herein.

The Plaintiff sought for special damages for Kshs. 37, 500/= but never produced any receipts to confirm this averment. Section 109 of the Evidence Act, stipulates 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”.***

In the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**, the Court of Appeal held that: **‘Considering the above holding in the light of the now crystalized principle of law that special damages must not only be specifically pleaded but also proved, we agree with the trial Judge’s holding that it was not sufficient for the appellant to merely state the loss that he had allegedly suffered, and throw the resulting figure to the Court, and then ask the Court to allow it.’**

In relying on this Court of Appeal decision, I find that the Plaintiff is not entitled to the special damaged sought as he failed to furnish receipts to prove the same.

The Plaintiff sought for the issuance of a Beacon Certificate in respect to plot No. 85. Since the 2<sup>nd</sup> Defendant confirmed that the Plaintiff is the allottee of the said plot and the Plaintiff having paid for survey and issuance of a Beacon Certificate in 2012, I will direct the 2<sup>nd</sup> Defendant to issue the same to him and process the Lease once the Plaintiff adheres to the laid down legal process in acquisition of lease.

On the prayer for a permanent injunction against the 1<sup>st</sup> Defendant to continue with construction of the suit premises as well as eviction and removal of structures therefrom. I note the Plaintiff confirmed that the 1<sup>st</sup> Defendant was owner of plot No.87. PW1 confirmed that the 1<sup>st</sup> Defendant had already finalized his construction. From the evidence adduced in Court, it emerged that the 2<sup>nd</sup> Defendant was responsible for pointing out to the 1<sup>st</sup> Defendant his plot as indicated in the Beacon Certificate. In the circumstance, and relying on the principles established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358**, I am unable to restrain the 1<sup>st</sup> Defendant from his plot No. 87. As for the prayer for eviction of the 1<sup>st</sup> Defendant from plot 85, even though the Plaintiff contended that he knew the shape of his plot No. 85, however from the evidence before me, his plot was unsurveyed. Further, he admitted that 1<sup>st</sup> defendant is owner of plot No. 87. I find that since his averments are contradictory as he confirmed the 2<sup>nd</sup> Defendant that was the allocating authority was yet to show him the exact plot. I will decline to grant orders to evict 1<sup>st</sup> defendant from his plot No. 87.

The Plaintiff also sought for General Damages against the 1st Defendant for Trespass to Land, illegal occupation, Mutation, Damaging, Digging, Excavating and/or interfering with the Landscape of Plot No. 85 aforesaid and putting the suit premises into the same condition in which they were made prior to December, 2011 when the Plaintiff first made a demand and gave the 1st Defendant notice, to cease from encroaching and complained to the 2nd Defendant, together with interest at Court rates. Based on the evidence the Plaintiff has tendered before me and my analysis above, I find that the 1<sup>st</sup> Defendant did not trespass on Plaintiff's plot No. 85 but was constructing on plot No. 87 and hence unable to award him general damages as sought.

On the issue as to the whether the Plaintiff is entitled to an award of exemplary damages as a result of the actions of the 2<sup>nd</sup> Defendant, I wish to interrogate the evidence presented. I note the 2<sup>nd</sup> Defendant that is the allocating authority failed to issue Plaintiff with a Beacon Certificate and also to point out to him his plot despite correspondence from him as well as receiving rates from him.

In the case of **Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR**, Justice Sila Munyao held as follows: **‘In my view, this is a fit case for the award of exemplary damages. In the case of Rookes v Barnard (1964) 1 All ER 367, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Rookes v Barnard, received the stamp of approval of the East African Court of Appeal in the case of Obongo v Kisumu Council (1971) EA 91. In the matter, Spry V.P stated as follows at page 95 :-"I am therefore of the opinion that this court should regard Rookes v Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967." Apart from the case of Obongo v Kisumu Council, the case of Rookes v Barnard has been applied in Kenya in various decisions. These include the cases of C A M v Royal Media Services Limited [2013] eKLR, C.A at Nairobi Civil Appeal No. Civil Appeal No. 283 of 2005, Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, Court of Appeal at Kisumu Civil Appeal No. 84 of 2009; and, Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR, High Court at Mombasa, Civil Suit No. 290 of 2000. The basis for awarding exemplary damages is to punish the defendant for its conduct. A wrong doer must not be allowed to benefit from his conduct. If this were not so, a wrongdoer could chose to commit a wrong, being alive to the reality that taking into consideration the amount to be awarded in damages, he would still be better off if he proceeds to commit the wrong. Exemplary damages are at the**

**discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building.'**

Based on the evidence presented and in associating myself with the decision above, I find that the Plaintiff is indeed entitled to exemplary damages as against the 2<sup>nd</sup> Defendant as he was unable to develop his plot. The 2<sup>nd</sup> Defendant's actions of failing to intervene and respond to the Plaintiff's plea on location of his plot, issuance of a Beacon Certificate and Deed Plan yet it was already receiving his rates and rent from him was contrary to the provisions of the Fair Administrative Action Act. It is against the foregoing that I proceed to award the Plaintiff exemplary damages amounting to Kshs. 2 million.

Costs generally follow the event and since the Plaintiff has been inconvenienced, I will award him the costs of this suit.

Based on the analysis above, it is clear that it is actually the 2<sup>nd</sup> Defendant responsible for the confusion herein and I will proceed to exonerate the 1<sup>st</sup> Defendant from the proceedings.

It is against the foregoing that I enter judgment for the Plaintiff as against the 2<sup>nd</sup> Defendant only in the following terms:

- i. A Declaration be and is hereby issued that Plot 85 Kariobangi Light Industries Nairobi belongs to the Plaintiff absolutely.
- ii. The 2<sup>nd</sup> Defendant be and is hereby directed to issue the Plaintiff with the Beacon Certificate for Plot No. 85 and process the Lease.
- iii. The Plaintiff be and is hereby awarded Kshs. 2,000,000/= as exemplary damages.
- iv. Costs of the suit is awarded to the Plaintiff to be borne by the 2<sup>nd</sup> Defendant
- v. Interest on (iii) and (iv) above until payment in full.

**Dated signed and delivered in open court at Kajiado this 16th day of December, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Nairi holding brief for Gaturu for the Plaintiff

No appearance for the defendant

Court assistant- Mpoye