



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 719 OF 2014

RACHEL MUHADIAPLAINTIFF

VERSUS

MARGARET WANGARI MWANIKI DEFENDANT

JUDGMENT

1. Through a plaint dated 6/6/2014, the plaintiff instituted this suit against the defendant seeking the following orders;

a) A permanent injunction restraining the defendant, her agents and or servants from trespassing on the suit premises by carrying on any developments therein and or in for any other manner whatsoever interfering with the plaintiff's quiet and peaceful possession thereof and general damages for trespass.

b) Costs of the suit.

c) Any other order as the court may deem appropriate.

2. The plaintiff contended that she was the registered owner or allottee of Plot No 440 Umoja III Housing Settlement Scheme (the **suit property**). She further contended that between June 2008 and 3rd June 2014, the defendant, her agents and/or servants had interfered with her quiet and peaceful possession of the suit property by trespassing on it and severally destroying her developments thereon. She added that she had reported the matter to the local Elders, Area District Officer and at Buru Buru Police Station and that the Area District Officer had confirmed that she was the legal owner of the suit property but the defendant had continued with the trespass and was threatening to evict her from the suit property. She added that the defendant's actions were unlawful, illegal, unjustified, unconstitutional and had caused her suffering.

3. The defendant filed a statement of defence and counterclaim dated 23/6/2014 in which she denied the plaintiff's claim. She contended that she purchased the suit property on 2/5/2007, developed the land and had been in occupation since then. She further contended that she was summoned by the Area Chief who determined that the suit property belonged to her and that the plaintiff was the one who had trespassed on the land and constructed a semi-permanent structure on it. She added that the Deputy County Commissioner gave her the go-ahead to proceed with the development of the suit property and that her ownership of the suit property had been confirmed by the Assistant Chief of Kariobangi South and the Assistant County Commissioner. In her counterclaim, she sought the following orders against the plaintiff:

a) A permanent injunction restraining the plaintiff, her agents and/or servants from trespassing on the suit premises by carrying on any developments therein and/or in any manner whatsoever interfering with the defendant's quiet possession of the suit property.

b) A declaration that the defendant is the lawful owner of all that property known as PLOT No 96 Umoja III Settlement Scheme.

c) That the plaintiff's suit be dismissed with costs.

d) Any other relief that the Court deems fit to grant.

4. Hearing was set for 24/6/2019. On the appointed day, both the plaintiff and her lawyer did not attend the hearing. Consequently no evidence was tendered to support the plaintiff's claim.

5. The defendant testified as DW1. She adopted her written statement as her sworn evidence in chief. She testified that she entered into an agreement with one Joel Kanyi Mbuitu for purchase of the suit property at a consideration of Kshs 170,000. She was subsequently issued with a Certificate of Allotment by Umoja III Housing Project, Number 2810. She then proceeded to construct a semi-permanent house which was demolished by the plaintiff. The dispute relating to ownership of the suit property was determined by the Area Chief and the Area

Deputy County Assistant in charge of Dandora. She proceeded to build two permanent houses on the suit property but the plaintiff kept on encroaching on the property claiming to be the owner. She further testified that the plaintiff demolished her buildings and the matter was reported to Buruburu Police Station. The plaintiff kept harassing and threatening her with eviction. On one occasion, the plaintiff assaulted her. She testified that her documents of ownership were issued before the plaintiff's. She added that she had tenants in the property. She urged the court to grant the orders sought in the counter-claim.

6. The plaintiff did not file any submissions. The defendant filed her submissions on 16/9/2019. She identified the following three issues for determination and submitted on them: (i) *Whether the defendant is the lawful owner of all that property known as Plot No 96 Umoja III Settlement Scheme?* (ii) *Whether the orders sought by the defendant should be granted?* (iii) *Who is to pay costs?*

7. On the first issue, the defendant submitted that she had demonstrated that she was the legal owner of the suit property as she had produced a housing scheme plot identification certificate, a bundle of receipts relating to payment for the plot and a copy of a letter from the Area Chief confirming that she was the rightful owner of the plot. She further submitted that she got her allotment letter earlier than the plaintiff, having been issued with allotment letter number 2810 whereas the plaintiff, was issued with an allotment letter number 2849. She further argued that she made payment for the plot on 2/5/2007 whereas the plaintiff made hers on 9/6/2007. She added that she had never been arrested nor charged in court for forging any title documents as alleged by the plaintiff.

8. The defendant further submitted that she had proved beyond reasonable doubt that she was the legal owner of the suit property. She argued that given that the plaintiff did not come forward to testify or put in documents to support her claim, the defendant's counter-claim, defence and testimony remained uncontroverted. She relied on the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** and the case of **Karuru Munyoro v Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988** where the court held that where a party fails to lead evidence in support of its case, the party's pleadings should not be taken as evidence.

9. On the issue of costs, the defendant submitted that the plaintiff should bear costs of this suit because costs follow the event. She added that because the plaintiff trespassed on the suit property, she (the defendant) was entitled to costs. Reliance was placed on the case of **Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR** where Odunga J stated that the general rule in awarding costs is that costs follow the event unless the court is satisfied otherwise. He added that where the court decides otherwise, it should give reasons why the general rule was not followed.

10. I have considered the parties' respective pleadings together with the defendant's evidence and submissions. I have also considered the relevant legal framework and jurisprudence. The two protagonists in this suit make rival claims of ownership of the suit property. The suit property is not registered. The plaintiff did not attend the hearing despite the hearing date having been fixed in the presence of her advocate. Her pleadings therefore remain unproven. Secondly, the evidence led by the defendant in support of her defence and counter-claim remain uncontroverted. Consequently, only two issues fall for determination in this suit. The first issue is whether the defendant has proven her case on a balance of probabilities. The second issue is whether the defendant is entitled to the prayers sought in the counter-claim. I will make brief pronouncements on the two issues simultaneously.

11. No official search or certified copy of the parcel register relating to the suit property was produced. It is therefore not clear whether the suit property is part of a surveyed and titled piece of land. It is also not clear whether the suit property is part of a larger parcel of public or private land. Both parties lay claim to the suit property based on unregistered and none-statutory instruments. My determination is therefore obviously limited to the competing rival claims of the two protagonists and does not in any way confer title as against any registered proprietor or against any public interest in the suit property.

12. The plaintiff did not lead evidence to support her claim. Consequently, her claim is unproven and accordingly fails. On her part, the defendant produced an informal plot identification certificate number 329, bundle of payment receipts; letter dated 28/4/2014 inviting her to attend arbitration proceedings before the Assistant Chief in charge of Mowlem Sub-location; determination of dispute by the Assistant Chief of Mowlem sub-location dated 26/5/2019, Letter dated 7/6/2012 from the Area Chief for Kariobangi South Location confirming that the defendant was the lawful occupier of the suit property; Medical Examination Report (P3 Form) together with other Medical documents relating to alleged assault against her; Acknowledgements of receipt of purchase price by one Joel Kanyi Mbuitu, and Letter dated 10/12/2013 inviting the defendant to attend a dispute resolution meeting. In the absence of any controverting evidence, I am satisfied that the defendant has demonstrated that *visa-a-vis* the plaintiff, she is the lawful occupant of the suit property. Consequently, I hereby grant the defendant prayer (a) of the counter-claim. The plaintiff's suit is dismissed. The defendant shall have costs of the suit.

13. Lastly, because the land registration status of the suit property is unknown and there is no verifiable letter of allotment from either the Lands Department or the County Government, I will not grant a declaratory order in terms of prayer (b) of the counter-claim as sought by the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Court Clerk - June Nafula