



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT AT ELDORET

E & L CASE NO. 193 OF 2015

GRACE AKINYI.....PLAINTIFF

VERSUS

GLADYS KEMUNTO OBIRI.....1ST DEFENDANT

UASIN GISHU COUNTY GOVERNMENT.....2ND DEFENDANT

JUDGMENT

By a plaint dated 6th July 2015 the plaintiff herein sued the defendants seeking for an order of:

- a) A permanent injunction restraining the defendants her agents and/or servants from entering, demolishing and /or in any way dealing with plot No. ELD.17/94/15A (3) PLOT NO. 78 ZONE S.
- b) Costs of the suit.
- c) Any other relief this court may deem just and expedient in the circumstances of this case.

The plaintiff also filed a Notice of Motion for an injunction together with the plaint which application was heard and dismissed by the court. The plaintiff later filed an application for review of the ruling that dismissed her application for injunction but the same also suffered the same fate.

Plaintiff's Case

This matter proceeded for hearing when the plaintiff gave evidence in support of her case. It was her evidence that she purchased land parcel No. ELDORET/17/94/15A(3) plot No. 78 zone S from one FRANCIS GICHARU WOOTTA on 10th August 2010. She produced a sale agreement as exhibit No.1. The plaintiff also stated that she paid land rates and was given an allotment letter dated 8/12/95 which she produced as exhibit No 2.

The plaintiff further testified that she has been paying rates and that she resides on the suit plot. She produced a rates payment receipt for Kshs. 12954/ as exhibit No.3. She also stated that she had been issued with a receipt for Kshs 30,000/ by the vendor.

She testified that on 1/7/15 she received a notice from the County government to vacate the plot as it had been allocated to someone else in 1995. It was her evidence that a meeting was held at the county government offices and that the part development plan was in line with her documents. She prayed that the court do issue an injunction against the defendants restraining them from interfering with her suit plot.

On cross-examination by Miss Chesio for the 1st defendant the plaintiff stated that she has been residing

on the suit plot since 2010. She confirmed that she did not write a letter to the county government contesting the minutes that indicated that she does not reside on the suit plot. The plaintiff confirmed that she received a letter dated 1/7/15 from the county government the 2nd defendant herein indicating that the suit plot belongs to the 1st defendant. She also stated that the vendor could not have shown her the wrong plot.

The plaintiff also confirmed on cross – examination that she did not call the vendor as her witness and that she has not paid rates since 2015. She stated that she did not have any consent letter or transfer from the seller.

On cross -examination by Mr. Chemoyai Counsel for the 2nd defendant the plaintiff stated that the suit plot is 0.20 hectares and there was no written notice for consent to transfer or sell the allotted plot as per clause No. 6 of plaintiff's exhibit No. 2. The plaintiff closed her case after her testimony.

1st Defendant's Case

DW1 testified and stated that she wrote a letter to the then Municipal Council and was allotted plot No. 78 Zone S A(1) vide an allotment letter dated 8/12/95 after payment of Kshs. 30,000/ which she produced as exhibits before the court. She further stated that she has been staying on the suit plot and paying rates. She produced a bundle of documents to confirm the same. She stated that her name appeared in the gazette notice for rate defaulters. The 1st defendant testified that she wanted to fence the plot and was asked to pay Kshs. 3000/ being fees for scrutiny of plan which she paid. She further testified that she wrote a letter dated 19/8/14 to the county government complaining that the plaintiff had trespassed on her plot.

It was the 1st defendant's evidence that a meeting was called where both the plaintiff and the defendants were present and it was decided that the suit plot belongs to the 1st defendant. She produced the minutes as exhibit No. 5. She also stated that it was confirmed that the two plots were different. The plaintiff was issued with a general notice by the county government to vacate the 1st defendant's plot and the temporary structures demolished upon the expiry of the notice period. She prayed that the plaintiff's suit be dismissed with costs.

On cross – examination by Mr. Melly Counsel for the Plaintiff, the 1st defendant reiterated her evidence and confirmed that she has an allotment letter and rates payment receipts. She also confirmed that the plot is approximately 0.1 hectare.

2nd Defendants case

DW3 testified and alluded to the departmental minutes held on 19/6/15 whereby the meeting resolved that the letter of allotment for the 1st defendant Gladys Obiri was accompanied by a part development Plan (PDP) while the one for the plaintiff Grace Akinyi had none. The witness further testified that the 1st defendant's name was captured in the County rates management system while the plaintiff's was not. It was also his testimony that the defendant produced a purchase receipt of Kshs 30,000/ while the plaintiff did not. Lastly, he stated that the 1st defendant's name was captured in the newspaper for rates defaulters while the plaintiff's was not and those were some of the reasons why the county decided against the plaintiff.

DW3 further testified that the plaintiff's temporary structures were demolished pursuant to Sections 29 and 30 of the Physical Planning Act, the Building code of 1968 and the Municipal Council Bye laws. He stated that this was done after sufficient Notice was given.

On cross – examination by Mr. Melly he stated that the plaintiff did not have a PDP plan which is a tool for alienating land. Anybody allotted land must be accompanied by a PDP. He further confirmed that the first allotted was the 1st defendant.

On cross- examination DW3 confirmed that the plot No. in the plaint, the receipt and the verdict of the

Municipal Council do not tally. He stated that the lawful owner of the suit plot is the 1st defendant Gladys obiri. The 2nd defendant closed its case and the parties were asked to file written submissions within 14 days which they did.

PLAINTIFF'S WRITTEN SUBMISSIONS

Counsel for the plaintiff filed his written submissions and reiterated the plaintiff's evidence. Counsel submitted that the suit plot was passed to the plaintiff upon the transfer of the payment receipt and the allotment letter from the vendor. He further submitted that the allotment letter produced by the defendant, which dates back to 1995 is computer generated unlike other documents which were typed by use of manual typewriters as at that time.

Mr. Melly further submitted that the deliberations by the County Government were challenged by the plaintiff by filing this suit and the decision thereof cannot be relied upon at all as it had no the jurisdiction to decide as to who was actually allocated the plot. Counsel had issue with the evidence of DW3 namely JACKTON KIPROP whom he states came to know of the dispute when the same had come for deliberations and did not give the basis of their deliberations

It was Counsel's submission that the use of computers by the Municipal Council was introduced in the year 2000 or thereabouts which for him made the alleged allotment letter invalid. He urged the court to find that the disputed plot belongs to the plaintiff.

1 ST DEFENDANT SUBMISSIONS

Counsel for the 1st defendant gave a brief summary of the facts and reiterated the evidence of the 1st defendant. Miss Chesu submitted that the 1st Defendant filed her defence on 14th July, 2015 and the 2nd Defendant filed its defence on 24th July, 2015. She stated that these statements of Defence emphasized the following:

- i. 1st Defendant plot is known as ELD/17/94/15A Plot No. 78 Zone S (1)
- ii. Plaintiffs plot is known as ELD/17/94/15A(3) Plot No. 78 Zone S

Counsel submitted that it was the 1st Defendants' case that several meetings were held between government officials, the parties herein, area chief and local MCA which culminated into the decision of the County Government vide a letter dated 1st July, 2015 (2DEX1) declaring the disputed land according to government records to be legally and lawfully owned by the 1st Defendant.

Counsel drew the court's attention to excerpts of cross examination of the plaintiff where she confirmed her attendance and participation in the deliberations resulting in the determination aforementioned. The plaintiff reiterated that her dissatisfaction with said decision necessitated the current suit.

Miss Chesu expounded on the role of Mr. Patrick Mutai in the dispute herein as a witness of the 2nd defendant as follows:

- a) That he was the lead investigator in the dispute between the parties herein;
- b) He was one of the county officials who visited the suit site;
- c) His statement remained uncontroverted by the Plaintiff, and
- d) He is the author of the verdict dated 1st July, 2015

Miss Chesu submitted that it was the 2nd Defendant's evidence that the property known as ELD/17/94/15A Plot No. 78 Zone S (1) belongs to the 1st Defendant and that all documents within the government records confirmed the said assertions.

Counsel for the 1st defendant further submitted that it is clear that the exhibits that the 1st Defendant produced all refer to the property known as ELD/17/94/15A Plot No. 78 Zone S (1) in tandem with the allotment letter and that the Plaintiff did confirm that she lacked an approval from the office of the Uasin Gishu County Physical Planner for the structures she erected over the 1st Defendant's property in the year 2015. In addition, counsel submitted that it was the Plaintiff's evidence in cross examination that she lacked a letter of consent from the defunct Eldoret Municipality approving the purchase of the property known as ELD/17/94/15A (3) Plot No. 78 Zone S measuring 0.2 ha from one Francis Gicharo Woota contrary to paragraph 6 of the Allotment letter reference no. EMC/TD/8/A (1) (PEX2) which she highlighted hereunder:

6. You will not sell, transfer, charge, sub-let or otherwise part with the possession of the plot or any part thereof except with the prior written consent of the council."

It was counsel's submission that the plaintiff confirmed in cross-examination that she had neither filed a suit against the said Francis Gicharo Woota nor called him as a witness. Counsel further reiterated the evidence of the 2nd defendant which reinforced the 1st defendant's case on the issue of ownership.

Counsel for the 1st defendant listed 5 issues for determination by the court as follow:

- a) Whether the plaintiff obtained a consent of the council to purchase ELD/17/_94/15A (3) Plot No. 78 Zone S measuring 0.2 ha from one Francis Gicharo Woota?
- b) Whether the 2nd defendant lawfully demolished the structures erected by the plaintiff on the property known as ELD/17/94/_15A Plot No. 78 Zone S (1)?
- c) Whether the property known as ELD 17 94/15A Plot No. 78 Zone S (1) belonging to the 1st Defendant is located in the correct position as per the PDP produced and filed in Court?
- d) Whether the Plaintiff is entitled to the remedies sought?
- e) Which party shall bear the costs of the suit?

On the first issue as to whether a consent was obtained from the Municipal council to sell the suit plot by Francis Gicharo Woota, counsel submitted that the plaintiff did not produce any written consent as per the requirements under clause 6 of the special conditions which had already been highlighted.

It was counsel's submission that the property known as ELD/17/94/15A (3) Plot No. 78 Zone S was a government property leased to Francis Gicharo Woota for a period of 99 years from 1st October, 1995 and Section 37 of the Land Registration Act No.3 of 2012 notes:

- (1) A proprietor may_ transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
- (2) A transfer shall be completed by—
 - (a) filing the instrument; and
 - (b) registration of the transferee as proprietor of the land, lease or charge.

Miss Cheso stated that all conveyances of and for the occupation of Council Land was at the time of the transaction herein guided by the Trust Land Act CAP 288, (Repealed) Section 2 of the Trust Land Act CAP 288, (Repealed) defines council as in relation to Trust Land, means the local authority in whom the Trust land is vested.

Counsel submitted that it is not in dispute that under clause 6 of the Allotment Letter PEX2, the vendor

was not permitted to sell, transfer, sublet, charge or part with possession of the property known as ELD/17/94/15A (3) Plot No. 78 Zone S without prior written consent of the Eldoret Municipal Council. It is also not in dispute that as at the time of entering the agreement for sale dated 10th August, 2010 between the Plaintiff and Francis Gicharo Woota, such consent was not obtained. It is further not in dispute that at the time of the hearing seven (7) years after the sale no consent had been sought, and or issued by the 2nd Defendant to the Plaintiff. The sale /assign in favour of the Plaintiff was prohibited under Trust Land Act CAP 288, (Repealed) and contrary to express provisions of the Allotment letter issued to Francis Gicharo Woota therefor making it void ab initio.

On the 2nd issue as to whether the 2nd Defendant lawfully demolished the structures erected by the plaintiff on the property known as ELD/17/94/_15A Plot No. 78 Zone S (1), Counsel submitted that the 2nd Defendant held meetings and rendered a ruling declaring that the Plaintiff had invaded the 1st Defendant's property known as ELD/17/94/15A Plot No. 78 Zone S (1) had erected illegal temporary structures. The illegality performed by the Plaintiff included:-

a) Erecting structures without a development permission as required under Section 33 of the Physical Planning Act Section 31 of the Physical Planning Act notes:-

(1) Any person requiring a development permission shall make an application in the form prescribed in the Fourth Schedule, to the clerk of the local authority responsible for the area in which the land concerned is situated.

b) Trespassing and erecting a structure on the 1st Defendant parcel of land known as

ELD/17/94/15A Plot No.78 zone S (1)

Counsel referred the court to the ruling by Justice E.Obaga of 30th September, 2015 which ruling is in the court file stating that :

The second respondent was demolishing structures built contrary to the Physical Planning Act. Though the applicant claimed that she had permission to put up temporary structures there was no evidence to that effect adduced or annexed to the supporting affidavit

It was counsel's submission that at close of the Plaintiff's case, the Plaintiff had failed to submit the application to develop structures and or the consent by the 2nd Defendant in defiance of the Hon Justice Obaga's guidance in the aforementioned Ruling. The Plaintiff had the sole onus to establish the legality of structures erected by herself on the 1st Defendant's land. This led to the 2nd Defendant using the law to demolish the structures. Section 38 as read concomitantly with Section 29 (3 b) of the Physical Planning Act to:-

b) if on the expiry of the ninety days notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer.

Counsel urged the court to dismiss the plaintiff's case as it is an abuse of judicial process for the reason that the Plaintiff has no title or any valid allotment letter to the subject property to warrant any orders including litigation as perpetrated by this Plaintiff.

On the 3rd issue as to whether the property known as ELD 17/ 94/15A Plot No. 78 Zone S (1) belonging to the 1st Defendant is located in the correct position as per the PDP produced and filed in Court, Counsel submitted that Section 25 of the Physical Planning Act on the contents of local physical development plan states that:-

A local physical development plan shall consist of—

a) a survey in respect of the area to which the plan relates carried out in such manner as may be

prescribed; and-----

Miss Cheso reiterated the earlier submission that the 1st defendant's allotment letter was accompanied by a PDP unlike the plaintiff's.

On the 4th issue as to whether the Plaintiff is entitled to the remedies sought, counsel stated that Section 107 of the Evidence Act notes that :

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Counsel reinforced the incidence of burden of proof that in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. She submitted that the Plaintiff failed to discharge her burden under Section 107, 108 and 109 of the Evidence Act. Counsel referred the court to Justice Obaga's ruling in the court file where he stated that

The committee set up by the second respondent went to the ground. It is the second respondent who are in custody of documents pertaining to plots within its jurisdiction. The second defendant's agents deliberated on the case of the two disputants and found that the plot in contention belonged to the first respondent. Minutes of the meeting as well as the verdict of the second respondent as regards the ownership of the plot were annexed to the second respondent's replying affidavit. The first respondent is the one who has been in possession since the disputed plot was allocated to her in 1995. The applicant bought the disputed plot in the year 2010. Documents held by her do not support her case. The balance of convenience tilts in favour of the first respondent whose documents prima facie show that she is the lawful allottee of the disputed plot. See pg 2 paragraphs 7 &8

Lastly on the issue as to which party should bear the costs of the suit, Counsel submitted that the Plaintiff having failed to prove her case on a balance of probabilities, costs shall follow the event and the same be shouldered by the Plaintiff. Miss Cheso therefore prayed that the plaintiff's case be dismissed with costs and interest to the Defendants.

2ND DEFENDANT'S WRITTEN SUBMISSION

Counsel for the 2nd defendant filed his submissions and reiterated the defendant's evidence. He stated that the 2nd defendant deliberated on the issues and came to the conclusion that the suit land belongs to the 1st defendant herein. Counsel submitted that the 2nd defendant was merely carrying out its mandate of demolishing unplanned and unapproved structures that were constructed contrary to the provisions of the Physical Planning Act Cap 286 and other relevant authorized or by-laws.

Mr. Chemoyai also submitted that the plaintiff's application for injunction and review were dismissed by the court as she did not have a prima facie case with a probability of success. Counsel further submitted that the plaintiff subsequently filed a notice of Appeal in respect of the ruling for review which was dismissed but she is yet to prepare a record of appeal or canvass the said appeal to date. Counsel prayed that the plaintiff's case be dismissed with costs to the defendants.

Analysis and Determination

This is a case involving a dispute on who is the rightful allottee of plot No. as ELD 17/ 94/15A Plot No. 78 Zone S (1). This case has a history of applications by the plaintiff for temporary injunction against the defendants, a review of the dismissed application and a Notice of Appeal filed in respect of the dismissed application for review which has never been prosecuted.

I will start by stating that both applications were dismissed as they lacked merit or the threshold for

granting injunctions or for review. The issues as enumerated by counsel for the 1st defendant are valid but I will deal with three major issues to enable me come to a conclusion on who is the rightful owner of the suit plot and whether the plaintiff deserves the orders sought.

From the evidence on record and the exhibits produced, it is apparent that even though the plaintiff produced an agreement and a receipt which she purportedly bought the suit land from one FRANCIS WOOTA, it seems like there was a missing link somewhere. The produced allotment letter by the plaintiff which was given to her by the vendor had conditions which prohibited sale or transfer of the plot without a written consent from the Municipal Council. The plaintiff admitted that she did not have a written consent from the 2nd defendant for sale or transfer of the disputed plot.

The contents of paragraph 6 of the Allotment letter reference no. EMC/TD/8/A (1) (PEX2) clearly stated as hereunder

6. You will not sell, transfer, charge, sub-let or otherwise part with the possession of the plot or any part thereof except with the prior written consent of the council."

This clause of the allotment letter was flouted by the vendor who sold the plot to the plaintiff.

In response to the second issue on demolition of the structures erected by the 2nd defendant, it was the defendant's evidence that they were doing so in accordance with their mandate of removing unplanned and unapproved structures which were constructed contrary to the Physical Planning Act and relevant bye laws. Section 31 of the Physical Planning Act provides that: -

(1) Any person requiring a development permission shall make an application in the form prescribed in the Fourth Schedule, to the clerk of the local authority responsible for the area in which the land concerned is situated.

The plaintiff did not produce any authority or approval of the structures that she erected on the suit land. Parties should not be allowed to erect unapproved or unplanned structures in areas that require such approvals.

The plaintiff was given sufficient notice to remove the structures but did not take action therefore resulting in the demolition by the 2nd defendant. Justice Obaga in his ruling in this case also found that the 2nd defendant was demolishing structures built by the plaintiff contrary to the Physical Planning Act. He also found that although the plaintiff claimed that she had permission to put up temporary structures, there was no evidence to that effect adduced or annexed to the supporting affidavit. I therefore find that the 2nd defendant was carrying out its lawful mandate to rid the town of unplanned and unapproved structures.

The next issue is the location of the suit plot. The 1st defendant produced a part development plan which was accompanied by the allotment letter. DW3 who testified on behalf of the 2nd defendant stated that he is a registered Physical Planner. He further explained that a PDP is a tool for alienating land and any individual allotted land vide an allotment letter must be accompanied by a PDP. This is as per the requirements of the Physical Planning Act. The plaintiff did not have a PDP to show that the land or plot that had been allocated to her. These were some of the reasons why the 2nd defendant in their deliberations concluded that the suit plot belonged to the 1st defendant.

Counsel for the plaintiff took issue with the typing of the allotment letter alleging that the 1st defendant's allotment letter was computer generated and at the time of the allotment, the letters were type writer written. This was brought through submissions and not through objections. The parties had time to go through the pre-trial procedures and this was not raised. The other issue is that if it was a forgery then Counsel is aware of the procedure to follow to deal with forgeries. The 2nd defendant who was the originator of the document did not object to the production and had no issue with it. If that was the case then they could have rejected the document as a forgery. That not being the case I find no issue with the allotment letter.

On the issue whether the plaintiff is entitled to the remedies sought, I find that the plaintiff has not proved her case to the required standard. She has failed to prove that she is the rightful owner of the suit plot. I also found it strange that she did not see the benefit of calling one FRANCIS GICHARU WOOTTA either as a witness to reinforce her case or sue him as a defendant to shed light on the transaction. This was a major failure on her part. The plaintiff's evidence and the documents produced fell short of the required proof of her case.

The plaintiff stated that she resides on the suit plot but the minutes by the county government whereby the plaintiff and the defendant were in attendance confirmed that the plaintiff does not reside on the plot. She confirmed on cross examination that she did not contest the findings of the minutes. The plaintiff further confirmed that she has not paid rates since 2015.

Having analyzed the evidence, the documents produced and the submissions by counsel, I find that the plaintiff does not deserve the remedies sought as she has not proved her case against the defendants. The plaintiff's case is therefore dismissed with costs to the defendants.

Dated and delivered at Eldoret on this 18th day of January, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of:

Mr. Onyinkwa holding brief for Miss Chesio for 1st defendant

The plaintiff

Mr. Koech – Court Assistant.