



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO.773 OF 2012**

**MARGARET WAIRIMU MUCHERU KARURI.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE NJERI MUCHERU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHRISTOPHER MUGAMBI.....1<sup>ST</sup> DEFENDANT**

**TOM ONYANGO.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs, who are the registered proprietors of L.R. No. Nairobi/Block 72/2934 situated in Southlands, Langata within Nairobi (“the Suit Property”), seek a permanent injunction to restrain the Defendants from entering onto their land or interfering with the Plaintiffs use and occupation of the Suit Property. They also seek general damages for trespass and nuisance; and the costs of the suit.
2. The Defendants admit that the Plaintiffs are the registered owners of the Suit Property but aver that the Plaintiffs hold it in trust for the residents of Mugumoini area in Langata since it has always been public utility land which was irregularly and illegally allocated to the Plaintiffs.
3. The Defendants further aver that the Plaintiffs plot was found to have been illegally allotted and was among the plots listed in the Ndung’u Report which ought to be cancelled and to revert to the public as a parking area. The Defendants aver that the Plaintiffs forged the allotment letter and conspired with officers from the Lands Office and City Council to grab the Suit Property which is public land.
4. The 1<sup>st</sup> Plaintiff testified on behalf of both Plaintiffs. She owns the Suit Property with the 2<sup>nd</sup> Plaintiff, who is her sister. They bought Suit Property in 2004 from one Pauline Mulinge. They did due diligence at the time they purchased the land and established that it had a clean title.
5. She was informed in September 2012 by the watchman who was on site that the Defendants came to the land with a gang of youths removed her fence, and constructed temporary structures made of iron sheets. She reported the matter to Langata Police Station and the Chief of Mugumoini Location who summoned the Defendants and after hearing the matter, ordered them to remove the structures within 7 days. The Defendants promised to do so but never complied. The Defendants continued to harass and threaten the Plaintiffs’ guards.
6. The Plaintiffs could not develop their land despite getting approval from City Council of Nairobi since the Defendants were on the land. The witness produced a copy of the title for the Suit Property, the approved plans and the demand letter issued to the Defendants.
7. On cross examination the witness stated that the Plaintiffs had not had any issues with the National Government over the Suit Property. She did not know that it was in the Ndung’u Report. She stated that they did not have any disputes with the neighbours.
8. She confirmed that the 2<sup>nd</sup> Plaintiff had given the 1<sup>st</sup> Defendant authority to use the Suit Property but that he was later evicted by the Chief. She stated that the Defendants went back on the land at night and that any time they attempted to develop the Suit Property, the Defendants attacked them with a gang of people who harass and intimidate them.
9. Both Defendants gave evidence. They maintained that the Suit Property has always been a public utility plot used as a parking yard for the tenants, mosque, adjacent buildings and the residents of Mugumoini area in Langata. They maintain that the Plaintiffs grabbed the Suit Property and that they obtained it through fraud and forgery. They also contend that the Plaintiffs’ title was meant for revocation as recommended in the Ndung’u Report on illegal and irregular allocation of public land.
10. The 1<sup>st</sup> Defendant conceded that the Plaintiffs are the registered owners of the Suit Property. The Plaintiffs authorised him to use part of

the land in 2007 until 2008 when the area Chief moved him out of the Suit Property. He stated that the City Council demolished their structures and that he was no longer on the land next to the Suit Property.

11. The 2<sup>nd</sup> Defendant also maintained that the Suit Property was illegally allocated to the Plaintiffs. He claimed that it was public utility land which they had used since 2003 with other traders. He claimed that the Plaintiffs engineered the issuance of enforcement notice by the City Council of Nairobi in respect of Nairobi/72/2425 requiring them to demolish and remove their structures on this land. He also believed that the Plaintiffs caused the City Council to demolish their kiosks.

12. He urged the court to revert the Suit Property to public utility land for use by the general public and residents of Mugumoini, Langata. On cross examination, he stated that he used to do business on the Suit Property while he resided on plot number Nairobi/Block 72/2425. He had built four kiosks on the Suit Property and was using one for his business while he rented out the other three to other traders. He knew it was a parking area and therefore reserved for public utility. He did not sue the City Council when they demolished his structures. He confirmed that the Enforcement Notice that the City Council issued was in respect of where he was staying.

13. The Defendants produced copies of the Enforcement Notice; letter dated 29/6/2005 on repossession of illegally allocated public land, and a letter from Court Yard Business Community challenging the enforcement notice. They did not produce a copy of the Ndung'u report to confirm that the Suit Property was listed among the plots whose titles were recommended for revocation for being public land.

14. If indeed the Suit Property is public land reserved for parking as the Defendants aver, does this entitle the Defendants to erect structures on the land for their businesses? The court thinks not.

15.. Article 68 (c) (v) of the Constitution tasked Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Pursuant to this, the National Land Commission (NLC) Act was enacted. This Act mandated NLC to review grants of public land within five years of May 2012, to establish their propriety and recommend revocation of titles of illegally acquired public land or regularisation of irregularly acquired land. Parliament has not extended the time for NLC to inquire into the acquisition of public land.

16. The National Land Commission was therefore the right entity to review the grant of the Plaintiffs' title over the Suit Property to establish if it is public land and whether it was acquired properly and not the Defendants. The investigation of the Plaintiffs' title to determine if it is public utility land ought to be undertaken by the entities mandated to investigate and recover public land such as the Ethics and Anti-Corruption Commission.

17. The protection of property afforded by the Constitution excludes property found to have been unlawfully acquired at Article 40(6). Only the bodies mandated by law to make a finding that land was unlawfully acquired can take such a decision. The Defendants cannot make such a finding.

18. The onus to prove that the Suit Property was public utility land fell on the Defendants. They did not discharge this burden. On a balance of probabilities, the court finds that the Plaintiffs who are the registered proprietors of the Suit Property have proved their case on a balance of probabilities. However, this does not stop the bodies mandated by law to inquire into the alienation of public land from inquiring into the propriety of the Plaintiffs title to establish if it is public land.

19. The court grants a permanent injunction to restrain the Defendants from entering onto or interfering with the Plaintiffs use and occupation of the Suit Property.

20. The Plaintiffs seek damages of Kshs. 5 million for trespass to their land as they have been unable to develop their property due to interference by the Defendants. The court awards the Plaintiffs general damages of Kshs. 100,000/= against the 2<sup>nd</sup> Defendant since the 1<sup>st</sup> Defendant had already moved out of the Suit Property. The Plaintiffs are also awarded the costs of the suit.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of February 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Ongicho holding brief for Mr. Kahuthu for the Defendants

No appearance for the Plaintiff

**Mr. V. Owuor- Court Assistant**