



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO. 25 OF 2007

**GRACE WAMUYU MAINA (Suing as the legal representative of
ESTATE OF JOHN G. MAINA (DECEASED)).....PLAINTIFF**

VERSUS

EDWARD M. TENGA.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff, who is suing as the legal representative of the estate of the late John G. Maina, seeks a permanent injunction to restrain the Defendants from alienating, taking possession, selling, developing or in any other way dealing with Plot No. S25 Kahawa West Phase II. The Plaintiff claims that the late John G. Maina bought the suit plot on 8/8/1995 from John Kaurai who was initially allotted the plot by the 2nd Defendant.
2. The Plaintiff claims that the 1st Defendant filed **HCCC No. 1233 of 2004** claiming ownership of four plots which included Plot No. S25 Kahawa West Phase II. The suit was later withdrawn when the 2nd Defendant agreed to issue a letter of allotment for plot No. A Kahawa West Phase II. Plot No. A Kahawa West was created from the amalgamation of plot Numbers S25, S26, S27 and S28. The Plaintiff seeks an order to compel the 2nd Defendant to cancel the letter of allotment it issued to the 1st Defendant and to cancel the amalgamation of the plot and restore the plots to their original status. The Plaintiff also seeks a declaration that Plot No. S25 is legally owned by the estate of the late John G. Maina.
3. The 1st Defendant denies the Plaintiff's claim. He contends that the sale agreement was not proper since the City Council of Nairobi was not made a party to it. He maintains that his family has been in occupation of the suit land for over 40 years and that once the part development plan was issued and advertised on the amalgamation of the plots, the 1st Defendant was allotted plot No. A Kahawa West Phase II and subsequently issued a lease. This was the basis for withdrawing the case he had filed in 2004.
4. The 1st Defendant argues that he was issued a valid beacon certificate in respect of the suit land and that he made all the requisite payments to the 2nd Defendant. The 2nd Defendant denies the Plaintiff's claim and admits issuing a letter of allotment to the 1st Defendant in respect of Plot No. A Kahawa West Phase II.
5. Each party called one witness to testify on its behalf. The witnesses adopted their witness statements. The Plaintiff testified that her late husband purchased Plot No. S25 Kahawa West through a sale agreement he entered into on 8/8/1995 with John Kaurai. She learnt in 2004 from the owner of Plot No. S28 that the 1st Defendant had sued the 2nd Defendant seeking revocation of letters of allotment. The 1st Defendant claimed ownership of plots Nos. S25 to S28. The Plaintiff applied to join that suit as an interested party but it was withdrawn before it could be heard when the 2nd Defendant agreed to allot plot nos. S25 to S28 to the 1st Defendant.
6. The Plaintiff was not involved in the discussions that led to the allocation of her plot to the 1st Defendant and was not consulted when the decision to withdraw the suit was taken. She instructed counsel to file the instant suit. She states that the 1st Defendant is running a car wash business on the suit land and she is unable to access it.
7. She produced a copy of the Certificate of confirmation of grant which does not list Plot No. S25 among the assets of her late husband; the 2nd Defendant's letter dated 9/9/1992 allocating plot No. S25 to John Kaurai and the sale agreement dated 8/8/1995. She also produced a copy of the letter of allotment dated 8/8/1995 allocating Plot No. S25 to her late husband. The letter asked him to pay a total sum of KShs. 18,180 as stand premium for the plot. She produced several receipts issued by the 2nd Defendant for payment of rates in 2006, 2007 and 2008. Some of the receipts bear the names of John S. Kaurai while others are in her name.
8. On cross examination, she stated that she did not know if there was a Council Committee meeting before the suit plot was allocated to her

husband or the initial allottee. She stated that she only got the documents she produced in court after her husband died.

9. She applied to be registered as the owner of the plot on 15/5/2006 and was asked to pay Kshs. 2,000/= for the City Council records to be amended to read her name. She did not know whether the 1st Defendant was in occupation and did not have a beacon certificate or part development plan for her plot.

10. The Plaintiff did not know that the 1st Defendant's family had resided on the suit land. She stated that she had seen the gazette notice and was certain that it did not describe her plot.

11. The 1st Defendant gave evidence. He produced several documents in evidence. He applied for allocation of the plot in Kahawa West Estate Kasarani Division through his letter of 24/7/2003. He stated that his grandfather had resided on the suit land but when the 2nd Defendant's surveyors surveyed the land, they overlooked their presence on the land.

12. The letter dated 13/8/2003 which applied for allocation of the land to the family of the late Ambrosi Inanga stated that his family had lived in that estate for 46 years. The 2nd Defendant's letter of 17/11/2003 stated that investigations had been carried out and it had been agreed to retain the 1st Defendant's grandfather's estate on its present site. The letter stated that the process of completing documentation for the 1st Defendant was ongoing and other interests would be relocated in order to solve the matter conclusively.

13. The letter dated 13/1/2004 from the Ministry of Local Government confirmed this position and requested the 2nd Defendant to issue the relevant documents to the 1st Defendant's family. A follow up letter from the Provincial Commissioner dated 27/7/2004 stated that through Kenya Gazette No. 1254 of 28/5/2004 notice of PDP No. CP/FP/164A/5/92A was published for the proposed residential plot in Kahawa West Station Road. The letter asked the 2nd Defendant to conclude the preparation of the relevant documents for the 1st Defendant.

14. The 2nd Defendant issued a removal notice which was served on the 1st Defendant on 16/3/2004 asking him to remove the garage, citing the reason that the site was illegally occupied.

15. The letter dated 27/7/2004 addressed to the District Officer from the Provincial Commissioner's Office urged the District Officer to keep off the matter and ensure the status quo was maintained since the matter was being handled by the City Council.

16. The 1st Defendant wrote to the Minister for Local Government on 28/7/2004 seeking his intervention in having the documentation for the suit land completed and processed to reflect their ownership.

17. The 2nd Defendant's memo dated 30/7/2004 which refers to the eviction notice on Sub plot A for the family of the late Ambrosi Inanga stated that no objection had been received to the part development plan within the 60 days. The memo requested to have the status quo maintained. The copies of the newspaper advertisements notifying the public of the revised part development plan (pdp) produced in evidence are unclear.

18. The 1st Defendant produced a copy of the gazette notice that makes reference to the proposed residential plot off Kahawa West Station Road which invited interested persons to make presentations or objections to the part development plan.

19. The letter from the Ministry of Local Government dated 11/8/2004 urged the 2nd Defendant to issue the relevant documentations to the family of the late Ambrosi and decried the continuous harassment of this family through the issuance of eviction notices by the 2nd Defendant.

20. The 1st Defendant produced a copy of the beacon certificate dated 21/2/2007 confirming that Plot No. A had been surveyed. He paid the stand premium of Kshs. 101,200/= on 1/2/2007 and also paid Kshs. 18,000/= as ground rent for the plot. The 1st Defendant was issued a receipt by the 2nd Defendant on the same date for Kshs. 15,000/= paid on account of survey fees. Plot No. A Kahawa West Phase II was allocated to the 1st Defendant vide the 2nd Defendant's letter dated 22/12/2006.

21. The internal memo of the 2nd Defendant emanating from its Director of City Planning dated 22/6/2005 stated that a decision had been taken at the General Purposes Committee meeting held on 9/2/2000 to have the court case settled by reverting back to the pdp of 1992 which had been approved by the Council and the Ministry of Lands and Settlement; to allow the 1st Defendant and his family to retain the land. The memo stated that a revised pdp had been prepared for the re-planning of the site while setting aside subplot A measuring about 0.25 hectares for the Inanga family which they were occupying. The memo stated that those who had been allocated subplots S27 and S28 were transferred to alternative site as compensation.

22. The 1st Defendant produced photographs showing his homestead with mature trees. One of the photographs shows the destruction on the land caused by the City Council askaris. The 1st Defendant stated that his grandfather lived on the suit land and his relatives were now residing on it. He confirmed that he was allocated the plot by the 2nd Defendant in 2006. He did not know that the plot had been subdivided and allocated to different people. He applied for allotment of the suit land and once he paid the stand premium he was allocated the suit land. He stated that he had no claim against the 2nd Defendant who had given him a lease after the survey of his plot.

23. The 2nd Defendant called a Senior Land Surveyor in its department of City Planning as a witness. The witness confirmed that Plot A comprised what was previously subplots S25, S26, S27 and S28 before the amalgamation. He confirmed that the 2nd Defendant allocated plot A to the 1st Defendant on 22/12/2006.

24. The 2nd Defendant prepared a revised part development plan for the suit plot which was duly advertised in accordance with law in the Kenya Gazette of 28/5/2004. After the expiry of the 60 days for public scrutiny, all the previous plans used for allocation of plots S25 to S28 were superseded. He confirmed that the 1st Defendant was issued with a beacon certificate for his plot in 22/12/2006.
25. On cross examination he stated that when the 2nd Defendant acquired the land, the 1st Defendant's family was already living on it and that when other people were allocated plots in 1992 the 1st Defendant was left out. He stated that the Provincial Administration used to be in the committee for allocation of plots.
26. He stated that when the pdp was advertised in the Kenya Gazette, previous owners were deemed to be informed of the amalgamation and no letter goes to them. He stated that plots No. S29 and S30 were not affected by the amalgamation and that they did not form part of plot A. He stated that after revising the pdp, plots Nos. S25 to S28 should not have remained in existence.
27. On the issue of payment of rates in the name of the Plaintiff, he stated that it is incumbent upon an allottee to disclose any changes to the 2nd Defendant's cash office and that if there is no disclosure the Council accepts payment and the names remain in the system. He faulted the Plaintiff for not disclosing to the cash office at the time she made payments in 2006 which was after the revision of the pdp.
28. He stated that when surveying one is guided by the pdp and that the 1st pdp drawn in 1992 ignored the 1st Defendant's occupation of the land which should have been noted on the record. The revised pdp was to rectify that error. He confirmed that the Plaintiff and other allottees should have been allocated plots elsewhere by the 2nd Defendant if they had complied with the conditions for the allocation of the plots.
29. He stated that the 2nd Defendant was not involved in the sale transaction between John Kaurai and John Maina. He had never seen the documents confirming that the Plaintiff applied for allocation of the plot or that she had complied with the conditions of the allotment. He explained that a revised part development plan supersedes any previous pdp issued under the Physical Planning Act.
30. The issue for determination is who has a better claim to the Suit land. The Plaintiff claims that she owns plot No S25 while the 1st Defendant claims that he was issued a lease over plot number A in Kahawa West Phase II.
31. The court has looked at the submissions filed by the parties. It is not in dispute that the 1st Defendant was allocated plot No. A by the 2nd Defendant. It is also not in doubt that plots S25 to S28 were amalgamated to create plot A which the 2nd Defendant allocated to the 1st Defendant.
32. The Plaintiff claims that her late husband bought plot No. S25 from John Kaurai, the initial allottee. The 1st Defendant sued the 2nd Defendant in **HCCC 1233 of 2004**. This suit was withdrawn when the Defendants reached an agreement and the 2nd Defendant allocated plot No. A to the 1st Defendant. There was a resurvey which resulted in the amalgamation of plots S25 to S28.
33. To determine who between the Plaintiff and 1st Defendant holds a good title to the plot in dispute, the court needs to consider the process followed by the 2nd Defendant in the allocation of the plot. What the court has to determine is whether the procedure set out in the Physical Planning Act and the Local Government Act was followed when the 2nd Defendant allocated the Suit land to the 1st Defendant.
34. The letter of allotment dated 9/9/1992 issued to John Kaurai required him to make payment of Kshs. 18,180/= and comply with the conditions set out in the letter. The letter of allotment dated 8/8/1995 addressed to John G. Maina offered plot S25 subject to his written acceptance of the conditions set out in the letter and payment of Kshs. 18180/=. There is no evidence that these two allottees made payment of the sum demanded or that they wrote to the 2nd Defendant accepting the offer of allocation of plot No. S25.
35. It is not in dispute that the 2nd Defendant owns the Suit land. Section 144 of the Local Government Act, which was repealed, allowed the local authorities such as the 2nd Defendant to acquire and deal in land. The 1st Defendant confirmed that the 2nd Defendant acquired the suit land while his grandfather was living on it.
36. Land belonging to a local authority that was not required for the purpose for which it was acquired could be appropriated by the Minister on conditions he deemed fit to impose pursuant to Section 144(3) of the Local Government Act. Section 144 (5) allowed a local authority to let or grant a license to any person to occupy any land which it possessed. This would be with the consent of the Minister if it was for a term exceeding seven years.
37. The 2nd Defendant was mandated by Section 177 (1) (a) and (f) of the Local Government Act to lay out building plots or subdivide any land it had acquired for the purpose of housing schemes for its inhabitants. It could sell, let or otherwise dispose of any plot or subdivision of land it had acquired to any person for the person to erect a dwelling house on the land for his occupation.
38. This is the basis upon which the 2nd Defendant issued a letter of allotment over the Suit land. The 1st Defendant produced letters in evidence which confirmed that the Ministry of Local Government was involved when the 1st Defendant applied to be allocated the Suit land on the basis that his family had resided on the land for a very long time.
39. The 2nd Defendant submits that it followed the laid down procedures before the amalgamation and that it complied with the preparation and advertisement of the revised part development plan (pdp) which gave rise to the amalgamation. It therefore submits that de-amalgamation which the Plaintiff seeks is not possible. It submits the Plaintiff has failed to prove her case on a balance of probability.

40. The 1st Defendant submits that under Section 17 of the Physical Planning Act, the Planning Officer is required to prepare a report on the conditions, resources and facilities in the area being planned as well as maps and plans showing the present and future land uses and development in the area when preparing a physical development plan. The 1st Defendant argues that when the 2nd Defendant prepared the physical development plan for the area it overlooked the fact that the 1st Defendant's family was occupying and using the suit land.

41. Section 19 of the Physical Planning Act states that the part development plan must be published in the Kenya Gazette and local newspapers to invite persons to object to or make representations on the plan.

42. Sections 24 to 26 of that Act set out the procedure for the preparation of the local physical development plan, how it is to be approved and published. If no representations against or objections to the plan are received within 60 days, then the regional physical plan is to be submitted to the Minister for his approval. The 1st Defendant submits that the 2nd Defendant complied with these procedures when he applied for allocation of the suit plot.

43. Section 52 of the Physical Planning Act requires that every notice published in the gazette under the provisions of the Act should also be published in two local dailies. The 2nd Defendant advertised the revised pdp in 2004.

44. It is not clear why the Plaintiff did not pursue the 2nd Defendant to issue a lease over Plot No. S25 to her. If she had done this, then the 2nd Defendant would have allocated her a different plot after the amalgamation of this plot with S26, S27 and S28 to create Plot A as intimated in the 2nd Defendant's memos. The 2nd Defendant would have ascertained whether the conditions set out in the letters of allotment were complied with by John Kaurai and her late husband.

45. It was not proper for the 2nd Defendant to continue collecting rates from the Plaintiff for Plot No. S25 which ceased to exist after this plot was amalgamated with others to create Plot A which the 2nd Defendant allocated to the 1st Defendant.

46. Based on the facts and evidence presented in court, the court finds that the 2nd Defendant complied with the provisions of the Physical Planning Act when it allotted the suit land to the 1st Defendant.

47. The court finds that the Plaintiff failed to prove her claim on a balance of probabilities and dismisses the suit with costs to the 1st Defendant. The 2nd Defendant will bear its own costs.

Dated and delivered at Nairobi this 19th day of April 2018.

**K.
JUDGE**

BOR

In the presence of: -

Mr Chacha holding brief for Mr. Mogeni for the 1st Defendant

Mrs. Sang holding brief for Mr. Oange for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff