



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 520 OF 2017

(Formerly Milimani ELC Case No. 68 of 2012)

MARY NJERI GATERO.....PLAINTIFF

VERSUS

TOWN COUNCIL OF KAJIADO.....1ST DEFENDANT

VERONICAH T. MAINGI.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 3rd March, 2012 the Plaintiff prays for judgement against the Defendants in the following terms:

- (a) That a Declaratory Order be issued that the Plaintiff is the lawful owner of plot no. 178 Majengo “A” and a Lease be issued in her favour forthwith.
- (b) The 2nd Defendant, her agents, servants and or workmen be evicted from the suit property.
- (c) The Defendants or their servants, agents and/or workmen be permanently restrained by by an order of the Honourable Court from trespassing, constructing, excavating soil or in any other way interfering with the Plaintiff quiet possession of plot No. 178 Majengo ‘A’
- (d) Costs and interest of the suit.
- (e) Any other relief the court may deem fit.

The 1st Defendant filed a Defence dated the 10th December, 2012 and denied that the Plaintiff was the allottee of plot No. 178 Majengo ‘A’ hereinafter referred to as the ‘suit land. It confirmed that the 2nd Defendant was issued with a letter of Allotment to that effect. It denied that the Plaintiff took possession of the suit land and that she was issued with a Letter of Allotment. The 1st Defendant also denied supporting the hiring of hooligans by the 2nd Defendant to invade and destroy the structures in the suit land.

The 2nd Defendant filed a statement of Defence dated the 10th August, 2012 where she denied the Plaintiff’s averments and contended that the allegations at paragraph 4 of the Plaint that intimated that Peterson Gatero was the allottee of the suit land as confirmed by a Letter dated the 11th August, 1978 is a forgery.

Evidence of the Plaintiff

PW1 MARY NJERI GATERO testified that she was the administrator of the estate of the late Peterson Gatero who died in 1987. She stated that the deceased was the allottee of the suit land having purchased it in 1978. She produced the Sale Agreement, Certificate of Translation and Certificate of Official Search to prove that her late husband Peterson Gatero was owner of the suit land. She contended that before August 2010, she had paid rates to the 1st Defendant. It was her testimony that when she undertook a search on 18th August, 2010 it revealed that the suit land belong to the 2nd Defendant.

In cross-examination she denied having held a meeting with the 2nd Defendant at the Chief’s office to deliberate on the dispute over the suit land. She confirmed reporting the dispute to the DO but not the Police. She insisted her husband had purchased the suit land in 1978 and commenced paying rates to the Council. She disputed that the 2nd Defendant bought the suit land in 1984 and denied knowing Wanjiru Wangai. It was her testimony that when the 2nd Defendant commenced putting up a latrine, she stopped it and reported to the County

Council. Further, when a cow fell into a hole at the suit land, she was called and she directed the said cow to be removed therefrom. In reexamination, she denied being related to Wanjiru Wangai but confirmed she was the vendor of the suit land. She stated that they had a caretaker Anne Wamuyu who used to take care of the plot as they resided in Nyeri. It was her testimony that the DO advised her to institute a suit in court and that Wanjiru Wangai had initially sued her late husband and in 1984 her late husband sued Wanjiru Wangai.

PW2 Anne Wamuyu Kageri confirmed that Peterson Gatero was her twin brother. It was her testimony that Peterson Gatero bought the suit land from Wanjiru Wangai and referred to the Sale Agreement dated the 21st July, 1978 that she had witnessed. She averred that the transfer of the suit land was done by the County Council. It was her evidence that Peterson Gatero never resided on the suit land nor constructed a house thereon and could not recall when the 2nd Defendant got into it.

During cross examination, she confirmed that the Plaintiff was her sister in law and had informed her that someone was on the suit land. She insisted the vendor was not alive when the 2nd Defendant commenced putting up the pit latrine on the suit land.

The Plaintiff thereafter closed their case.

Evidence of the Defense

DW1 Veronica Thimba Maingi testified that Wanjiru Wangai who was childless, was like her mother. It was her testimony that in 1984 Wanjiru Wangai sold her the suit land for Kshs. 12, 000 and they made an agreement to that effect. She confirmed paying the purchase price in bits and after completing to do so, she continued paying the land rates in Wanjiru Wangai's name. She averred that in 1990 Wanjiru Wangai transferred the suit land to her and thumbprinted the Transfer as she was illiterate. She stated that in 1995 she constructed a toilet thereon, and the vendor used to come stay with her when she was doing so. She confirmed that PW2's plot was opposite the suit land and that PW2's husband is a village elder who witnessed when she was putting up the toilet. It was her testimony that she continued paying rates for the suit land but slowed down any developments thereon in 2000. She contended that after Wanjiru's death, her family members started claiming the suit land but after several deliberations, the village elders declared she was the owner of the suit land. Further, after several meetings with the County Council, they also declared the plot belonged to her, was issued with a Letter of Allotment and advised to put up her pit latrine. She reiterated that she has developed the suit land by putting up houses thereon. It was her evidence that the Plaintiff even reported her to the Police who asked each one to produce their respective documents of title, which she did after which she was advised to proceed with developments thereon.

In cross examination she clarified that they entered into an agreement on 7th April, 1984 with Wanjiru Wangai who was selling her the suit land but the said vendor did not sign the Agreement. It was her testimony that her father used to pay the purchase price which was paid in bits, on her behalf. She stated that she used to pay rates to the County Council in the name of Wanjiru Wangai. She confirmed that she was only given the Letter of Allotment on 8th September, 2010. She did not avail minutes of the meeting held on 3rd April, 2007. She did not recall undertaking a search on the suit land in 1984. She insisted that the vendor did not tell her she had sold the suit land to Peterson Gatero and neither did she inform her there was a court case between them. She averred that the vendor used to periodically ask her for money. She further confirmed that the vendor did not sign some two letters and neither was there a witness who saw her writing them. She affirmed that the dispute over the suit land arose after the vendor had passed away but when she was alive no one came to claim it. Further, that the vendor's relative Jedidah did not recognize her as the purchaser of the suit land. She started building on the suit land before she got her letters of allotment and has a permanent house as well as temporary rental houses thereon.

DW2 Peter Wambua who was the village elder stated that three persons Jemima, Nyokabi and the Plaintiff who were from the vendor's family all claimed ownership of suit land. After deliberations and verification of the documents which the Plaintiff, Jemima and 2nd Defendant produced, they concluded that the suit land belonged to the 2nd Defendant. He said he knew that Wanjiru Wangai had been owner of the suit land. He confirmed seeing the 2nd Defendant from 1999 when she had started putting up a pit latrine and only met the Plaintiff in 2006. He however did not know Peterson Gatero.

In cross examination he clarified that he was a village elder and confirmed that the 2nd Defendant produced a Service Card which was in the vendor's name but did not avail a letter of allotment in respect of the suit land. He further clarified that by putting up a pit latrine on the suit land, it did not confer ownership. He explained that on the suit land there were iron sheet houses as well as one permanent house but could not recall the year they were constructed. He denied being present when the vendor sold the suit land to the 2nd Defendant.

In reexamination he reiterated that the 2nd Defendant showed them receipts which were in the vendor's name since the transfer of the suit land had not been effected to her.

DW3 James Akenga Angwenyi confirmed he was a neighbor of the 2nd Defendant. He knew the 2nd Defendant since 2012 when a cow had fallen into the pit latrine she was putting up and had to be pulled out. It was his testimony that Kameri Wangai told him the owner of suit land was the 2nd Defendant. He did not know the Plaintiff and confirmed that the 2nd Defendant had put up permanent houses on the suit land.

In cross examination, it was his testimony that his plot was about 100 metres from the suit land and he came to know the 2nd Defendant in 2012. He was emphatic that it is Kameri Wangai who told him the 2nd Defendant was the owner of the suit land.

The 2nd Defendant thereafter closed her case.

Both the Plaintiff and the 2nd Defendant filed witness statements, produced bundle of documents as exhibits as well as filed submissions that I have considered.

Analysis and Determination

Upon perusal of the pleadings filed herein including exhibits and upon hearing the testimonies of the witnesses as well as considering submissions from the Plaintiff and 2nd Defendant, the following are the issues for determination.

- i. Whether Peterson Gatero acquired suit land in 1978 and was thereafter issued with a Letter of Allotment.
- ii. Whether the Plaintiff took possession of the suit land.
- iii. Whether the 2nd Defendant was the legal allottee of the suit land and took possession thereof.
- iv. Is the Plaintiff entitled to the orders sought.
- v. Who should bear the costs of the suit.

As to whether the Peterson Gatero acquired the suit land in 1978, was thereafter issued with a Letter of Allotment and took possession thereof.

It was PW1's evidence that she is the administrator of the estate of the late Peterson Gatero and she produced Grant of Letters of Administration Intestate to prove this. Her testimony was that the deceased purchased the suit land from Wanjiru Wangai in 1978. She produced a Sale Agreement indicating the deceased purchased the suit land from the said Wanjiru Wangai for a purchase price of Kshs. 1700. PW1 further produced a Letter of Allotment dated the 11th March, 2004 which indicated that the same was a replacement of a Lost Letter of Allotment. It was her testimony that they paid land rates to the 1st Defendant until August, 2010 when she did a Search and discovered the suit land did not belong to the late husband anymore. PW1 however did not adduce any evidence on whether the deceased had obtained an initial letter of Allotment after purchasing the suit land from Wanjiru Wangai. PW1 did not adduce evidence on whether from 2010 to date she had been paying any land rates to the 1st Defendant. PW2 who was a sister in law to PW1 testified that the suit land belonged to the deceased Peterson Gatero and she was one of the witnesses who signed the Sale Agreement. PW2 also confirmed that she was the caretaker of the suit land and that the Plaintiff's had not built thereon. It was her testimony that it is the 2nd Defendant who had encroached on the suit land. I note at condition no. (b) in the Plaintiff's Letter of Allotment, it stated as follows: ' **The council may repossess (without compensation) the plot that remains undeveloped for a period of (2) two years after allocation.**' I note there was no evidence adduced by PW1 or PW2 if the deceased commenced developing the suit land from 1978 nor why he never took possession of the same from Wanjiru Wangai. PW1 in her evidence stated that PW2 was the caretaker of the suit land. She admitted that the 2nd Defendant had encroached on her land and constructed thereon. It is against the foregoing that I find that Peterson Gatero had never taken possession of the suit land and does not hold a letter of allotment over the same.

As to whether the 2nd Defendant was the legal allottee of the suit land and took possession thereof.

DW1 in her evidence claimed ownership of the suit land and contended that she was issued with a Letter of Allotment. and has been in occupation having constructed a permanent house as well as temporary rental units thereon. DW1's occupation of the suit land was not disputed by the Plaintiff's witnesses who failed to adduce evidence as to why the Plaintiff had never taken possession of the suit plot since 1978. It was DW1's testimony that she commenced constructing on the land when the vendor Wanjiru Wangai was alive. I note the vendor died in 2005 and it is not clear why after selling the suit land in 1978, the purchaser never took possession. PW1 produced proceedings from the Kajiado DM's Court Case No. 1 of 1984 where the deceased had sued Wanjiru Wangai concerning the suit land but he later withdrew it. In the said proceedings, he admits that the vendor was yet to transfer the suit land to him. DW1 also produced various documents to prove her claim to the suit land and these include a Letter of Allotment dated 8th September, 2010 that indicated it was a transfer from Wanjiru Wangai. She further produced two letters written by the Vendor dated the 26th June, 1990 and 27th May, 1997 which were thumbprinted by the vendor. However, she produced the Sale Agreement but admitted the same was not signed by the vendor. It was her testimony that after purchasing the suit land, she continued to pay the land rates in the vendor's name until the suit land was transferred to her. Both PW1 and DW1 produced receipts from the County Council to prove they were paying rates. This brings the question as to why would the 1st Defendant proceed to receive rates from the Plaintiff and the 1st Defendant for the same plot at the same time. In the minutes of a meeting of the Kajiado Town Council Dispute Committee held on 24th April, 2007, at page 2, it indicated that a Ms Jedidah Wangai disputed the signature of Wanjiru Wangai in the Sale Agreement with Peterson Gatero and claimed the said vendor was illiterate and did not know how to sign. As a result of this evidence, the Dispute Committee meeting resolved that the suit land belonged to the 2nd Defendant. I note the said minutes had also been filed by the 1st Defendant who however never brought any witnesses to testify.

As per the Certificate of Official Search dated the 20th July, 2010, produced by the Plaintiff, it indicated that Peterson Gatero was owner of the suit land. However it was DW2's evidence that she had been on the suit land and the dispute only arose in 2005 after Wanjiru Wangai died. If indeed the Plaintiff had been issued with a replaced Letter of Allotment in 2004, then why did she not take possession of the suit land as she had a document to back up her claim. From the testimonies of DW2 and DW3, they all confirmed that it was the 2nd Defendant who was in actual ownership of the suit land. PW2 who was PW1's caretaker on being cross examined on what she did after the alleged encroachment, said she only informed the Plaintiff. What is not clear is why the caretaker who resided on the adjacent plot continued to watch the alleged encroachment but never took any action. PW1 confirmed she went to the Police, DO and County Council following up on the suit land but this was all in vain.

Since it already emerged that the plaintiff stopped paying rates in 2010 and noting that it is the 2nd Defendant, currently doing so, and in referring to the case of **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** where Kimondo J held that:

"... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property"

I find that the 2nd defendant's letter of allotment is valid.

It is against the foregoing that I find that since the deceased did not comply with condition No. b in the Letter of Allotment that is cited above and noting that the 2nd Defendant was issued with a Letter of Allotment after 2004, I hold that the 2nd Defendant is indeed the allottee of the suit land.

Due to the glaring inconsistencies in the Plaintiff's evidence, and the fact that they have never been in occupation nor constructed on the suit land since 1978. Further, noting that the 2nd Defendant having been issued with a Letter of Allotment, constructed thereon and is currently residing on it, I find that the Plaintiff has failed to prove her case on a balance of probability and is not entitled to the orders sought.

I proceed to dismiss her case.

However since she was pursuing the suit land as part of the deceased estate, I will not make her pay the costs of the suit but direct that each party do bear their own costs.

Dated signed and delivered in open court at Ngong this 15th day of November, 2018

CHRISTINE OCHIENG

JUDGE