

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 465 OF 2010

BATROBA CHANGENDA KEMOLI.....PLAINTIFF

-VERSUS-

CITY PARK ESTATE HOUSING RESIDENTS ASSOCIATION.....DEFENDANT

JUDGEMENT

1. The Plaintiff is the registered owner of L.R. No. 209/11092/2, City Park Estate in Nairobi (“the Suit Property”). She was allocated the Suit Property vide the letter of allotment dated 21/10/1992 issued by the City Council of Nairobi. She obtained approval to develop the Suit Property from the City Council. When she requested the Defendant to ask the residents of City Park Estate to remove goal posts erected on the Suit Property so that she could develop the land, she met resistance and avers that the Defendant mobilised youth to heckle, harass, intimidate and threaten her and the contractor forcing the contractor to abandon the project altogether. She averred that the Defendant incited the residents claiming that the Plaintiff had grabbed the suit land.

2. The Plaintiff filed this suit on 1/10/2010 claiming that the Defendant’s trespass and wrongful occupation of the Suit Property had deprived her of the use of its and the opportunity to develop it as a result of which she had suffered damage. She seeks a declaration that she is entitled to the exclusive and an unimpeded right of possession and occupation of the Suit Property and is entitled to develop it. Further, she seeks a declaration that the Defendant or his agents are not entitled to remain on the Suit Property. She also seeks a permanent injunction to restrain the Defendant or his agents from continuing in occupation of the Suit Property, and from interfering with her development of the Suit Property. She also seeks vacant possession of the Suit Property, general damages for trespass and costs of the suit.

3. The Plaintiff attended court and gave evidence. She produced a copy of the letter of allotment dated 21/10/1992 which allocated her the suit plot. The letter set out certain conditions including making a capital payment of Kshs. 180,000/= . The letter required her to arrange for payment and acceptance of the offer within 60 days failing which the offer would lapse without further reference to her. She did not produce evidence of payment of the sum required or any formal acceptance of the offer.

4. She produced a copy of the lease dated 12/4/2000 granting her a 99-year lease of the Suit Property from 1/11/1981 together with copies of approval from the City Council of Nairobi authorising her to put up a domestic building comprising 12 flats on the Suit Property, and the approvals for the proposed development given by the National Environment Management Authority.

5. The Plaintiff filed written submissions in which she stated that the Defendant’s contention is that she acquired the Suit Property fraudulently. The Plaintiff maintains that the Defendant failed to prove fraud in her acquisition of the property. She relied on the case of ***Mike Maina Kamau v The Attorney General ELC Case No. 1303 of 2014***’ in which the court found that there was no evidence to show that the Plaintiff was involved in fraud or the irregular registration of the Suit Property.

6. The issue for determination is whether the court should grant the orders sought in the plaint.

7. The Defendant did not file a defence but he participated in these proceedings during the hearing of the application for injunction. The Defendant did not attend court during the hearing. His advocate informed the court that he wished to withdraw from acting for the Defendant for lack of instructions. The advocate had filed an application dated 6/2/2018 seeking leave to withdraw from acting for the Defendant citing the reason that the advocate- client relationship had irretrievably broken down and that, the Defendant had withheld further instructions. The application was not prosecuted. It is not clear why a defence was not filed before the advocate fell out with the Defendant.

8. The court has looked at the Plaintiff’s replying affidavit sworn on 4/2/2011 in opposition to the Defendant’s application dated 24/1/2011. She deponed at paragraph 4 that the Defendant had denied her access to the Suit Property by ordering the security guards at the main entrance to stop her or any vehicle wishing to proceed to the Suit Property. She stated that the Defendant had threatened her caretaker. She attached photographs taken of the Suit Property on 3/2/2011 to demonstrate that no work was going on at the Suit Premises. The court has looked at the photographs one of which shows the barrier at the entrance to City Park Estate. Another photograph shows some large holes dug up within City Park Estate with lines of houses on either side of the land.

9. The court has also looked at the affidavit of Samuel Kimani Thube filed in court on 3/11/2010. He deponed that the Suit Property has always been an open space in view of the underlying public utility lines such as power cables, water pipes and sewer pipes.

10. It is clear that the Suit Property lies within the estate. At the point when the City Council allocated the plot to the Plaintiff it ought to have given her access. It is not clear from her letter of allotment and the lease which was granted eight years later how she acquired title over the Suit Property. The Defendant, who was a resident of City Park Estate, deponed that the suit land had always been an open space for public

utility.

11. The court has considered the matter. The Plaintiff pleads that there were goal posts on the suit land which was left as an open space. The goal posts on the land connoted that the suit land was used as a playground and other recreational activities by the residents of City Park Estate. Samuel Kimani Thube averred in his affidavit that he had been a resident of City Park Housing Estate from 2000, having bought his house in that estate from its previous owner and that the suit land had always remained an open space.

12. Section 29(f) of the Physical Planning Act enjoins a local authority, such as the County Council of Nairobi which allocated the Suit Property to the Plaintiff, to preserve and maintain all the land planned for open spaces.

13. The Plaintiff has failed to prove her case on a balance of probabilities. It is dismissed.

Dated and delivered at Nairobi this 8th day of November 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Moriasi holding brief for Ms. Amani for the Plaintiff

Mr. Gakaria holding brief for Ms. Wambua for the Defendant

Mr. V. Owuor- Court Assistant