



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELC. CASE NO. 313 OF 2008**

**EDWARD MBURU MUNGAI & 3 OTHERS.....1<sup>ST</sup> PLAINTIFF**

**-VERSUS-**

**SAUTI SACCO SOCIETY LIMITED.....1<sup>ST</sup> DEFENDANT**

**DISTRICT COMMISSIONER OF MAKADARA.....2<sup>ND</sup> DEFENDANT**

**DISTRICT COMMISSIONER OF EMBAKASI.....3<sup>RD</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> DEFENDANT**

**AMOS NGATA KAMAU.....5<sup>TH</sup> DEFENDANT**

**SAMMY KARIUKI.....6<sup>TH</sup> DEFENDANT**

**FRANCIS LAPANDO.....7<sup>TH</sup> DEFENDANT**

**STEVEN KISAVI.....8<sup>TH</sup> DEFENDANT**

**STANILUS WAMBUA.....9<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs filed this suit in their capacity of officials of Alfajiri Self Help Group seeking a permanent injunction to restrain the Defendants or their agents from encroaching, occupying, destroying and trespassing onto the property known as Nairobi Block 82/4264-Savanna ("the Suit Property"). They also seek a mandatory injunction to compel the Defendants to vacate this land and remove any structures erected on it. They seek a declaration that they are the legal and beneficial allottees of the Suit Property and general damages for trespass in the Further Amended Plaint dated 25/9/2009.

2. Alfajiri Self Help Group was registered in the office of Social Services in Nairobi and its primary objective is to provide care for people who are affected and infected with HIV AIDS. They claim that on or about 23/6/2008, the 1<sup>st</sup> Defendant trespassed upon the Suit Property and illegally demolished the perimeter fence on the land. They claim that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have in abuse of their powers persistently interfered with or intermeddled with the Plaintiffs' ownership and quiet enjoyment of the Suit Property. The Plaintiffs claim that they are the beneficial owners of the Suit Property and that their proprietary rights are protected by the Constitution. They accuse the Defendants of interfering with their quiet possession and ownership of the Suit Property.

3. The 1<sup>st</sup> Defendant in its Defence filed in court on 5/8/2008 denied the Plaintiffs' claim. It denied that the City Council allocated the Suit Property to the Plaintiffs and averred that it was the registered owner of the Suit Property which it surrendered the title to the Government on 11/12/2007. The Suit Property was divided into two portions measuring 20.216 ha and 12.277 ha in respect of which fresh titles for L.R. No. Nairobi Block 82/8759 and Nairobi Block 82/8760 were issued, hence the Suit Property ceased to exist.

4. The 1<sup>st</sup> Defendant averred that the Plaintiffs applied for allocation of a different plot known as Nairobi Block 82/4262. It contended that the City Council of Nairobi did not own the Suit Property and had no right or interest to sell, allocate or transfer ownership of it to anybody. L.R. No. Nairobi Block 82/8760 was registered in the name of Sauti Cooperative Savings and Credit Society Limited. Nairobi Block 82/8759 measuring 20.216 ha was sold and transferred to Green Span Investment Limited which was issued a title that it charged to Prime Bank Ltd.

The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiffs claim since they have no legal right, title or interest to pursue as they aver in the plaint.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Notice of Preliminary Objection urging that the suit does not disclose any reasonable cause of action against them and that the reliefs sought in the plaint cannot be awarded against them. They argued that the suit did not comply with Section 13 A the Government Proceedings Act and that the Plaintiffs had not demonstrated in what capacity they instituted this suit.

6. The 4<sup>th</sup> Defendant filed a defence denying the Plaintiffs' claim. It denied being liable for any damage suffered by the Plaintiffs. The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants filed a defence on 5/11/2009 denying the Plaintiffs' claim set out in the Further Amended Plaint. They denied that the Plaintiffs have capacity to institute the suit or that the Plaintiffs had any right title or legal interest in the Suit Property. They stated that the 2<sup>nd</sup> Plaintiff is deceased and that the suit did not disclose any cause of action against them.

7. The 4<sup>th</sup> Plaintiff gave evidence. She stated that Alfajiri Self Help Group made an application for allocation of land and on 25/5/2007 to the Town Planning Committee of the City Council of Nairobi, which resolved to allocate the members of Alfajiri the Suit Property. She stated that the City Council of Nairobi in its letters of 13/6/1995 and 4/7/2007 recognised that part of the Suit Property was surrendered for public purposes and that the Plaintiffs' members were committed to use the suit land pending the Council's decision. She stated that the City Council of Nairobi confirmed by the letter of 16/5/2008 that the Suit Property had been allocated to Alfajiri Self Help Group. She also stated that the City Council of Nairobi approved the building plans in respect of the Plaintiffs development of the Suit Property. She claimed that the Defendants interfered with the Plaintiffs' ownership and enjoyment of the Suit Property on 23/1/2008.

8. She produced minutes of proceedings of the meeting of the City Council of Nairobi for the Months of April, May and June 2007. An item on the minutes reads:

**'Allocation of plot block number 82/4264 – Savanna**

Area councillor for Savanna Ward tabled an application letter for allocation of plot number 82/4262 in Savanna to Alfajiri Self Help Group who care HIV AID people.

The Minutes show that it was resolved that the proposals would be accepted subject to evaluation by technical officers.

9. The letter dated 4/7/2007 from the City Council of Nairobi addressed to Alfajiri Self Help Group stated that the Council was not allocating land due to a Government embargo and that Alfajiri Self Help Group was permitted to continue using the land on a temporary basis pending the Council's decision on the use of the land.

10. The memo from the Director of City Planning to the Director of Housing Development dated 13/5/2008 on the allocation of plot block no. 82/4264 stated that there was no objection from the planning point of view and that the proposal could be processed further. The letter of 16/5/2008 from the Director of Housing Development to the Plaintiff confirmed that the City Council of Nairobi approved the resolution of the Town Planning Committee to allocate the Suit Property to members of the Self Help Group. The letter stated that the Council was waiting for the list of members of Alfajiri Self Help Group so that it could issue plot ownership documents.

11. A letter dated 18/9/2009 addressed "To Whom It May Concern" on the notepaper of the City Council of Nairobi stated that as per the Council's records the captioned project belonged to members of Alfajiri/Savanna Self Help Group who had paid for their respective plots. No land reference number is indicated on the letter.

12. The Plaintiffs did not produce a copy of the application that they made to the Council for allocation of the plot. The witness stated that they believed that the land belong to the Government. Alfajiri Self Help Group wrote to the Ministry of Lands on 17/8/2006 applying for the Suit Property. In the letter they claimed that Continental Developers Ltd only claimed beneficiary interest which it not have; and Kenya Bureau of Standards claimed purchaser's interest but was not the purchaser. This information was based on what they found out when they did a search at the lands office. The witness confirmed that they did not have a letter of allotment issued by the Council in respect of the Suit Property.

13. Sammy Mbata also gave evidence for the Plaintiffs, which was along the same lines as that of the 4<sup>th</sup> Plaintiff. He did not have any evidence of payment by Alfajiri Sacco for the Suit Property.

14. David Elly Ndwiga, who was the Chairman of the 1<sup>st</sup> Defendant, gave evidence. He stated that the 1<sup>st</sup> Defendant which is the registered owner of the Suit Property, surrendered the original title in respect of the land in 2007 for purposes of having it subdivided into 2 parcels. The land was subdivided to create Nairobi Block 82/8759 and 8760. At no time did the City Council of Nairobi own the Suit Property. He maintained that the Plaintiff applied for allocation of plot 82/4262 Savanna and not the suit land. He denied that the Suit Property was allocated to Alfajiri Self Help Group.

15. He pointed out that the letter relied on by the Plaintiffs from the City Council of Nairobi dated 16/5/2008 made reference to a meeting held on 20/5/2008 which was not possible. He relied on the Council's letter of 16/9/2009 in which the Council indicated that its letter of 4/7/2007 was written under the mistaken belief that the Suit Property had been surrendered to the Council. The letter further stated that the Council could not have allocated land that it did not own and stated that the letter of allotment was null and void. The witness stated that the suit land belonged to the 1<sup>st</sup> Defendant which it subdivided.

16. The witness also stated that the Plaintiffs lodged a complaint with the National Land Commission (NLC) seeking orders similar to those it seeks in this suit. NLC reviewed the matter and confirmed that the 1<sup>st</sup> Defendant purchased the Suit Property in 1995 and that it subdivided

it and transferred one portion to Green Span Limited. The Commission upheld the 1<sup>st</sup> Defendant's title as being valid while dismissing the claim by the Alfajiri Self Help Group.

17. The witness produced a copy of the certificate of lease over the Suit Property issued to the 1<sup>st</sup> Defendant on 19/5/1995 by the Government of Kenya as lessor, for a term of 99 years from 1/7/1977. He also produced copies of the certificate of lease for Nairobi Block 82/8760 issued to the 1<sup>st</sup> Defendant on 18/12/2007 by the Government of Kenya as lessor. The approximate area is 12.277 ha. A certificate of lease over Nairobi Block 82/8759 was issued to Greenspan Investment Limited on 4/3/2008. The land measures 20.216 ha and the lessor is indicated as the Government of Kenya.

18. The letter from the City Council of Nairobi addressed to the Commissioner of Lands gave approval for subdivision of the Suit Property. The letter of 16/9/2009 addressed to the 1<sup>st</sup> Defendant clarified that the letter of 4/7/2007 addressed to Alfajiri Group was based on the mistaken belief that the suit land was surrendered to the council upon subdivision, which was not the case. The letter confirmed that the land allocated to Alfajiri Group did not exist on the date it was allocated and that the Council had no rights over the subdivisions of the Suit Property. The letter was copied to Alfajiri Self Help Group. The witness also produced a document evidencing payment of property rates in respect of Block 82/8760.

19. The abstract of title for the Suit Property shows that the 1<sup>st</sup> Defendant was registered as the proprietor of the Suit Property on 19/5/1995 and issued a certificate of lease. Prior to that, Continental Developers Limited was registered as the lessee on 7/10/1994. Entry number 5 shows that on 23/10/1995 Continental Developers Limited placed a caution against the Suit Property claiming interest as a beneficiary. Entry number 6 is a prohibitory order issued in **Nairobi HCCC No. 933 of 1996** and entry number 7 is a caution registered on 17/8/2000.

20. The search on Nairobi Block 82/8760 shows that the 1<sup>st</sup> Defendant was registered as proprietor of the lease on 18/12/2007 and that it charged this piece of land to Co-operative Bank Kenya Limited for Kshs. 34,600,000/=. The witness produced a copy of the Plaintiff's letter addressed to NLC claiming the Suit Property on 25/9/2013 and an earlier one dated 2/7/2013. He also produced a copy of the determination by the NLC that the 1<sup>st</sup> Defendant was the bona fide owner of Nairobi Block 82/8760 and that the Self Help Group did not establish any legal ownership to the land.

21. The witness clarified that the 1<sup>st</sup> Defendant surrendered its title over the Suit Property for purposes of subdividing it but not for public use since it was private land.

22. Parties filed submissions. The Plaintiffs submit that the Suit Property was held by the City Council of Nairobi in trust for the public and that it had a mandate to lease it out. The Plaintiffs maintain that the 1<sup>st</sup> Defendant could not have surrendered the suit land and at the same time retained the reversionary interest. They further argue that the subdivision of the Suit Property could not have been done by the 1<sup>st</sup> Defendant without the approval of the 4<sup>th</sup> Defendant.

23. They argued that the certificate of lease issued to the 1<sup>st</sup> Defendant was not properly acquired. They relied on the 4<sup>th</sup> Defendant's letter of 4/7/2007 which they claim indicated that the Suit Property was surrendered for public purposes. The Plaintiffs blame the 4<sup>th</sup> Defendant for permitting the 1<sup>st</sup> to 3<sup>rd</sup> Defendants to trespass on the Suit Property and for giving contradictory communication after approving the Plaintiffs application for allocation of the suit land. The Plaintiffs urged the court to grant the orders sought.

24. The court has considered the pleadings, the evidence and submissions of the parties. The issue for determination is whether the court should grant the orders sought in the Further Amended Plaint.

25. The Suit Property ceased to exist when it was subdivided to create Nairobi Block 82/8759 and 8760 which were registered in the names of Greenspan Investment Limited and Sauti Sacco Limited. Prior to that the land was privately owned by Continental Developers which transferred it to the 1<sup>st</sup> Defendant. If anyone were to lay claim to this property it would be Continental Developers Limited. The Suit Property was not public land and the City Council of Nairobi could not have allocated it to the Plaintiff since it was private land. The City Council of Nairobi acknowledged this position in its letter of 16/9/2009 addressed to the 1<sup>st</sup> Defendant and copied to the Plaintiffs.

26. The Plaintiffs have failed to prove their case. The suit is dismissed. Each party will bear its own costs since the primary objective of Alfajiri Self Help Group is to provide care to persons affected and infected by HIV AIDs. The court declines to award costs against the Self Help Group.

Dated and delivered at Nairobi this 6<sup>th</sup> day of December 2018.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Wanyanga for the Plaintiffs

Ms. Nyaga holding brief for Mr. Ngatia for the 1<sup>st</sup> Defendant

Mr. Kamau holding brief for Mr. Motari for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

Ms. Omesa for the 4<sup>th</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 5<sup>th</sup> to 8<sup>th</sup> Defendants