



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. SUIT NO. 363 OF 2008

LEAH ATIENO OGWEL.....1ST PLAINTIFF
MAURICE ODONGO AYUGI.....2ND PLAINTIFF
DUNCAN WAITHAKA NDEGWA.....3RD PLAINTIFF
CONSOLATA AWINO OKEYO.....4TH PLAINTIFF

VERSUS

NGEI PHASE 2 LANGATA RESIDENTS ASSOCIATION...1ST DEFENDANT
MAJOR RTD. MOSES A. MULEBI.....2ND DEFENDANT
MR. ENOCK M. SABWA.....3RD DEFENDANT
MRS. CATHERINE KIHICO.....4TH DEFENDANT
MRS. RAHIMA ABUBAKAR.....5TH DEFENDANT
MRS. LOICE BARMAO.....6TH DEFENDANT
MR. EDWIN OTIENO.....7TH DEFENDANT
MR. OSCAR BEAUTTAH.....8TH DEFENDANT

JUDGMENT

1. The Plaintiffs sued the Defendants who are residents of Ngei Phase 2 Estate in Nairobi, seeking a permanent injunction to restrain the Defendants or their agents from trespassing upon or interfering with the Plaintiffs' ownership and enjoyment of L.R. Numbers Nairobi/Block 72/2927, Nairobi/Block 72/2928, Nairobi/Block 72/2929 and Nairobi/Block 72/2930 (the "Suit Properties").
2. The Plaintiffs are the registered owners of the Suit Properties situated in Langata. They claim that the Defendants have interfered with their ownership and enjoyment of the Suit Properties by stopping them from accessing and developing their properties on the pretext that the plots are a reserved recreational area for residents of Ngei Estate.
3. Contemporaneously with the filing of the suit, the Plaintiffs brought an application for temporary

injunction.

4. The Defendants appointed the firm of J.B. Shilenje and Company advocates who filed grounds of objection together with an affidavit sworn by the 8th Defendant. The court will refer to this affidavit later in the judgment.

5. The application for injunction was withdrawn with no orders as to costs on 16/11/2009.

6. The Plaintiffs' advocate wrote to court on 1st December, 2009 asking the court to issue summons to enter appearance. Summons to enter appearance were issued and they were served by Lawrence Mulinge Mwanza who filed the affidavits of service in which he depones that he served all the 8 Defendants on 11th March 2010 between 11.00 a.m. and noon. He depones that he served all of them in their houses and they all declined to sign his copies of the summons to enter appearance. Curiously, the process server swears that he served both the 5th and 8th Defendants at 11.20 a.m. at Mamboko Close and Malibet Crescent respectively.

7. The Plaintiff's advocates requested for judgment against the Defendants for failing to enter appearance and file defence. The file was placed before the Deputy Registrar who entered judgment against the 1st, 2nd, 3rd, 5th and 7th Defendants only on 21st September, 2010. The court directed that the 4th, 6th and the 8th Defendants were to be served personally. There is no evidence on the file that these Defendants were served personally.

8. The Defendant's advocates filed an application in court on 27th February, 2017 seeking leave to cease acting for the Defendant. That application was not prosecuted.

9. The 2nd, 3rd and 4th Plaintiffs filed a document titled "Authority to Act" on 10th March 2017 through which they authorised the 3rd Plaintiff to appear, plead or act on their behalf in this matter.

10. During the hearing, the 2nd and 3rd Plaintiffs gave evidence. The court was informed that the 1st Plaintiff died hence her suit had abated.

11. The 3rd Defendant stated that he was a land surveyor. He bought plot No. E from Mary Agolla for Kshs. 300,000/= on 10th April 1997. The seller gave him a letter of allotment and part development plan (pdp) which was to be used for allocation of the unsurveyed plots.

12. The witness testified that after the resurvey was done, survey plan folio register no. 266/169 was prepared. He stated that as at 1977 plot numbers 249, 250, 251 and 252 had been created on the same line. These 4 parcels of land were amalgamated into one portion which was then subdivided to create plot numbers 2927, 2930 and 2931. Parcel numbers 262, 263 and 264 were also consolidated and on re-survey they produced parcel numbers 2928, 2929. The witness produced a copy of the survey plan and amended Registry Index Map (RIM) showing these plots.

13. After the re-survey the plots were allocated as follows: -

<u>Plot No.</u>	<u>New No.</u>	<u>Proprietor</u>
Plot A	2927	Leah Ogwel
Plot B	2928	Sold to Maurice Ayugi
Plot D	2930	Consolata Okeyo

14. The Plaintiffs were subsequently issued with leases and certificates of leases.

15. The 3rd Plaintiff informed the court that when he tried to fence his plot so that he could start construction he was stopped by the Defendant's Residents Association who claimed that his plot formed part of an open space. The witness testified that the survey plan done in 1997 showed that those plots were already surveyed for residential purposes. He stated that there are other open places within the estate. The Plaintiff asked the court to stop any interference with his property.

16. The 2nd Plaintiff stated in his evidence that he bought the land in 2001 after being introduced to George Owuor Ochieng who was selling his land. He had not done any development because the Defendants and the Ngei 2 Residents Association were hostile claiming that the land was their children's playing ground. He produced building plans and stated that he was ready to commence construction since his building plans have been approved.

17. Christine Okeyo gave evidence on behalf of the 4th Plaintiff. She told the court that she was the 4th Plaintiff's daughter and that her mother had given her the power of Attorney. She urged the court to grant an order to restrain the Defendants from interfering with the Suit Properties and prayed for costs of this suit.

18. The court has studied the file and notes that the 8th Defendant, Oscar Kiragu Beuttah swore an affidavit on 23rd October 2008 setting out material facts relating to the Suit Properties.

19. The 8th Defendant states that he had been an owner and resident of Ngei Phase II since 1973. He states at paragraphs 2 and 3 as follows:

2. THAT Ngei Estates in Langata area were developed and constructed in two phases, by National Housing Corporation between 1971 and 1973. The topography in Ngei Phase I did not present any major problems and the house compounds were parcelled out as larger units than those in Ngei 2. The topography in Ngei 2 presented difficulties with underground water and below surface rivers, and I am privy to information that certain areas, already given numbers, were not developed and were eventually left as an open ground, and these were the swampy areas and/or storm carriage lines and some were eventually utilized to place underground sewage and drainage pipes.

3. THAT three (3) of those open areas appear in the estate map.....One of them is occupied on temporary basis by Langata Junior School with approval of the Ngei 2 Langata Residents Association. The other two are similarly used by the school for playing grounds. Residents also use them for their sports, recreation, including church meetings and weddings.

20. He deponed that for the last 35 years, many people had visited the open spaces claiming to have been allocated the open spaces only to discover that the spaces were used by contractors for the passage of underground sewage pipes.

21. The 8th Defendant annexed copies of letters written to the police, Minister for Lands and the then area Member of Parliament, Hon. Prime Minister Raila Odinga complaining about the grabbing of their open spaces.

22. The copy of the 3rd Plaintiff's lease shows that it was issued by the Commissioner of Lands in September, 1997. The Commissioner of Lands who signed the Plaintiff's leases was not made a party to this case.

21. Section 9 of the Government Lands Act (which has been repealed) authorised the Commissioner of Lands to cause any portion of a township which was not required for public purposes to be subdivided into plots suitable for erecting buildings for business or residential purposes. Section 12 of that Act provided that unless the President ordered otherwise leases of town plots was to be sold by auction. None of the Plaintiffs adduced evidence to show that these plots were sold by auction.

22. The issue for determination is whether the Plaintiffs are entitled to a permanent injunction. The 8th

Defendant and 2 other Defendants were never served with summons to enter appearance. The orders sought cannot be granted against these three Defendants.

However, the court is of the view that in arriving at a fair determination of this dispute, it ought to consider the affidavit the 8th Defendant swore in opposition to the application for injunction.

23. The 3rd Plaintiff who is a surveyor, testified that the Suit Properties had initially been surveyed and allocated parcel numbers 249, 250, 251, 252, 253 and 262, 263 and 264. These two sets of plots were consolidated and letters of allotment issued indicating that they were unsurveyed plot numbers ABCD and E. These were subsequently allotted to the Plaintiffs. His testimony corroborates the averments of the 8th Defendant contained in his affidavit that when Ngei Estates in Langata area were developed and constructed, certain areas, already given numbers, were not developed and were eventually left as an open ground. The 8th defendant states that these were the swampy areas and/or storm carriage lines and some were eventually utilized to place underground sewage and drainage pipes.

24. The Plaintiffs relied on the case of **Joseph Arap Ng'og V Moiyo Ole Keiwua and 4 others** (1997) eKLR in which the court stated that Section 23 of the Registration of Titles Act gives an absolute an indefeasible title to the owner of property and that such titles can only be challenged on grounds of fraud or misrepresentation which the owner was party to. They also relied on the case of **Kuria Greens Ltd V Registrar of Title and another** (2011) eKLR where the court adopted the decision in the case of Ng'ok v Ole Keiwua on the sanctity of title.

25. The other case the Plaintiff relied on is **Phelister Mukamu Makau V Elizabeth Kanini Mulumbi** (2015) eKLR in support of the contention that a Plaintiff is entitled to orders sought in the plaint since the Plaintiffs evidence remained unchallenged and uncontroverted.

26. These authorities dealt with the issue of ownership of title. The Plaintiffs in this suit seek a permanent injunction against the Defendants.

27. The Plaintiffs state in the plaint that the Defendants maintained that the Suit Properties were left as an open space when the National Housing Corporation developed Ngei Estate and is used as a playground and for other social and recreational activities. This issue has weighed on the courts mind. If the Plaintiffs were to develop these plots, the residents and the school children from the neighbouring public school would be deprived of the use of the open space. Any excavation that the Plaintiffs may undertake would interfere with the underground sewerage and drainage pipes.

28. The Plaintiffs have not demonstrated that they are entitled to a permanent injunction to restrain the Defendants from interfering with their possession of the Suit Properties. The suit is dismissed with costs to the 1st, 2nd, 3rd, 5th and 7th Defendants.

Dated and delivered at Nairobi on 29th June 2017.

Read in open court in the presence of: -

K. BOR

JUDGE

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff & Defendant