



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 322 OF 2013

ELIDA WAIRIMU KINUTHIA.....PLAINTIFF

VERSUS

PATRICIA NTHENYA MATHEKA.....1ST DEFENDANT

JAMES KIPROTICH LELEI.....2ND DEFENDANT

BERNARD MAINA MUTTAHA.....3RD DEFENDANT

MESHACK O. AMBUKA.....4TH DEFENDANT

AMOS MACHENGE.....5TH DEFENDANT

JUDGMENT

The dispute between the parties herein revolves around the ownership of all that parcel of land known as Plot No. 287 “A” (also known as Plot No. C423) (hereinafter referred to as “the suit property”). The Plaintiff has contended that the suit property was allocated to her by a self help group known as Embakasi/Njiru United (hereinafter referred to as “EN United”) in the year 2006. In her plaint dated 7th March 2013, the Plaintiff averred that sometimes in the year 2010 or thereabouts, the 4th and 5th Defendants fraudulently purported to allocate the suit property to the 1st and 2nd Defendants. The Plaintiff contended that following the said fraudulent allocation, the 1st and 2nd Defendants unlawfully entered the suit property and started developing the same. The Plaintiff sought judgment against the Defendants for; a permanent injunction to restrain the Defendants from developing, selling, alienating, disposing and interfering with the Plaintiff’s title and occupation of the suit property. The Plaintiff also sought a declaration that the suit property belongs to her.

At the trial, the Plaintiff testified that sometimes in the year 2001, she purchased a parcel of land known as Plot No. A22 from one, Geoffrey Kahura Njoroje (hereinafter “Kahura”) at a consideration of Kshs. 90,000/=. Kahura had been allocated the said parcel of land by EN United. The Plaintiff told the court that the said parcel of land which she purchased from Kahura was later on taken over by a church. Plaintiff stated that after her parcel of land, Plot No. A22 was taken by the said church, Kahura told her that she could be allocated another parcel of land. The Plaintiff stated that she was thereafter allocated the suit property. The Plaintiff produced as exhibit, ownership certificate dated 13th December 2006 for the suit property which she claimed to have been issued to her by EN United following the said allocation. The Plaintiff also produced a receipt dated 13th February 2006 for the sum of Kshs. 1,500/= which she paid to the said EN United for survey, planning and other costs associated with the said parcel of land. The Plaintiff also produced as exhibit a Beacon Certificate dated 13th December 2006. The Plaintiff stated

that the suit property was allocated to her as a compensation for her parcel of land which was taken by the church.

The Plaintiff stated that the 4th Defendant who was the secretary of E N United confirmed in a letter dated 24th July 2011 that the suit property belonged to her. The Plaintiff stated that she had occupied the suit property from the year 2000 up to the year 2011. The Plaintiff stated that she later learnt that one, Francis Matheka Kambo who is the father of the 1st Defendant is the one who had purported to transfer the suit property to the 1st and 2nd Defendants. The Plaintiff stated that from the year 2000 when she purchased the suit property up to the year 2011 when the said Patrick Matheka Kambo purported to transfer the same to the 1st and 2nd Defendants, the said Patrick Matheka Kambo never laid a claim over the suit property.

The Plaintiff called the 4th Defendant MESHACK AMBUKA (PW2) as her witness. In his testimony, PW2 gave the history of EN United from the time it was established in the year 1998 up to the time the dispute herein arose. PW2 told the court that he was the secretary of EN United. He reiterated the evidence of the Plaintiff that the Plaintiff had acquired Plot No. A22 from Kahura and was issued with all requisite documents. He stated that the Plaintiff was later on allocated the suit property after her Plot No. A22 was taken over by S.D.A Church. He stated that the original allottee of the suit property was one, Andrew Kyengo who was the Chairman of EN United.

He stated that Andrew Kyengo (“deceased”) transferred the suit property to Francis Matheka who failed to develop the same. He stated that the suit property was in Block C while Plot No. A22 which was transferred to the Plaintiff by Kahura and was later on taken over by SDA church was in Block A. He stated that in Block C, EN United revoked several allotments to those who had not developed their parcels of land. He stated that Francis Matheka who owned the suit property was one of those whose allotments were revoked in 2004. He stated that EN United allocated to the Plaintiff the suit property in the year 2006 after the revocation of Matheka’s allotment. PW2 stated that the suit property was allocated to the Plaintiff after the Plaintiff made a complaint to the police over her plot which was taken over by S.D.A Church. PW2 stated that a dispute arose in the year 2010 between among others, the Plaintiff, one, Esther Maina and Francis Matheka over the suit property which was reported to Kayole Police Station. PW2 stated that it was at the request of the Assistant Chief Komarock sub-location that he wrote the letter dated 24th July 2011 which he produced in evidence as PExh 3. He stated that when the dispute was deliberated upon at Kayole Police Station, it was resolved that the suit property belonged to Francis Matheka because he had not been served with a notice for the revocation of his allotment of the suit property. After this determination, Francis Matheka proceeded to transfer the suit property to the 1st and 2nd Defendants on 21st January 2011. PW2 confirmed that he was the one who gave the certificate of ownership and other documents of title to the Plaintiff. He stated that the Plaintiff had also not developed the suit property by the time the same was returned by EN United to Francis Matheka. PW2 stated that his attempts to get another parcel of land for the Plaintiff failed.

The suit was defended by the 1st and 2nd Defendants only. In their joint statement of defence dated 28th November 2013, the 1st and 2nd Defendants (hereinafter referred to only as “the Defendants”) denied that the Plaintiff owned the suit property. The Defendants contended that they were the rightful owners of the suit property and that the Plaintiff was engaged in fraudulent machinations to dispossess them of the suit property. The Defendants averred that the development activities which they had commenced on the suit property were lawful as they were the rightful owners of the suit property. At the trial, the Defendants gave evidence and called two witnesses. The first witness to give evidence on behalf of the Defendants was Francis Matheka (DW1). DW1 stated that he acquired the suit property in the year 2000 from one, Kyengo who was the Chairman of EN United. After the suit property was allocated to him, he was shown the location of the property. DW1 stated that the suit property had no other claimant until the year 2011 when he transferred the same to the 1st and 2nd Defendants. It is in the year 2011 that the Plaintiff came up to lay a claim over the suit property. He stated that after the suit property was allocated to him by Mr. Kyengo, he was issued with a certificate of ownership on 20th June 2000. He stated that he paid a sum of Kshs. 1,500/= for the survey of the property. DW1 stated that he surrendered his certificate of ownership

for cancellation when he transferred the property to the 1st and 2nd Defendants who were issued with a new certificate of ownership. He produced copies of his certificate of ownership dated 20th July 2000 and a receipt dated 18th May 2000 as exhibits.

The 1st Defendant gave evidence next after PW1. The 1st Defendant told the court that the 2nd Defendant was her husband and DW1 was her father. She stated that in the year 2009, DW1 promised them that he would give them a parcel of land as a gift. She stated that in the year 2011, DW1 showed them the parcel of land that he had promised them and proceeded to transfer the same to them. She stated that after the said parcel of land had been transferred to them, they started putting up a building thereon. This is when the Plaintiff came complaining that the 2nd Defendant and she were putting up a building on the Plaintiff's land. The issue was reported to the police and the Plaintiff's claim was found to have no basis. DW2 stated that they continued with construction up to lintel level after which they stopped when they ran out of money. She stated that the parcel of land which was transferred to them by DW1 was the suit property and that they were issued with a certificate of ownership in respect thereof after DW1 surrendered his certificate of ownership for cancellation. She stated that after the suit property was transferred to them, the City Council of Nairobi issued them with a Plot Card and the plot reference number was changed from 287A to 423. DW2 stated that they used to pay land rates and rent to the City Council of Nairobi but stopped doing so when the Plaintiff instituted this suit against them over the suit property. She produced as exhibits, the Certificate of ownership dated 21st January 2011 and Plot Card dated 3rd October 2012.

The third witness for the Defendants was the 2nd Defendant who essentially corroborated the evidence of DW2. The Defendant's last witness was Bernard Maina Muttaha (DW4). DW4 told the court that he was the Chairman of EN United. He corroborated the evidence of PW2 as to when EN United was formed and its objectives. He told the court that before he became the Chairman of EN United, he was the treasurer of the group. He told the court that he was familiar with the suit property. DW4 stated that the suit property was initially owned by the former chairman of EN United who transferred the same to a Mr. Matheka. Mr. Matheka subsequently transferred the suit property to the 1st and 2nd Defendants. He corroborated the evidence of DW2 that the City Council of Nairobi had changed the plot reference number for the suit property from 287A to 423 and issued the 1st and 2nd Defendants with a Plot card. DW4 corroborated the evidence of the Plaintiff and PW2 on how the Plaintiff came to be allocated the suit property. He stated that the suit property was allocated to the Plaintiff after it was repossessed from Mr. Matheka (PW1) to whom the same had been allocated by the Chairman of EN United. DW4 stated that when the Plaintiff also failed to develop the suit property, the Chairman of EN United requested that the suit property be returned to Mr. Matheka (PW1). The request by the Chairman of UN United was acted upon and the suit property reverted to Mr. Matheka who transferred the same to the 1st and 2nd Defendants. DW4 stated that when the 1st and 2nd Defendants commenced construction on the suit property, the Plaintiff started complaining about the same. He stated that as at that time, they had already transferred the suit property to the 1st and 2nd Defendants and as such they could not assist the Plaintiff.

After the close of evidence, parties were directed to make closing submissions in writing. I have considered the pleadings together with the evidence and submissions on record. The parties did not agree on the issues for determination by the court. The 1st and 2nd Defendants framed four issues for determination while the Plaintiff did not frame any issue. In my view, the following are the issues which arise for determination in this suit, namely;

1. Whether the Plaintiff is the lawful owner of the parcel of land known as Plot No. 287A ("the suit property").
2. Whether the entry onto the suit property by the 1st and 2nd Defendant was lawful?
3. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff?

The first issue;

From my analysis of the evidence on record, my finding is that Francis Matheka (DW1) was the first allottee of the suit property. It follows therefore that before EN United could allocate or allot the same parcel of land to the Plaintiff, the first allotment to Francis Matheka had to be lawfully revoked and his certificate of ownership of the suit property cancelled. I have perused the Certificate of Ownership that was issued to Francis Matheka on 20th June 2000 when the suit property was allocated to him by EN United (DExh 1). It appears that the said Certificate of Ownership did not have any conditions attached to it. The Plaintiff led evidence that the allotment of the suit property to Francis Matheka was revoked by EN United before the said parcel of land was allocated to her. The Plaintiff did not place any evidence before the court as to the procedure that was followed in revoking Francis Matheka's allotment neither did she point out the basis for such revocation. Although the officials of EN United who gave evidence alluded to a notice having been placed in their notice board, no evidence of such notice was availed. The witnesses did not also tell the court on what basis they adopted that mode of service of notices if at all there was such a notice. Francis Matheka (DW1) denied in his evidence that he was served with a notice revoking the allotment of the suit property to him. The onus was therefore upon the Plaintiff to prove that Francis Matheka's allotment was revoked before the suit property was allocated to her. I am not satisfied on the evidence on record that the Plaintiff discharged this burden of proof. It is my finding therefore that as at the time EN United purported to allocate the suit property to the Plaintiff, the said property was owned by Francis Matheka who still had in his possession the Certificate of Ownership which was issued to him by EN United on 20th June 2000. The suit property was therefore not available for allotment to another party. It follows therefore that the purported allocation of the suit property to the Plaintiff was irregular and improper. The same could not therefore confer upon the Plaintiff any title over the suit property. Since Francis Matheka was still the lawful owner of the suit property when he transferred the same to the 1st and 2nd Defendants, the transaction was lawful and the 1st and 2nd Defendants thus acquired lawful interest in the suit property. The upshot of the foregoing is that the first issue is answered in the negative. The Plaintiff is not the lawful owner of the suit property which is lawfully owned and occupied by the 1st and 2nd Defendants.

The second issue;

Having reached the conclusion that the Plaintiff has no lawful interest in the suit property, none of the reliefs sought by the Plaintiff in this suit can be granted. There is no basis for the reliefs sought. As I have held herein above, the 1st and 2nd Defendants are the lawful owners of the suit property. They were therefore within their right to enter the same and commence development thereon. There is no basis therefore for the Plaintiff's prayer that they be restrained from entering the property.

From the totality of what I have stated above, I find the Plaintiff's case not proved. The same is accordingly dismissed. Each party shall bear its own costs in view of the peculiar circumstances of the case.

Delivered and signed at Nairobi this 27th day of June, 2017

S.OKONGO

JUDGE

Ruling read in open court in the presence of

N/A for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

N/A for the 5th Defendant

Kajuju Court Assistant