



**REPUBLIC OF KENYA**

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

**ELC CASE NO.136 OF 2015**

**PHANUEL**

**NYATENG.....PLAINTIFF**

**VERSUS**

**TOWN CLERK, MOHORONI TOWN**

**COUNCIL.....DEFENDANT**

**JUDGMENT**

1. Phanuel Nyateng, the Plaintiff, filed this claim against the **Town Clerk, Town Council of Mohoroni**, the Defendant, through the plaint dated 11<sup>th</sup> December 2012 and filed in court on 14<sup>th</sup> December 2012 seeking for permanent injunction against his parcel of land known as plot **092, Swahili Mjini within the town Council of Muhooni and costs.**

2. The claim is opposed by the Defendant through the statement of defence dated 17<sup>th</sup> January 2013 and filed in court on the 25<sup>th</sup> January 2013.

3. The hearing of the plaintiff's case started on 30<sup>TH</sup> September 2015 when the Plaintiff started testifying as pw1. Mr. Odeny and Odhiambo, the learned counsel for the plaintiff and defendant respectively represented their parties. The hearing was adjourned to allow the filing of supplementary list of documents. The hearing continued on 20<sup>th</sup> December 2016 in the absence of the defendant and their counsel. The plaintiff testified that the plot was given to him by **Kisumu County Council in 1978**. That later the area where the plot is situated was taken over by **Muhoroni Town Council** and that he has been paying the rates as exhibited by the receipts he produced as exhibit. That the Plaintiff had established a semi –permanent house before the Defendant required the plot owners to elect permanent buildings. The Plaintiff presented his building plans proposal for approval to the Defendant and paid the requisite fee of Sh.3,000/=. Thereafter he commenced the construction but the market master verbally ordered him to stop the construction alluding that his plot was not on the place he was carrying out the construction. The Plaintiff then contacted a registered surveyor who confirmed to him that his plot was on the position he was occupying. The Plaintiff has filed the Surveyor's report with the court.

4. The court then directed that written submissions be filed. The counsel for the Plaintiff filed their submissions dated 10<sup>th</sup> January 2017 on the 11<sup>th</sup> January 2017 while counsel for the Defendant filed theirs dated 19<sup>th</sup> February 2017 on the 21<sup>st</sup> February 2017.

5. The following are the issues for the court determination;

a) Whether the Plaintiff has established ownership of **plot No.092 Swahili Mjini, Mohoroni.**

b) Whether the Plaintiff has establishment grounds for issuance of permanent injunction against the Defendant.

c) What orders to issue

d) Who pays the costs.

6. The court has considered the pleadings filed by both sides, evidence adduced by the Plaintiff, documents filed by both sides, submissions by both counsel and come to the following determinations;

a) That though the Plaintiff's pleadings and oral evidence is to the effect that he was allotted plot number **092, Swahili Mjini** Muhoroni within the area under the Defendant, he did not avail to the court any document to confirm ownership either in form of a letter of allotment or lease. The Plaintiff had filed the list of documents dated 11<sup>th</sup> December 2012 with four documents listed but none of them had been annexed. The first document was described as Allotment/letter of offer. The Plaintiff subsequently filed another list of documents dated 30<sup>th</sup> September 2015 with four documents listed but none of those documents was an allotment letter or lease over the said plot.

b) That though the Plaintiff alleges that the Defendant has been interfering with the Development of his plot by stopping him from carrying out the development that have been approved by the Defendant, the latter has vehemently denied the allegation. The Defendant's position is that the Plaintiff's proposed development has not been approved and that all the Defendant was doing was to point out the extent of plot occupied by the Plaintiff. The court has perused the copies of the receipts dated 2<sup>nd</sup> August 2012, 11<sup>th</sup> July 2011, 28<sup>th</sup> August 2012, and 04<sup>th</sup> September 2012 and noted that the last two refer to building plan approval and are all in the names of the Plaintiff except the one dated 11<sup>th</sup> July 2011 which is in the name of **Boaz Lucy Magero** and refers to Plot **No.4476/126 Mohoroni**. The receipt dated 11<sup>th</sup> July 2011 cannot therefore be for Plot 092 and the Plaintiff has failed to offer an explanation to bring the nexus of that payment to the suit land.

c) That the ground report by Patrick Opiyo, licensed surveyor, that was commissioned by the Plaintiff and dated 14<sup>th</sup> February 2013 is to the effect that what the Plaintiff knows as **plot 092** is now designated as plot No.092 on plan No.N251/2007/1 done by the Physical Planning Department. That in the absence of a formal letter of allotment or lease in favour of the Plaintiff, the court is unable to confirm whether Plot No.092 occupied by the Plaintiff was so occupied on temporary occupation license basis or any other arrangement. Secondly the court is not in a position to know whether the Plaintiff's plot No.092 changed to Plot No.90 after the 2007 physical planning departments exercise. That the reasonable cause of action to take is for the Plaintiff to engage the Defendant so as to obtain a formal letter of allotment or lease for the plot and confirmation of whether his entitlement is plot 90 or 092. The Plaintiff should also engage the Defendant to show him the beacons for the plot on the ground.

d) That the Plaintiff has not availed any approved building plans or a formal communication of the approval of the building plans in respect of plot 092. The receipts for payment of fees cannot be evidence of the approval to commence construction of permanent developments. The copy of the floor plan with notification of approval variously dated 29.8.2012, 04.09.2012 and 22.08.2012 has no details of the plot number and is indicated to belong to one P. O. Omondi and not the Plaintiff. The court notes that the Plaintiff did not offer any explanation how P. Omondi fits into his claim.

7. That in view of the foregoing, the court finds that the Plaintiff has failed to establish his case on balance of probabilities and his case is therefore dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF JUNE 2017

In presence of;

Plaintiff            Absent

Defendant         Absent

Counsel            Mr. Odeny for Plaintiff and

Mr. Toyot for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/6/2017**

14/6/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Yogo for Odhiambo for the Defendant

Mr. Odeny for Plaintiff

Order: Judgment dated and delivered in open court in presence of

Mr. Odeny for the Plaintiff and Mr. Yogo for Odhiambo for the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/6/2017**