



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAIROBI**  
**ELC SUIT NO. 180 OF 2010**  
**JESCA ANDENYI ANDWATI**  
**(Suing as the Personal Representative of the estate of**  
**ERICK MELCHZADEK ANDWATI).....PLAINTIFF**  
**VERSUS**  
**AYUB MAINA.....1ST DEFENDANT**  
**CITY COUNCIL OF NAIROBI.....2ND DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this suit brings the suit on behalf of the Estate of Erick Melchzadek Andwati (deceased). She has sued the defendants over **Plot No.109-Umoja Inner Core – Sector V**.
2. Her claim is that her deceased husband bought the plot from one **John Unduvute Imbigo** in **September 1992**. Subsequently the said vendor caused a transfer to be done by the second defendant, the City Council of Nairobi in favour of the deceased where upon a Letter of Allotment issued in the deceased's name.
3. The plaintiff avers that after the demise of her husband, the 1st defendant illegally constructed structures upon the suit premises, despite him not being the registered owner of the suit premises. It is further pleaded that the 1st defendant built on the plot without obtaining the prior development approval as required by law.
4. The plaintiff therefore seeks an order of permanent injunction to restrain the 1st defendant disposing of, changing, seeking or pledging all the property known as **Plot No.109 – Umoja Innercore Sector V**.
5. She also seeks an order of Mandatory injunction to compel the first defendant, his servants, agents and employees to remove at their own cost all the structures or development erected or carried out by the respondents on the suit land or in the alternative, the plaintiff do remove the said structures and the 1st defendant do reimburse the plaintiff for the costs of removing the structures and pay the plaintiff mesne profits for unlawful occupation of the suit land.
6. A further order seeks that the second defendant be compelled to execute an assignment in favour of the plaintiff and in the alternative the Deputy Registrar do execute the assignment for the suit land in favour of the plaintiff.

7. The Grant of Letters of Administration was produced as '**P Exh 1**'. The letters show that the plaintiff was granted Letters of Administration *ad litem* over the Estate of Erick Melchzadek Andwati.

8. A copy of a Sale Agreement made between the deceased and one John Undubute Imbigo was produced as "**P.Exh 2**". It is undated. It also appears that in response to the plaintiff's letter dated **5th December 2008**, the 2nd Defendant, vide a letter dated **23/12/2008**, confirmed that indeed the suit land had been allocated to one J.U. Imbigo who later transferred the plot to Erick M. Andwati who as at the date of that letter was still the registered owner. Copies of these letters were produced by the plaintiff as "**P.Exh 3**" and "**P Exh 4**" respectively.

9. A copy of the Letter of Allotment issued by the 2nd defendant to the plaintiff's deceased husband was produced as "**P.Exh5**". Finally the plaintiff produced photographs of the structure erected upon the suit land. The two photographs were marked "**P.Exh 6(a)**" and **6(b)**. In conclusion of her evidence the plaintiff, said that she was pleading for the right to possess the suit property because it belonged to her.

10. The defendant never entered appearance and he never filed any defence despite service of summons upon them. The Affidavit of one **Harrison Machio** sworn on **10/3/2015** leaves no doubt that both defendants were properly served with Summons in this suit. The second defendant was, however, represented by counsel at the hearing of this case on **30/3/2017**. The first defendant was not represented at the hearing at all. However, as the plaintiff correctly submits, the 2nd defendant though represented, never refuted the plaintiff claims or put them to any doubt by way of cross-examination.

11. The plot in question is within the territorial jurisdiction of the 2nd defendant. The 2nd defendant, like the 1st defendant, was silent on the issue of whether or not approval was given to the erection of the structures on the suit premises by the 1st defendant. The plaintiff relies on the cases of **Joseph N.K. Arap Ngoi vs Justice Moiyo Ole Keiwua and 4 others - Civil Application No. Nairobi 60 of 1997 Koinange & 13 others vs Koinange, (1986) eKLR 23, Philomena Warigia Waweru vs Patrick Mbugua & 4 others (2008) eKLR and Alice Otieno Ochieng vs Monica Juma Apela & Another Kisumu HCCC No.365 of 1996**.

12. There is no doubt that the suit land belonged to the plaintiff's deceased husband. The 2nd defendant confirmed as much in writing. The letter of allotment and the letter dated **23/12/2008 (P Exh8)** are a testimony to this fact. The plaintiff is the administrator over the estate of the deceased husband. She therefore has capacity to bring these proceedings against the defendants.

13. The documentary evidence she presented to this court is quite persuasive as to the genuineness of her claim. Besides, the 2nd defendant, being the custodian of records of plot ownership did not seem at all interested in defending the claim. It did not file a defence and neither did the 1st defendant.

14. This court therefore finds save on the issue of *mesne profits* on which no evidence was laid, the plaintiff has proved her case on a balance of probabilities. I therefore grant the following orders:-

a. Prayer No. (a) and (d) are granted as prayed in the plaint.

b. Prayer No. (b) of the plaint is granted only to a limited extent, that is:-

i. The defendants shall have six (6) months from the date of service of the decree herein to remove the structures from the suit land failure to which the plaintiff will be entitled to remove the said structures; and

ii. There shall be no award of *mesne profits* as the same were not proved.

c. Prayer (c) is granted only to the extent that the execution of assignment in favour of the plaintiff as administrator to the estate of the deceased shall be done by the second defendant only upon the production by the plaintiff of a full grant of letters of administration to the deceased's estate.

15. Finally, it is regretted that due to the involvement of the Court in the Service Week at Nairobi in May, 2017 and in Meru in June, 2017, and the two subsequent Judges' Retreats held after the hearing of the case, the judgment could not be delivered on time on 25/5/2017 as scheduled.

**Signed at Kitale on this 11<sup>th</sup> day of July 2017**

**MWANGI NJOROGE**

**JUDGE**

**Dated, signed and delivered at Nairobi on this 19<sup>th</sup> day of July, 2017**

**K. BOR**

**JUDGE**

**Judgement read in open court in the presence of:**

**Malinzi for the Plaintiffs**

**No appearance for the Defendant**

**Court Assistant: V. Owuor.**

**K. BOR**

**JUDGE**