REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 3074 OF 1997

HEBRON SALANO OBENDA……..……..PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI…..……....…..DEFENDANT

JUDGMENT

This suit was commenced by way of an Amended Plaint dated 4th June 2009 and filed on 5th June 2009 in which the Plaintiff sought for judgment to be entered against the Defendant as follows:

a) An injunction to restrain the Defendant, its agents, servants or anybody claiming through it from re-allotting, transferring the suit premises to any other person other than the Plaintiff and or in any other way interfering with the Plaintiff's quiet possession of the suit premises.

b) Specific performance by the Defendant of its contract to lease the suit premises to the Plaintiff for a term of 99 years residue of the Defendant's term.

c) Costs of this suit.

The Pleadings

In his Amended Plaint, the Plaintiff stated that by a Letter of Allotment dated 18th January 1994, the Defendant offered to allocate to the Plaintiff Plot No. B1022 Dandora Phase II Infill (herein referred to as the "suit premises") for a term of 99 years residue of the Defendant's term. He further stated that the said offer was conditional on the Plaintiff's acceptance of the terms and conditions set out therein and payment of stand premium of Kshs. 8,000/- and annual rent of Kshs. 1,600/-. He stated that he made those payments to the Defendant with the result that he became vested with the leasehold interest in the suit premises. He further intimated that a binding contract was created between him and the Defendant in which the Defendant was obliged to lease the suit premises to him for the specified term. The Plaintiff further stated that he was shown the beacons of the suit premises by one Ibrahim Maina, a surveyor of the Defendant and he took possession thereof. He then stated that on 10th October 1996, the Defendant approved his development plan and the Plaintiff commenced developing the suit premises. He stated that on 21st August 1997, one Carol W. Motiga (now deceased) unlawfully, maliciously and without justification demolished the Plaintiff's building alleging that the suit premises belonged to her.

The Defendant filed its Amended Defence dated 26th June 2009 in which it admitted demolishing a structure which was built on Plot No. 21019 Dandora Phase II, owned by one Carol W. Motiga, deceased, which structure was illegal and a trespass upon another plot. It was the Defendant's further statement that as per its records, Plot No. 21019 belongs to the said Carol W. Motiga and that the Plaintiff is a trespasser thereon. On those grounds, the Defendant sought for the dismissal of this suit with costs.

The Evidence

Hearing of this suit proceeded on 11th November 2010 when the Plaintiff gave his evidence. He testified along the same lines as set out in his Amended Plaint. In cross-examination, he admitted that he did not pay the stand premium and annual ground rent within the 30 days specified in the Letter of Allotment but did so after the lapse of this period. It was his testimony that the person who was harassing him and claiming the plot, Carol W. Motiga, has since passed on and that he was operating a kiosk on the suit premises.

The Defence closed their case without calling any witness or adducing any evidence.

Determination

After studying the pleadings and the evidence brought before this court, the question on the exact parcel of land under dispute in this case is still unclear. The Plaintiff, on his part, claims the parcel in dispute is Plot No. B1022 Dandora Phase II Infill while the Defendant maintains that the parcel of land that the Plaintiff is claiming is in fact Plot No. 21019 Dandora Phase II. Being the Plaintiff's case, the onus was on him to convince the court that the plot he occupies and claims is in fact Plot No. B1022 Dandora Phase II Infill and not Plot No. 21019 Dandora Phase II. I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

> ***"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

The Plaintiff, unfortunately, failed to address this issue of the actual identity of the plot under dispute. He did not produce any evidence whatsoever to convince the court that the plot he claims is Plot No. B1022 Dandora Phase II Infill and not Plot No. 21019 Dandora Phase II. That being the position, the court is not in a position to determine the question of the ownership of the suit premises and is further not able to issue the orders sought by the Plaintiff being a permanent injunction and an order for specific performance.

In light of the foregoing, this suit is hereby dismissed. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE