



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
LAND CASE NO. 357 OF 2010

BERNARD KARIUKI WARURU.....PLAINTIFF

-VERSUS-

FRANCIS WAWERU.....1ST DEFENDANT

MOSES MWANGI.....2ND DEFENDANT

THE CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

DAVID MWANGI.....4TH DEFENDANT

JUDGEMENT:

INTRODUCTION:

1. The plaintiff brought this suit against four defendants claiming the following reliefs:-

- a. A declaration that plot No.158 Kahawa West Phase II is the property of the Plaintiff for which the defendants have no legal right to encroach upon it.*
- b. A permanent injunction to restrain the defendants either by themselves, their agents, employees, servants or otherwise whatsoever from alienating, trespassing, encroaching upon or in any manner dealing with the subject matter of plot No. 158 Kahawa West Phase II.*
- c. An order of this Honourable Court directed to the defendants to demolish the permanent structure illegally erected on plot No.158 Kahawa West Phase II forthwith.*
- d. Costs of this suit plus interest at court rates.*
- e. Any other relief this Honourable Court may deem fit and just to grant.*

2. The case against the first defendant was withdrawn on 23rd October 2014. The third defendant entered appearance on 28th March 2011 through the firm of T M Kuria & Co. Advocates. The third defendant seems not to have filed any defence. When this case came up for hearing on 27th June 2017, Mr Kuria for the third defendant walked into court after the plaintiff had been examined in chief and cross examined by counsel for the second and fourth defendants. He was placed on record but never took part in the

proceedings.

3. This is an interesting case in which three parties seem to be claiming one plot on the ground using two different parcel numbers. The Plaintiff and the second and fourth defendant all claim to have been allocated the plot by the third defendant. It would have been much easier to solve the dispute had the third defendant whose successor is Nairobi City County participated in the proceedings. From the documents produced in Court by the disputants, it is clear that the third defendant was unwilling to unravel the dispute because it even declined to send a surveyor to the ground citing security challenges and was even unwilling to come out on who was the genuine allottee of the plot according to its records. The dispute was left to the court to solve and the same will be solved in accordance with the evidence adduced and the law.

PLAINTIFF'S CASE

4. The plaintiff's case is that he applied to the third defendant for allocation of the plot and was allocated plot No. 158 at Kahawa West Phase II. He was given a letter of allotment and he complied with the terms of the allotment letter. He paid the requisite money as indicated in the letter of allotment. He has been paying rates to the third defendant.

5. In the year 2010, he went to check on his plot and found some people carrying out construction. When he enquired as to who had authorised them to construct, they informed him that it was the second defendant. He then moved to Court where he obtained injunctive orders stopping any further construction. As he was pursuing the case against the second defendant he noticed that though the fourth defendant was claiming to own plot 159, he was actually putting up a house on his plot.

6. Efforts to have a surveyor from the third defendant to go to the ground did not succeed as the third defendant's officials claimed that they could not go to the site due to security concerns.

SECOND DEFENDANT'S CASE

7. The second defendant's case is that in 2001 he gave the area councillor his ID number and names for the councillor to go and process an allocation of a plot for him. The councillor took his details and later brought him a letter of allocation for plot No. 158. In 2005, he started constructing a house on the plot. When the house was mid-way, he was stopped from further construction. He insists that the plot in issue was allocated to him.

FOURTH DEFENDANT'S CASE.

8. The fourth defendant's case is that he applied to the third defendant for allocation of a plot. He was allocated plot No. 159 where he constructed a house where he is staying to date. He stated that he has never been served with any court order stopping him from constructing on plot no 159. He stated that he is willing to have a surveyor to go to the ground to show him his boundary and that of the plaintiff.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

9. I have carefully gone through the evidence adduced in this case as well as the submissions by the plaintiff. The issues which emerge for determination are firstly who is the lawful allottee of plot No. 158. Secondly has the fourth defendant encroached and or trespassed into plot No. 158?.

Who is the lawful allottee of Plot No. 158?

10. The plaintiff produced an allotment letter dated 25th June 1997. According to the letter of allotment, the plaintiff was expected to pay a total of kshs.8,640/= being stand premium and annual ground rent of 1,440. The plot was 0.02 hectares. The plaintiff paid the required amount and was issued with a receipt dated 25th June 1997. He also accepted the offer in writing as expected within the period given. The plaintiff also produced a letter from the town clerk of the third defendant authorising the revenue officer

to receive payment from him.

11. On 28th July 2014, the third defendant put up a public notice in the Daily Nation Newspapers calling on plot owners to pay up their rent and rates arrears within 30 days failing which forfeiture proceedings were to be taken. The Plaintiff's name appeared as number 160 as owner of plot 158. He owed the third defendant Kshs.17,280/-. The plaintiff paid the outstanding amount on 29th September 2004.

12. When a dispute arose between the plaintiff and the second defendant, the plaintiff complained to the third defendant that there was an illegal structure being put on his plot. The third defendant issued an enforcement notice which required the structure to be demolished. The demolition did not however go on as the third defendant's officers cited security concerns.

13. The second and fourth defendants produced letters allocating them plot Nos 158 and 159 respectively. Both letters are dated 21st September 2001. The second defendant did not make any payment of the ground rent and stand premium until 9th February 2012 after this suit had been filed. The fourth defendant did not make any payment for stand premium and ground rent until 23rd May 2011 after this suit had been filed.

14. There is no evidence that either the second or fourth defendants have been paying rates and rent to the City Council and lately the Nairobi City County. Though the fourth defendant claims to be owner of plot No. 159, he is actually not the owner of that plot. The records of the third defendant which were published on 28th July 2004 in the Daily Newspaper show that the owner of plot No.159 at Kahawa West Phase II is Grace Musyoki who had accumulated arrears of Kshs. 12,960/=. If the fourth defendant was owner of plot No. 159 as he claims, his name would have been the one shown under that plot as he had not made any payment as at the time the advertisement was made.

15. There is a letter dated 20th June 2011 by the Ward Manger, Kahawa West addressed to the Chief Surveyor of the third defendant. This Ward Manager listened to the Plaintiff and the second and fourth defendant. Plot No 158 was 25x60 ft as per the plaintiff. The second and fourth defendants claimed that the plot was later subdivided into two portions of 12.5 x60 ft each. The Ward Manager was asking the third defendant's surveyor to send a surveyor to solve the ownership dispute.

16. Had the surveyor from the third defendant gone to the ground, the truth would have been known. However be that as it may, it is clear that the plot which the second defendant is claiming does not belong to him. It is also clear that plot No. 159 which is being claimed by the fourth defendant is non-existent. From the analysis given herein and considering the contents of the letter of 20th June 2011 from the Ward Administrator of Kahawa West, the second and fourth defendant are actually on plot No. 158 which belongs to the plaintiff. I therefore find that the lawful owner of plot No. 158 is the plaintiff.

17. Even if it were that this was a case of double allocation which is not the case, then the law is that the first in time takes precedence and in this case it is the plaintiff who was the first in time to be allocated the plot. There is overwhelming evidence that plot No. 158 belongs to the plaintiff. The plaintiff's plot size is shown to be 0.02 hectares. That of the second defendant is also 0.02 hectares. This is the same case with the plot which the fourth defendant claims to be plot No.159 which as I have shown hereinabove belongs to someone else. This is not possible.

Whether the fourth defendant has encroached and or trespassed into plot No.158.

18. I have stated hereinabove that plot No.159 which the fourth defendant claim to own does not exist. The plot he is occupying is actually within plot 158. The fourth defendant is agreeable to a surveyor being sent to the ground. The plaintiff in his submissions is also requesting for an order to issue directing the Nairobi City County Surveyor to go to the ground to determine if the fourth defendant has encroached on to plot 158. I may not be a surveyor but from the evidence herein, I have no doubt that the fourth defendant is a trespasser on plot 158 and I find so. I will be vindicated once the Nairobi City Survey goes to the ground.

CONCLUSION.

19. From the analysis herein above, I find that the Plaintiff has proved his case on a balance of probabilities. I enter judgement in his favour against the defendants as follows:-

a. A declaration that the Plaintiff is the owner of plot No.158 at Kahawa West Phase II for which the defendants have no right to encroach upon.

b. A permanent injunction to restrain the defendants either by themselves, their agents, employees, servants or otherwise whatsoever from alienating, trespassing, encroaching upon or in any manner dealing with plot No.158 Kahawa West Phase II.

c. An order is hereby given directing the defendants to demolish the permanent structures illegally erected on plot no. 158 Kahawa West Phase II within a period of 90 days failing which the plaintiff shall be at liberty to do so at the defendants cost.

d. Before the demolition is carried out the County Surveyor of Nairobi City County shall within 90 days from the date hereof carry out survey to establish the boundaries of plot No. 158 Kahawa West Phase II under the supervision of the OCS Kiamumbi Police Station for security reasons.

e. The costs of this suit shall be borne by the defendants.

Dated, Signed and delivered at Nairobi on this 23rd day of November 2017.

E.O.OBAGA

JUDGE

In the absence of parties who were aware of the date and time of delivery of Judgement.

Court Assistant: Hilda

E.O.OBAGA

JUDGE