



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CASE NO. 181 OF 2011

JOHN MWANGI NGAHU.....PLAINTIFF

VERSUS

MARY MUKIRU.....DEFENDANT

JUDGMENT

Introduction.

The suit property is situated in an informal settlement scheme in Embakasi Nairobi. None of the parties has a title to the land in dispute, but both litigants peg their claim on the basis of letters of allotment. Plaintiff identifies his plot as no. 3/389 in Soweto squatters settlement scheme, whereas defendant states that her plot is No. 3/387 in Soweto squatters settlement scheme phase 11 (Ex- Muoroto village). On the ground though, both parties are claiming one and the same plot.

Pleadings.

Plaintiff filed the suit on 2/7/2011 averring that he is the lawful owner of a plot known as No.3/389 Soweto Squatters Settlement Scheme Phase II having purchased the same from one James Kamau Kingi on or around September 1990. He states that in March 2011, defendant unlawfully invaded the plot and efforts to have her leave have been futile. Plaintiff therefore prays for the following orders;

- a) A declaration that the suit plot rightfully belongs to the plaintiff
- b) General Damages
- c) Costs of this suit
- d) Interest on (c) and (d) at court's rates

Defendant in her pleadings states that she is the owner of plot No. 3/387 at Soweto Squatters Settlement Scheme Phase II (Ex-Muoroto village). She avers that since 1992, the area had not been surveyed and that it was in March, 2011 when plaintiff trespassed on her land.

Defendant had filed a counter claim where she has identified herself as the plaintiff whereas she has named present plaintiff as 1st defendant and she has brought on board the Nairobi City County

Government as the 2nd defendant in the suit.

In her counter claim, Mukiri states that she is the lawful owner of the plot in question, the same being plot no. 3/387 situated at Soweto -Ex-Muoroto Village resettlement scheme. She further states that she is the one in occupation of the suit land and that it is Ngahu who trespassed into the plot in March 2011. Mukiri had reported the matter to Nairobi city council but no action was taken. Mukiri further states that she had built some structures on the suit land but the same were demolished by Ngahu, and she hence incurred loss and damage. Her prayers in the counterclaim are;

a) A declaration that the 1st Defendant in the Counter-Claim is not entitled to enter or use the Counter-Claim Plaintiff's Plot No.3/387 at all.

b) An injunction to restrain the Defendants by themselves, their servants or agents or otherwise howsoever from entering or using the said parcel of land or in any other manner from interfering with the Counter-Claim plaintiff's quiet enjoyment, use, occupation or possession thereof whatsoever.

c) Special Damages of Kshs.230, 000.

d) In the alternative without prejudice to (I) & (ii) above to the payment of the fair current value of the Plot in the sum of Kshs.1, 500,000.

e) General Damages

f) Costs of the Suit

g) Interest on (c) above from the date of filing suit to the date of payment in full and or (d) and (v) from the date of judgment until payment in full.

The second defendant, Nairobi County Government, did file a statement of defence on 10/6/16. It contains a general denial of both Ngahus and Mukiris claims, whereby the county government's claim is that it is not in the picture as far as the feud is concerned.

For ease of reference, the litigants will be identified by their names as Ngahu and Mukiri in these proceedings.

As is common in disputes of this nature, the matter has been in court for a long time primarily because of the diversions occasioned by the numerous applications filed by the parties (Ngahu and Mukiri). When the matter came up for hearing on 27/3/17 both Ngahu and Mukiri and their counsels were present. There was no appearance for Nairobi county government who had duly been served. Matter proceed.

Plaintiff's Case (Ngahu)

While testifying, Ngahu adopted his statement filed in court on 27/4/11 as his evidence in chief. His case is that he bought the Plot No.3/389 form one James Kamau Kingi in 1990. The Housing Development then updated its record. In 2005, he started to develop the plot and he built the premises up to slab level. Then in 2011 he found that Mukiri had invaded the plot. During Cross-Examination, he stated that his plot was in Soweto Squatters Settlement Scheme Phase 2 and that he doesn't know about Ex-Muoroto resettlement Scheme.

During Re-Examination, Ngahu stated that when he bought the plot, it was identified as 1/211 and upon going to the ground the plot was found to be too small hence he was given plot no. 3/389. He also says that his plot No.3/389 has no relation with plot No.387, the one of Mukiri is claiming. In support of his claim Ngahu relied on the following documents:

1) Allotment letter dated 20th September 1990

- 2) Housing Development Department allotment card dated 10th November 2009
- 3) Receipts Nos.211648, 211650 for standing premiums and plot card.
- 4) Letter dated 27th October 2005
- 5) Letter dated 10th March 2001
- 6) Enforcement notice dated 25th March 2011
- 7) Letter dated 14th March 2011 from Housing Development Department.
- 8) Letter dated 8th April 2011 from Assistant Chief – Embakasi District
- 9) Letter dated 11th April to Mukiri .

Defendants case (Mukiri).

Mukiri adapted her statement filed in court on 29/5/13. She avers that she is an evictee of Muoroto village and that the government resettled her and her colleagues in March 1992 in the Soweto Ex- Muoroto village resettlement scheme. She was allocated plot No. 3/387. She then proceeded to operate a food kiosk on the plot until 2006 when she found the kiosk demolished. She was assisted by the Chief and villagers to rebuild her kiosk. She learnt that it is a man called Njoroge who had ordered the demolitions. When she threatened to sue him, he disappeared only to resurface in March 2011 in company of Ngahu and the two were claiming her plot.

She says that at some point, Ngahu instigated her arrest. Her property was then demolished and she was served with court summons. Mukiri contends that Ngahu's plot is not in that area and that the impasse could have been resolved by the county government but the latter did nothing. She claims she has been paying rates to the County Government and that her plot is in the computer systems.

Further Mukiri states that fellow scheme villagers had again come to her rescue and this time round, she has managed to build a permanent house.

Danson Ndung'u Muiruri ,Mukiri's witness No. 2 has given an account of how they were relocated to the Ex-Muoroto village resettlement scheme as evictees of muoroto village. He confirms that the site where Mukiri is occupying is the same plot she was given. This witness resides in that area where he assists the area chief and he therefore knows that Ngahu is the trespasser.

Mukiri's witness No.3, one Samuel Njoroge told the court that he is the one who assisted Mukiri to build her food kiosk only for the kiosk to be demolished.

Mukiri also relied on the set of documents listed as No. 3 (a) to (l) filed on 28/5/2013.

ANALYSIS/DETERMINATION;

I will analyze and make a determination of the plaintiff's case as well as that of plaintiff in the counterclaim simultaneously. I proceed to frame the issues for determination as follows;

- 1) What is the nature of the allotment
- 2) Land interest in a settlement scheme.
- 3) Who is paying rates for the suit land
- 4) Damages

Nature of allotment.

From the record, the evidence and arguments advanced herein, Ngahu's claim is for Plot No. 3/389 at Soweto Squatters Resettlement Scheme Phase II whereas Mukiri's claim is for Plot No. 3/387, Ex-Muoroto village Resettlement Scheme. The question is Are the two plots one and the same on the ground? Who is the rightful owner of the plot in dispute?

The history of the dispute in and outside the court's arena is a classic case of unbridled lethargic method of haphazard planning (or lack of it) by the county government's predecessor. The indifference manifested by the County Government is rather shocking. Obviously it is the County Government's predecessor who ought to have been in charge of allocations of the plots in the settlement schemes but it appears they left this process to be run by other entities (known and unknown) including the provincial administration.

Under what category of land does the suit land fall under? Are there two different resettlement schemes or are the two schemes mentioned by Ngahu and Mukiri one and the same scheme. The County Government is the one which could have authoritatively shed light on these issues, but sadly it has not.

The dispute has persisted in and outside court since 2005, a period of over 12 years. It is the duty of this court to bring a legal closure to this dispute despite the absence of any input from the county government.

The first salvo was thrown by Ngahu when he filed the Notice of Motion of 27/4/2011, praying for injunction orders to restrain Mukiri from trespassing on Plot No. 3/389 Soweto Squatters Resettlement Scheme Phase II. The injunction orders were granted. Mukiri then filed an application subsequently thereof in an attempt to have the injunctive orders discharged. She didn't succeed, but it is apparent that she continued to utilize the suit plot on the ground hence the contempt of court orders application filed by Ngahu on 25/5/13.

In his submissions Ngahu urges the court to be guided by the evidence of surveyor from housing department given on 16/11/2011, where the surveyor had even produced a map. However, this evidence was given in support of the original application for injunction and not in the main hearing. Further, the ruling given by Gacheru J captures the magnitude of the situation, particularly the fact that the earlier court order was in respect of plot 3/389 and not 3/387.

An interest in land is as good as the one acquired. The question is, what kind of interests were acquired by the parties here in? For Ngahu, the basis of his claim is the document he produced as plaintiff exhibit 1, the allotment letter.

That document shows that the plot was issued to James Kamau Kingi on 20/9/1990 on temporary basis. The Plot No. was 1/211. The name James Kamau Kingi is then canceled along with the ID No.0920432/63 to read John Mwangi Ngahu ID No.1421333/64 and the plot No. is canceled to read 3/389. There is then the handwritten notes of 26/11/90 reading as follows:

“I have transferred my plot to John Mwangi Ngahu of ID No.1421333/64. Yours James Kingi.”

While being cross-examined, Ngahu had told the court that **“I bought the land on 26/11/1990. I didn't check with the allocating officer whether the change had been effected. I was shown the ground where the plot was allocated”**. If the allocating officer or authority were not in the picture, then on what basis was the plot of James Kamau Kingi changed from No.1/211 to 3/389? Who did the cancellation and when were the changes effected?

Further Ngahu has stated that:-

“I bought the plot No.1/211 but when we went to the ground, the plot was too small and so I was TRANSFERED TO PLOT NO 3/389. The question again is, who is this who had the mandate and a

free hand to go on the ground and just choose a plot, any plot? Was it a free for all kind of allotment? Even in such informal settlements as in the present case, there must be the allocating entity. Ngahu is not able to identify the allocating entity who had mandate to change plot numbers and even move around the area looking for a suitable, bigger plot for Ngahu. To this end I find that Ngahu's interest in the suit land has not been ascertained as the document referred to as the Letter of Allotment falls short of what can amount to an interest in land.

I therefore find that the authorities cited by Ngahu, **ELC NO.72/2013 Rachel Moraa vs. Machogu** and **ELC NO.501/2013, Ahmed Ibrahim Suleiman and another vs. Noor Hamisi Surur** cannot support Ngahu's claim to the land.

On the other hand, Mukiri's document of ownership is the one produced as Exhibit I. It has no cancellations in respect of plot No. No. 3/387. The document states that allottee was to be shown her plot by Surveyor. She and other Ex-evictees of Muoroto were then shown their plots. This is the same plot she has occupied to date despite the interruptions and demolitions of her structures in between. It follows that Mukiri's interest in land has been ascertained.

My conclusion is that in so far as the issue of ownership is concerned, Mukiri's letter of allotment is more authentic than that of Ngahu.

Land interest in a settlement scheme.

Ngahu calls his scheme Soweto Squatters Resettlement Scheme Phase II. Mukiri calls hers Soweto Ex-Muoroto village Resettlement Scheme. It is common ground that such settlement schemes are set up for the needy people, mostly people who have been displaced from elsewhere. Ngahu states that the plot was allocated to James Kingi on 10/9/1990 and he bought the same two months thereafter on 26/11/1990. Was James Kamau Kingi really a squatter?, Was he really a needy person?. Certainly not going by the speed with which he sold his "plot" (if indeed he ever had such a plot).

In cases of this nature, where there are settlements, the residents tend to know each other. They have a common history. They assist each other whenever one of them falls into some peculiar difficulties.

Mukiri has given a plausible and consistent account of how she and others were evicted from Muoroto village. They stayed put and refused to move until they were shown a place to resettle. I have taken judicial notice that the Muoroto slum evictions did occur sometime in early 1990s and the fame there of was in the gravity of confrontation between the evictees and authorities. The evictees according to Mukiri were eventually shown land where they were resettled. The evictees moved into this scheme in 1991. Mukiri's witness no. 2 was an evictee too. Mukiri states that, she had put up a food kiosk, which was her source of livelihood. That is why whenever her structures were demolished, the villagers would come to her aid to rebuild the same. To this end, Mukiri has been able to prove that she is part and parcel of the residents in the settlement scheme.

Ngahu on the other hand has no litany to tell regarding his occupation and utilization of the plot in question as a squatter, rightful so since he has never occupied or utilized the suit property from 1990 when he allegedly bought the plot from James Kingi.

This is perhaps a wakeup call for any one eyeing land in Resettlement Schemes. You buy such land at your own peril.

Rate payments'

I find that in Mukiri's documents produced as Exhibits 10 and II, she has demonstrated that the County Government dealt with her in respect of rate payments for plot No. 3/387 Ex-Muoroto (Soweto). This is a confirmation that her plot exists. There is no evidence to indicate that Ngahu is a rate payer on the other land. This again buttresses Mukiri's claim to ownership.

Damages.

When Ngahu obtained an injunction from the court on 27/4/11 ex-parte, it was stated that “**the order granted is subject to the Plaintiff/Applicant filing an appropriate undertaking as to damages ...**” He went ahead to file the undertaking on 29/4/11. Ngahu appears to have been going to the suit land with the backing and blessings of the Government officers especially the second defendant. This is clearly manifested from the documents he produced, particularly Exhibit 5, 6 and 7, (documents on enforcement). Now that he has not proved his case, I can only conclude that he is liable to pay damages. The county government too cannot remain blameless as it is the one that backed Ngahu in carrying out the demolitions.

Mukiri claims that in the demolition of 2006, she incurred a loss of Shs.230, 000. This amount is claimed under special damages. The claim was however not proved and I disallow the same all together.

On general damages, Mukiri has given a detailed account of how she was harassed and her property was destroyed. The plaintiff (Ngahu) and The 2nd defendant in the counter claim were the forces behind the harassments. I am inclined to believe that Mukiri is entitled to general damages for the harassments she encountered in the hands of Ngahu and the predecessors of the county government. I proceed to award general damages to the tune of sh. 300 000.

CONCLUSION;

I grant orders as follows;

- 1) Plaintiff's (NGAHUS) claim is here by dismissed.**
- 2) Plaintiff in the counterclaim (Mukiri) claim is hereby allowed.**
- 3) A declaration is hereby issued that 1st defendant in the counterclaim (Ngahu), has no claim of ownership on plot number 3/387.**
- 4) An injunction is hereby issued restraining defendants in the counterclaim by themselves, their servants and or agents from entering or using the parcel number 3/387.**
- 5) General damages are hereby awarded to the plaintiff in the counterclaim (Mukiri) in the sum of Ksh. 300,000 as against both defendants in the counterclaim jointly and severally.**
- 6) Costs of the suit are awarded to the plaintiff in the counter claim (Mukiri) with interests at courts rates.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

Aswani for Defendant

Plaintiff in Counter Claim -Mukiri