



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 93 OF 2008

FLORENCE WAIRIMU KARIUKI1ST PLAINTIFF

ELIZABETH W MUTEMBEI.....2ND PLAINTIFF

JANE W MUNA.....3RD PLAINTIFF

HELLEN WANGARI KAMAE

(Suing as the Legal Representative of the Estate of

WILFRED KAMAE(DECEASED).....4TH PLAINTIFF

PETER CYRUS MUNIOH5TH PLAINTIFF

LEE KAGO MWANGI.....6TH PLAINTIFF

SAMMY NJAU CHEGE.....7TH PLAINTIFF

=VERSUS=

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGEMENT

INTRODUCTION.

1. The Plaintiffs filed this suit against the defendant which was the predecessor of City County of Nairobi claiming the following reliefs:-

a) An order of specific performance directing the defendant to identify on the ground to the plaintiffs the beacons for the plots it allotted them, issuing them with a beacon/boundary certificate and letting them into possession thereof.

b) In the alternative and without prejudice to prayer (a) above a refund of all the moneys paid to the defendant by the plaintiffs in the form of stand premium, annual rent, survey fees or any other payment in reference to the letter of allotment and payment of general damages for non-performance or breach of the contract from the date of allotment until payments in full.

c) Costs of this suit.

d) Interest on (b) and (at Bank rates) and (d) (at Court rates).

2. The first, second and 6th Plaintiff were allotted plots Nos.167,297 and 391 respectively at Komarock South in Nairobi. The third and the fifth plaintiffs are purchasers of plot Nos.259 and 204 respectively from the original allottees. The fourth plaintiff brought the suit as legal representative of her deceased husband Wilfred Kamae who was the allottee of plot No. 367. The seventh plaintiff brought the claim on behalf of his deceased sister Fraciah Wambui Karuga who was the allottee of plot No. 46.

3. The defendant filed a defence to the plaintiffs claim out of time. This defence was later struck out at the instance of the plaintiffs. The hearing therefore proceeded by way of formal proof.

PLAINTIFFS CASE IN PLEADINGS.

4. The plaintiffs' case is that they were allocated their respective plots by the Nairobi City Council. They made all the payments which were required of them and accepted the offer in writing. The defendant however declined to perform its part by identifying the plots to them on the ground and issuing them with beacon certificates and putting them in possession.

EVIDENCE IN COURT.

5. The first plaintiff testified as PW2. She testified that she went to the plot which she was allocated but she was chased away by a criminal gang. Her plot was later built up by the criminal gang.

6. The second plaintiff testified as PW3. She testified that when she went to the plot which had been allocated to her, she found that the same had been built up. She complained to the City council but there was nothing done.

7. The third plaintiff testified as PW4 , she testified that she purchased her plot from Catherine Kavuu, the original allottee in 2006. She was taken to the ground by Catherine's husband but found that the plot was fully built up.

8. The fourth plaintiff testified as PW7. She testified that her late husband was allotted plot 362. That the City Council has never shown her the plot.

9. The fifth plaintiff testified as PW1. He testified that he bought plot No. 204 from Baraza Kitunyi in 1992. He later visited the plot and found that it had been built up.

10. The sixth Plaintiff had been incapacitated as at the time of hearing. His wife Keziah Nyokabi testified on his behalf as PW6. She testified that her husband was an accountant at the City Council of Nairobi. One time when they were going to Ruai, her husband told her that he had a plot at Komarock. She went on to state that he City Council did not show her the plot.

11. The seventh plaintiff testified as PW5. He stated that he used to work at the Nairobi City Council. In 1992, his sister who was working with the city council was allocated plot no. 46. His sister died in 1987.His family agreed that the plot be transferred to him as he was working with the City Council. The plot was duly transferred to him but he could not access it as he was prevented by a criminal gang. He further stated that there was a time the city council advertised a list of plot owners. His name appeared as owner of plot No.47 but that this was a mistake. It should have been plot No.46.

ANALYSIS

12. I have gone through the documents produced by the plaintiffs in this case. The first plaintiff was allotted her plot on 6th March 1992. On 10th July 1998 she entered into an agreement for lease with the City Council. She paid stand premium and ground rent of Kshs.8640 on 30th April 1992. She paid other

monies in 1998 and 2004 being annual ground rent to the defendant.

13. The first plaintiff testified that when she went to the ground she was chased away by a criminal gang. During cross-examination she stated that she had been taken to the ground by the defendant's official and shown her plot. It could therefore not be true that the defendant did not show her the location of her plot. There is no evidence that she ever complained to the defendant that she had not been shown her plot. If her plot was invaded by a gang of criminals, she cannot seek compensation from the defendant. There is no evidence that it is the defendant who re-allocated her plot to whoever is on the ground. There is also no evidence that she tried to ask the defendant to remove the gang from the ground or that she tried to remove them through other legal means.

14. The second plaintiff was allocated her plot on 18th March 1992. She paid stand premium and annual rent. She also made other payments in 2004. She went to the plot and found that it had been built up. There is no way she would have known the location of her plot if she had not been shown.

15. The third plaintiff bought her plot in 2006 from its original allottee. She was taken to the plot by the vendor's husband and found that the same had been built up. There is no evidence that she has ever complained to the council to remove the trespasser or that she tried to get the trespasser out of her plot through legal means.

16. The fourth plaintiff's husband was allocated a plot on 27th February 1992. As at 2004 the rates and ground rent was being paid. She did not state whether her husband showed her the plot or not.

17. The fifth plaintiff testified that he bought his plot from Baraza Kitunyi. He could not have purchased a plot if he did not know its location. He testified that he was prevented by some unknown people from accessing the plot.

18. The wife of the 6th plaintiff testified that her husband once told her that he had a plot at Komarock. This is when they were going to Ruai. She did not specify when this happened. There is no evidence that the sixth plaintiff had told her that he had a plot but that the city council had not shown him the plot.

19. The seventh plaintiff stated that it is his late sister who had been allocated plot 46 and that when she died, the plot was transferred to him. He produced an allotment letter in his name dated 4th July 2002. He also produced another allotment letter dated 6th March 1992 issued to his late sister Fraciah Wambui Karuga. He produced a letter requesting transfer dated 21st June 2002. There is no evidence whether this transfer was accepted. He also produced a police abstract dated 3rd August 2004 in which he stated that he had lost his allotment letter.

20. After analysis the evidence adduced by the plaintiffs, the issues which emerge for determination are firstly whether the plaintiffs were shown their plot on the ground; secondly whether the defendant was in breach of any agreement with the plaintiffs; thirdly whether the plaintiffs are entitled to compensation from the defendant and lastly whether the suit is statute barred. On the first issue, it is clear that the plaintiffs were shown their plots on the ground. The plaintiffs were workers of the defendant and they received those plots in their capacity as employees of the defendant. Except a few plaintiffs who appeared not to be truthful, most of them stated that they knew their plots and that when they visited their plots, they were chased away by criminal gangs. How would one be chased from a plot he/she does not know of its location?

21. The seventh plaintiff produced an area plan which shows that the plots are clearly planned and numbered. What else was required of the defendant?. In the records of the defendant, the plaintiff's names or those who were allotted plots and had arrears of ground rent were advertised on 28th July 2004. All the plaintiffs made payments of the arrears so as not to lose their properties. The receipts they produced clearly show that they all made some payment in 2004 after the advertisement in the press. The names of the allottees are clearly shown only that in some cases, there were mistakes as a result of alignment which resulted for example the seventh plaintiff's name appearing as number 47 instead of 46. The question one

would ask is why the plaintiffs were paying the arrears if they did not know the location of their plots.

22. On the second issue, there was no breach of agreement by the defendant. The defendant offered the plaintiffs plots which they accepted in writing and went ahead to make the required payments. Those plots were given to them. As at 2004 the plots were in the names of the allottees. In the valuation reports which the plaintiffs are using for the first time in their submissions, they have valued plot No.204 belonging to the 5th Plaintiff. The photographs attached to the valuation report show a clearly planned place with highrise buildings. Those buildings could not have been neatly put up without any boundary markings showing the extent of plots and road areas.

23. On whether the plaintiffs are entitled to compensation from the defendant, I do not think that they can be compensated. The plaintiff's plots appear to have been grabbed by an organized criminal gang which has put up buildings on them. The plaintiffs cannot seek compensation from the defendant when there is no evidence that the defendant is protecting the criminal gangs or that it is the one which re-allocated the plots to the criminal gangs. To allow compensation in the circumstances will be setting a bad precedent where criminals invade property and then the affected individuals seek compensation from public bodies in charge of allocating those plots.

24. The burden of proof at a formal proof is the same as that required in any civil case. See the case of **Bachu Vs Wainaina (1982) KLR 108**. See also the case of **Wareham t/a A.F Wareham & 2 others Vs-Kenya Post Office Savings Bank (20040 2 KLR** it was held as follows:-

“ The burden of proof is on the plaintiff and degree of proof is on balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail”.

It was upon the plaintiffs to prove that the defendant did not meet its part of the agreement. The plaintiffs through their documents have shown that they were allocated land or some bought from the previous allottees. The evidence adduced by them clearly shows that they were shown their plots. The press advertisement of 28th July 2004 show that in the records of the defendant, the allottees therein were still the ones who had those plots. The payments made in 2004 was made pursuant to the advertisement. The plaintiffs cannot say that as at 2004; a period of over 10 years from the date of allotment , they had not been shown their plots.

CONCLUSION

25. It is clear that the plaintiffs knew their plots but that their plots had been invaded by criminal gangs. They therefore cannot come in 2008 to file a case against the defendant claiming that the defendant had never shown them their plots. There is therefore no basis upon which the plaintiffs can seek either a refund of their stand premium and annual rent or claim compensation on a claim which is statute barred having been filed 16 years after the cause of action arose. The valuation report which is being used for the first time in submissions would not have been admitted as it was not part of the documents which the plaintiffs relied in their evidence even if they had any case. I therefore find that the plaintiff have failed to prove their case which is hereby dismissed with costs to the defendant.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **December 2017**.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Ndirangu for Mr Gichohi for Plaintiffs

Court Assistant: Hilda

E.O.OBAGA

JUDGE