



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 2020 OF 2001**

**ANDREW KARIUKI NJOROGE.....PLAINTIFF**

**=VERSUS=**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> DEFENDANT**

**PAUL JOHN KIMANI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**BACKGROUND**

1. The dispute in this case relates to the ownership of a plot known as plot No.A-22 Umoja Innercore Sector 1 (suit property). The suit property is being claimed by both the plaintiff and the second defendant.
2. The plaintiff had filed a suit against the defunct city council of Nairobi on 22<sup>nd</sup> November 2001. The plaintiff was seeking an injunction restraining the city council or its servants and agents from in any way interfering with the suit property. The plaintiff also sought a declaration that he was the owner of the suit property.
3. The second defendant later filed an application seeking to be enjoined in the suit as a second defendant. The second defendant was allowed into the suit. The second defendant filed a defence and counter-claim against the plaintiff in which he sought for among other prayers an order of eviction against the plaintiff.
4. The plaintiff had filed an application for injunction against the first defendant. The second defendant also filed an application seeking injunction against the plaintiff. The two applications were heard by Justice Mbiti (Rtd) who did not write ruling in respect of the two applications. However from the reconstructed file, some interim orders had been granted whereby further construction on the suit property was not to proceed.
5. The plaintiff later withdrew his suit against both defendants. The record shows that the plaintiff did not file any defence to counter-claim. What therefore proceeded to hearing was the second defendant's counter-claim.

**Second defendant's case in the counter-claim.**

6. The second defendant stated that he purchased the suit property from its original allottee James Njenga Mungai. The suit property was duly transferred into his name in the records of Nairobi City Council. He later discovered that one Geoffrey Kamau Ayub had claimed that he was allocated the suit property by Nairobi City Council and had sold it to the plaintiff herein.

7. The second defendant's contention is that Geoffrey Kamau Ayub obtained a forged letter of allotment which he used to transfer the suit property to the plaintiff. The second defendant made a complaint to both the City Council of Nairobi and the Criminal Investigations Department. The said Geoffrey Kamau Ayub was charged and arraigned in Makadara Chief Magistrate's Court in Criminal case No.9231 of 2002 where he faced charges of making a document without authority and obtaining money by false pretences. The accused was acquitted under section 210 of the Criminal Procedure Code.

8. The plaintiff had been stopped from making any payment of rates in respect of the suit property to him but when Geoffrey Kamau Ayub who had sold the suit property was acquitted he went to the City Council of Nairobi where an official wrote an internal memo asking the relevant department to accept rates payment from him.

9. The second defendant further stated that the acquisition of the suit property by Geoffrey Kamau Ayub was fraudulent and that the first defendant had confirmed that the documents which Geoffrey Kamau Ayub used to transfer the suit property to the plaintiff were fake and that Geoffrey Kamau Ayub had no good title to pass to the plaintiff.

10. The second defendant's contention is that the suit property was never re-possessed from him and that the plaintiff admitted in the criminal case that he had been made aware that the documents which Geoffrey Kamau Ayub used to transfer the suit property to him were forged. The plaintiff maintains that the criminal case was bungled and that the suit property lawfully belongs to him.

#### **Plaintiff's Case**

11. The plaintiff's case is that he bought the suit property from Geoffrey Kamau Ayub and the property was duly transferred to him. He took possession and has since built rental houses. He states that the criminal case against Geoffrey Kamau Ayub was dismissed and that the second defendant has no claim to the suit property.

#### **Analysis of evidence and issues for determination.**

12. I have carefully gone through the evidence adduced by the plaintiff and the second defendant. There is no contention that at one point, the suit property belonged to the second defendant. The first issue for determination is whether the suit property was re-possessed from the second defendant and if it was re-possessed whether the same was re-allocated to Geoffrey Kamau Ayub. The second issue for determination is whether Geoffrey Kamau Ayub had a good title to pass to the plaintiff. The third issue for determination is as to who between the plaintiff and the second defendant is entitled to the suit property. Lastly, is the second defendant entitled to the prayers in his counter-claim".

#### **Whether the suit property was re-possessed from the second defendant and if the same was re-allocated to Geoffrey Kamau Ayub.**

13. The documents provided by the second defendant shows that the suit property had been allocated to James Njenga Mungai. There was a transfer from James Njenga Mungai to the second defendant. The minutes of the Housing Development and Management Committee of Nairobi City Council held on 27<sup>th</sup> September 1993 show that the suit property was in the name of the second defendant. This committee discussed allottees who had arrears and resolved that those with arrears of Kshs.20,000/= and above were to be given 30 days notice to clear the arrears failing which their plots were to be re-possessed. The second defendant had arrears of Kshs.14,900/= .

14. There is no evidence that the second defendant's plot was re-possessed. As late as April 1997, the Director of Housing Development was demanding rates arrears from the second defendant. On 17<sup>th</sup> October 2003 the Director of Housing Development of the City Council of Nairobi wrote to the firm of M/s Musyoka Annan & Co. Advocates confirming that the second defendant had cleared all his dues to the council. Following this confirmation, a lease in favour of the second defendant was duly drawn and executed by the mayor and town clerk.

15. On 11<sup>th</sup> October 2000, the Director of Housing Development Department had written to the Plaintiff's then lawyers informing them that the suit property had never been re-possessed from the second defendant and that the documents the basis of which the plaintiff was laying claim to the suit property had been forged by Geoffrey Kamau Ayub . A report by the investigating officer of the City Council dated 18<sup>th</sup> January 2001 showed that the second defendant was the lawful owner of the suit property. There was a

recommendation that the illegal structures on the suit property be demolished. This is what prompted the plaintiff to rush to court seeking to forestall the impending demolition of the structures which he had started putting up on the suit property.

16. There are further reports like the one dated 25<sup>th</sup> January 2001 as well as the one dated 27<sup>th</sup> July 2001. These documents show that the purported allocations of the suit property to Geoffrey Kamau Ayub was a forgery. The said Geoffrey Kamau Ayub purports to have been allocated the suit property in 1994. As at this time, the suit property was in the second defendant's name and had not been re-possessed. There is therefore no way the same would have been re-allocated to Geoffrey Kamau Ayub.

**Whether Geoffrey Kamau Ayub had a good title to pass to the plaintiff.**

17. The first defendant had filed its list of documents on 28<sup>th</sup> February 2008. These documents support the second defendant's case. These are the same documents which the second defendant is relying on. I have gone through the proceedings in the criminal case. Geoffrey Kamau Ayub was not acquitted because he was not on the wrong. He was acquitted because there was no sufficient evidence put before the trial Magistrate to warrant putting the accused on his defence. It is clear that the plaintiff herein was aware that Geoffrey Kamau Ayub had no clean title but he still went on to purchase the property. The plaintiff cannot therefore claim to be an innocent purchaser for value without notice. Geoffrey Kamau Ayub clearly forged the allotment and he therefore had no clean title to pass to the plaintiff.

**Who between the plaintiff and the second defendant is the lawful owner of the suit property"**

18. The documents produced by the second defendant have shown that the suit property belongs to the second defendant. The plaintiff was allowed to pay rates following the acquittal of Geoffrey Kamau Ayub by the Criminal Court. The official who wrote the memo did it as if it was the plaintiff who had been vindicated. The truth of the matter is that Geoffrey Kamau Ayub had obtained the allotment on the purported ground that he had been allocated the suit property following re-possession. The suit property had not been re-possessed. The second defendant has proved on a balance of probabilities that there was fraud which fraud he pleaded in his defence and proved through documents.

19. The plaintiff has submitted in his submissions that the second defendant has failed to prove fraud on the part of the plaintiff. I have already stated hereinabove that the plaintiff knew that Geoffrey Kamau Ayub had not obtained his allotment in a proper way. This knowledge came to him even before he filed this suit. He was stopped from further construction but he ignored this. He knew what he was doing. He was only trying to rush to complete construction on the pretext that no order can be given against him once he completed building. It is clear that the suit property belongs to the second defendant.

**Is the second defendant entitled to the prayers in the counter-claim"**

20. The plaintiff prayed for a mandatory injunction and an order of eviction. He also prayed for general damages and mesne profits. The order of mandatory injunction and eviction go hand in hand. Once the plaintiff is evicted, he should also be ordered not to trespass into the suit property again. The second defendant has suffered for not utilising his property for many years. The plaintiff has been getting rental income from the property. The second defendant is clearly entitled to general damages. In the case of **Park Tower Vs Moses Chege & others (2014) eKLR** Justice Mutungi held as follows:-

**“ I agree with the learned judges that where trespass is proved a party needs not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages”.**

I assess general damages in the sum of Kshs.3,000,000/=.

21. The second defendant cannot get mesne profits which ought to have been pleaded and evidence led on the same. The second defendant did not plead mesne profits and no evidence was led on the same.

**CONCLUSION**

22. I therefore find that the second defendant has proved his case against the Plaintiff on a balance of probabilities. I enter judgement for the second defendant against the plaintiff in the following terms:-

**1. An order of eviction against the plaintiff from plot known as Plot A-22 Sector 1 Umoja Innercore (suit property).**

**2. General damages of Kshs.3,000,000/=.**

**3. A Mandatory injunction directed at the plaintiff or his servants and or servants from trespassing into the suit property.**

**4. Costs of this suit be paid by the plaintiff.**

**Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of July,2018.**

**E.O.OBAGA**

**JUDGE**

In the Presence of :-

Mr Gitonga for Plaintiff

Defendant in person

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**



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