



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 272 OF 2013

PATRICK MWANGI KARIUKI.....1ST PLAINTIFF

AGNES NDUTA KARIUKI.....2ND PLAINTIFF

-VERSUS-

ZACHARIAH NJOROGI GAKUNJU.....DEFENDANT

JUDGMENT

The plaintiffs have filed this suit against the defendant in which they have prayed for a permanent injunction against the defendant and/or his servants, agents and labourers restraining him/them from entering, trespassing and interfering with the plaintiffs' quiet possession, occupation, use, proprietary and legal ownership of **STALL NO. 23 KARIOBANGI NORTH MARKET**, general damages for trespass to property and mense profits from 16th February, 2010 to the date of judgment, an order that the OCS Kariobangi Police Post and City Inspectorate Officers do supervise the enforcement of these orders and the costs of the suit and interest thereof.

The plaintiffs aver that on 10th February, 2010, the first plaintiff bought and got legal ownership of stall no. 23 Kariobangi North Market from the previous owner, Jacinta Njeri alias Jecita Njeri Thukia. That following the sale, the City Council of Nairobi transferred the ownership of the said stall to him on the 11th day of March, 2011 vide minutes of proceedings of Social Services and Housing Committee which, was/is the sole authority which consents to all sale and transfer transactions of all stalls rented out by City Council of Nairobi.

He further averred that in July, 2011, the City Council of Nairobi issued him with the mandatory City Council Rates Market Lease and on 29th July, 2011, the Director of Social Services and Housing Committee duly confirmed to both the previous owner and the 1st Plaintiff that the transfer had been registered.

That upon approval of the transfer, he duly paid the transfer fees and the stall rent on the 23/11/2011, to the City Council of Nairobi and has been paying the stall rent to date.

He pleaded that he gave the management and control of the stall to the 2nd Plaintiff but she has been denied the use, possession and occupation of the same by the defendant who had on 10th February, 2010 undertaken to vacate the same after having been a tenant to the previous owner, Jacinta Njeri paying a monthly rent of Kshs. 14,000/-.

He further pleaded that despite the undertaking, the defendant refused to vacate the stall and/or to pay the monthly rent aforesaid claiming that he bought the plot from one Joseph Githinji Mukere. He has thus claimed a total of Kshs 574,000/- being mense profits from 10th February, 2010 and an order for vacant possession.

The defendant filed his statement of defence dated the 2nd day of December, 2013 seeking that the plaintiffs' suit be dismissed with costs. In the said defence, he denies that the 1st plaintiff is entitled to the said property. He avers that he bought the same from one Githinji Mukere who had previously acquired it from Jacinta Njeri.

At the hearing, the 2nd plaintiff testified on her own behalf and that of her son, the 1st plaintiff. She adopted her witness statement signed on 15th July, 2013 and filed in court the same date.

It was her evidence that on the 10th day of February, 2010 the 1st Plaintiff bought and got legal ownership of the stall from the previous owner Jacinta Njeri Thukia and the City Council of Nairobi duly transferred the ownership of the stall to him on the 4th day of March, 2011. That the 1st plaintiff gave her the management and control of the stall but she was denied the use, possession and occupation of the same by the defendant.

It was also her evidence that on 28th February, 2013, the defendant was evicted by the City Council for being an illegal tenant but on the 3rd March, 2013, he forcefully broke the City Council Padlock and re-entered the stall which incident she reported at Kariobangi Police Post OB No. OB36/2/3/2013 and all efforts to resolve the dispute by the City Council failed. She produced several documents in support of the claim and urged the court to grant them the orders prayed for in the plaint.

Jacinta Njeri Mbuthia testified as DW4. She told the court that she was the owner of the stall but she sold it to Eunice Wamuyu who was using it for her own business. It was her evidence that she does not know both plaintiffs or Joseph Githinji Mukere. She denied having sold the stall to the Plaintiffs and stated that after she sold it to Eunice, Eunice called her and told her that she wanted to sell it to somebody else and she requested her to sign the transfer.

On his part, the defendant who testified as DW2 stated that he bought the stall from one Joseph Githinji Mukere in the year 2009 who requested to be given six months to remove his things and immediately thereafter, he (defendant) took possession and he has been in the stall since then. He produced several documents in support of his case but stated that when he visits the County Government to pay rates, he finds that the same has been paid by the 1st plaintiff.

Joseph Githinji Mukere testified as DW3. Though he does not have a filed witness statement on record, he relied on his replying affidavit that was filed in court on 30th April, 2014. Counsel for the Plaintiff did not have any objection to the same. It was his evidence that he bought the stall from Jacinta Njeri vide an agreement dated the 17th March, 2005 which he later sold to the defendant. That he handed over the possession of the stall to him together with a copy of the Identity Card for Jacinta Njeri.

That he later wrote a letter dated 27th May, 2009 asking the City Council to transfer the stall to the defendant.

At the close of the case, parties filed written submissions which they later highlighted in court.

The court has cautiously considered and analyzed the evidence that was adduced by the parties together with the submissions.

The subject matter of the dispute before the court is ownership of market stall number 23, in Kariobangi North Market. From the evidence available to the court, it is not in dispute that the same was originally allocated to Jacinta Njeri Thukia alias Jacinta Njeri holder of ID card number 1890574. She testified as DW1. Both the plaintiff and the defendant produced several documents in support of their respective positions, which this court shall consider alongside the evidence on record.

The first plaintiff through the evidence of the second plaintiff claims the ownership of the stall on the strength of a sale agreement dated 10th February, 2010 which was produced as plaintiffs' exhibit 1. The same was entered into between the allottee Jacinta Njeri Thukia alias Jacinta Njeri and the plaintiffs herein. The said agreement was signed by the 2nd plaintiff on behalf of the 1st plaintiff and the subject matter of sale is market stall number 23 Kariobangi Market at the price of Kshs. 600,000/-. In addition to the said agreement, the 2nd plaintiff produced a copy of the I/D and PIN certificate for Jacinta Njeri, the rent card for the stall, minutes of proceedings of the social services and housing committee for the City Council of Nairobi (as it was then) for the months of December, 2010, February – May, 2011, confirmation letter of transfer of the stall dated 29th July, 2011 together with bundle of receipts for rent paid to the Nairobi City Council, some of which are for the year 2016.

On his part, the defendant produced a document marked as Defence exhibit 1 through which she relinquished ownership of the stall to Eunice Wamuyu Ndegwa with effect from 24th January, 1991, a letter dated 8th June, 1993 which Jacinta Njeri wrote to the Nairobi City Council requesting them to transfer the stall in favour of Eunice Wamuyu, agreement of sale dated 27/05/2009 between Joseph Githinji Mukere and Zacharia Njoroge Gakunju and a handwritten agreement dated 17th March, 2005 between Jacinta Njeri and Joseph Githinji Mukere.

It is the 2nd plaintiff's case that the plot was transferred to the first plaintiff by City Council of Nairobi on the 11th March, 2011 vide minutes of proceedings of Social Services and Housing Committee which was/is the sole authority which gives consent to all sale and Transfer Transactions of all stalls rented out by the City Council of Nairobi. They further contended that the city Council of Nairobi duly issued the 1st plaintiff with the City Council market Lease as proof of valid legal ownership which documents, the defendant does not have.

The defendant on his part submitted that he is in actual possession of the stall since he bought it from Githinji Mukere on 27th May, 2009, who had purchased it from the original allottee, Jacinta Njeri on the 27th May, 2009. According to the defendant, he is in possession of the stall rightfully and it is the 1st plaintiff who did not carry out due diligence before entering into the alleged transaction.

As submitted by the counsel for the plaintiffs, there are three issues for determination by this court;

- 1. Who between the plaintiff and the defendant is the legitimate owner of stall number 23 Kariobangi Market?***
- 2. Whether the plaintiffs are entitled to the prayers sought in the plaint?***
- 3. Who should bear the costs of the suit?***

As pointed out earlier, the subject stall was allocated to Jacinta Njeri by the City Council of Nairobi. Though she testified in court during the hearing, the court formed the opinion that she is not a truthful witness. Her evidence was full of contradictions and she ended up not being a helpful witness to the court and therefore, the court will heavily rely on the documents that were produced as exhibits.

In her evidence, she stated that she sold the stall to Eunice Wamuyu and, though a copy of the sale agreement (if any) was not produced to court, the defendant produced what he referred to, as the power of attorney between Jacinta Njeri and Eunice Wamuyu in which, Jacinta relinquished ownership of the subject plot with effect from 24th January, 1991.

In a letter dated 8th day of June, 1993 Jacinta wrote to the Director of Services and Marketing Department, Nairobi City Council recommending the transfer of the stall in favour of Eunice Wamuyu Ndegwa.

It was her further evidence that Eunice Wamuyu later called her and told her that she wanted to sell the stall to somebody else and she requested her to sign the transfer documents. She admitted that she thumb printed the agreement dated 17th March, 2005.

In cross examination, she stated that she did not sell the plot to anybody else not even to Joseph Githinji Mukere. On being shown the sale agreement between herself and the plaintiffs, she stated that she was paid money after she sold the stall but not the kshs. 600,000/- indicated in that agreement.

The court, however, noted that the I/D number stated in the sale agreement dated 10th February, 2010 is hers though she disowned the PIN certificate which bears her name.

In her evidence, the 2nd plaintiff produced the card for the stall that is usually issued by the City Council to the original allottee. In her evidence, Jacinta Njeri told the court that she gave it to Eunice Wamuyu after she sold the stall to her. When he testified, the defendant stated that when he bought the stall from Joseph Githinji, he did not give him the original card. He told him that the same got lost. He was not even given a copy of the same.

Considering the evidence tendered by the defendant, Jacinta Njeri's legal interest in the stall was extinguished on 24th January, 1991 and therefore, she did not have any legal capacity to enter into an agreement for sale of the same stall on the 7th day of March, 2005 with Joseph Githinji Mukere. Consequently, Joseph Githinji Mukere could not pass a valid title to the defendant herein vide a sale agreement dated the 27th May, 2009. The defendant did not establish any link/nexus between Jacinta Njeri, Eunice Wamuyu and himself with regard to the ownership and the transfer of the said stall.

No sale agreement was produced between Jacinta Njeri and the said Eunice Wamuyu and if indeed it's true that Eunice purchased the stall, she could have been given the original card which she could have in turn passed on to Joseph Githinji Mukere and eventually to the defendant herein. As it stands now, the only document that the defendant has is the sale agreement between himself and Joseph Githinji which is not a title document.

The court also noted that the evidence of Joseph Githinji was contradictory on how he acquired the stall. In his evidence in chief, he stated that he bought the same from Eunice Wamuyu but in his replying affidavit filed in court on 30th April, 2014 which he relied on, he has stated that he bought the same from Jacinta Njeri vide an agreement dated 17th March, 2005. The court notes that, that agreement is very sketchy with no particulars of the parties and especially the vendor. But as I have already stated, by this material time and going by documents produced by the defendant, Jacinta Njeri did not have any legal interest in the stall which she was capable of passing on to any other person, let alone Joseph Githinji Mukere.

Comparing the two accounts given by the parties herein, it is my considered view that the plaintiffs' evidence is more believable and carries more weight. The 2nd plaintiff produced the agreement dated 10th February, 2010 between them and Jacinta. The I/D number shown in the ID card is the same as the one shown in the aforesaid agreement. By this time, no transfer had been effected at the city Council and even assuming that it had been sold to any other person, the plaintiffs would not have known even after carrying out an official search. The transfer of the same has now been effected and the record held at the City Council reflects the first plaintiff as the owner of the same as per the transfer of tenancy from Director of Social Services and Housing, and the approval as show in the minutes of Social Services and Housing Committee which were produced as an exhibit. The 1st plaintiff paid for the transfer fees and has been paying for outstanding market stall rate for the subject stall. It is not therefore true that the original owner was taken advantage of, as alleged by the defendant. The defendant's account on how he acquired the stall was not satisfactory given the evidence on record and the documents that were tendered as exhibits. The court finds that the plaintiffs have proved their case against the defendant and hereby enter judgment in favour of the 1st plaintiff in terms of prayers (1) and (3) of the plaint. The court also finds that the defendant has trespassed on the 1st plaintiff's plot since 10th February, 2010 and he is liable for general damages for trespass. A global sum of kshs. 300,000/- is hereby awarded. As for the mense profits, no concrete evidence was tendered before the court to support that limb of the claim and therefore, no award is made under that head.

The plaintiff is also awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 24TH Day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

..... For the Respondent