



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 130 OF 2015

EMILY ADIKA.....APPELLANT

VERSUS

JAMES SAISI MAGAMBO.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

(Being aggrieved from the Judgment of the Senior Magistrate at Milimani Commercial Courts, Nairobi delivered on 10th March, 2015 by Hon. C. Obulutsa Mr. Senior Principal Magistrates in CMCC No. 1303 of 2011.

JUDGMENT

The 1st respondent herein sued the appellant and the 2nd respondent in the lower court seeking a permanent injunction against them, to restrain them or their servants, or agents from occupying, possessing, entering, letting or otherwise claiming any rights whatsoever over house No. 5742, Jericho Lumumba in Nairobi. He also sought damages for unlawful occupation. The two defendants in the lower court denied the 1st respondent's claim but after a full trial the lower court found in favour of the 1st respondent which decision aggrieved the appellant herein leading to the present appeal.

In the Memorandum of Appeal filed herein, the appellant has faulted the lower court for ordering that the rent card which is in her name be nullified and registered in the name of the 1st respondent, whereas no such prayer was made in the plaint.

The court was also faulted for holding that the 2nd respondent had not filed a defence yet there was a defence on record filed on 3rd February, 2011. Further, the lower court was faulted for dismissing the appellant's counter claim which had been proved on a balance of probabilities. Bias was also alleged and disregard to the appellant's evidence and documents produced.

The entire judgment was also said to be against the weight of evidence and the law. There was also a complaint that Nairobi City Council is a non-entity in law. On those grounds, the appellant sought to have the appeal allowed.

As required of me, I have to reconsider and evaluate the evidence adduced before the lower court to arrive at independent conclusions.

The house in question is owned by the 2nd respondent and it does not matter whether or not it is known as Nairobi City Council or Nairobi City County. This is because, the decision of the lower court and in this appeal does not turn on the name of the 2nd respondent. The question is whether or not the appellant has the right to lawful occupation of the said property.

The 2nd respondent is at liberty to allocate its property to any deserving person. I agree with the submission that the tenancy in such properties is a month to month arrangement and not a lease, provided that the occupant continues to pay the rent reserved. The appellant and 2nd respondents have filed submissions in the argument of the appeal. However, despite service, the 1st respondent did not comply.

There is no doubt the appellant was in occupation of the said house. She was married to one Evans Alunda Magambo who was occupying the subject house in which their late father lived. The said Evans then passed on and the appellant applied to have the tenancy transferred to her name. The 1st respondent is then said to have invaded the said house alongside some relatives with a view to pushing out the appellant. It is the refusal of the appellant to give in that prompted the suit in the lower court.

The lower court observed that the appellant was married by one of the family members of the 1st respondent. The court curiously however observed that, the children of the deceased should have been given the 1st chance to occupy the said house. The court then observed that it was common knowledge that such houses have been handed over from generation to generation and that, it would be against legitimate expectation for the appellant to side line her in-laws and evict them from the house that was in the name of her father in law.

The court stated that the rental subcommittee ruled that the house should be given to the appellant but that such a resolution was not brought to the court. With respect, that observation was misleading. The appellant gave evidence and adopted her witness statement alongside list of documents as exhibit 1 to 14. In that bundle of documents, the minutes of the Sub-committee are there, and in the record of appeal page 80 the meeting was held on 13th April, 2011. In the minutes, at minute 2 XII it was resolved (with regard to house No. AD 23/5742 Lumumba Estate) as follows,

“Tenancy of Emily Adika be legalised and the other parties be evicted forthwith.”

Eelier, on 10th March, 2010 the Director of Social Services and Housing of City Council of Nairobi, wrote to the Officer Commanding Station, Jogoo Police Station relating to the same house, asking that the said officer do assist the appellant by giving her protection. There is yet another letter dated 28th September, 2012 directing the same officer to oversee the eviction of the intruders from the said house and give the appellant the necessary security. At pages 84, 85 and 86 of the record, there are copies of receipts issued in the name of the appellant for payment of rent.

I have looked at defence and counter claim of the appellant herein. In her evidence, she alluded to the said pleadings and on a balance of probability established her counter claim. Her evidence was not controverted even after cross examination on record.

The first respondent had no right to chase the appellant fro that house in view of her counter claim which she established. The first respondent did not prove his case against the appellant and the 2nd respondent. The judgment of the lower court was therefore against the weight of evidence as rightly stated in the Memorandum of Appeal.

No fraud was proved against the appellant and the 2nd respondent. If anything, the issuance or the change of the rent card into her name was open and transparent. The minutes cited above confirmed this. There was no claim by the 1st respondent to chance the particulars of the rent card into the name of the 1st respondent. The lower court was therefore misdirected to have ordered that the name of the appellant be nullified and the card registered in the name of the 1st respondent. In the end I find that this appeal hereby succeeds.

The first respondent's case in the lower court should stand dismissed and the appellant's counter claim upheld. I find that she is entitled to be reinstated, if she had been evicted from the said premises and remain therein without any disturbance from anyone whatsoever.

Each party shall bear their own costs in this appeal.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE