



Marete v Principal Secretary, Ministry of Lands, Housing & Urban Development & another; Ruthuthi (Interested Party) (Environment & Land Case 1189 of 2013 & 1250 of 2016 (Consolidated)) [2023] KEELC 21973 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21973 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1189 OF 2013 & 1250 OF 2016 (CONSOLIDATED)
MD MWANGI, J
NOVEMBER 30, 2023

BETWEEN

LILIAN NKIROTE MARETE PLAINTIFF

AND

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 1ST DEFENDANT

THE HONOURABLE ATTORNEY-GENERAL 2ND DEFENDANT

AND

JOHNSON MURIUKI RUTHUTHI INTERESTED PARTY

JUDGMENT

Background

1. This is a judgment with respect to the two consolidated suits. The Plaintiff initially instituted this suit in the High Court as Nairobi HCCC No. 317 of 2013 which was subsequently transferred to this court and allocated Number ELCC No. 1189 of 2013. The Interested Party herein had also filed a suit being ELCC No. 1250 of 2016- Johnson Muriuki Ruthuthi –vs- Lilian Nkirote Merete.
2. The suits were consolidated on the 26th February, 2019 with ELCC 1189 of 2013- Lilian Nkirote Marete – Vs- Principal Secretary Ministry of Lands, Housing and Urban Development & Others being the lead file. For purposes of this Judgment, I will refer to Lilian Nkirote Marete as ‘the Plaintiff’, the Defendants shall be the Principal Secretary Ministry of Lands, Housing and Urban Development and the Attorney General. Johnson Muriuki Ruthuthi shall be referred to as ‘the Interested Party’.



Plaintiff's case

3. Vide the Plaintiff dated 6th August, 2013, the Plaintiff seeks;
 - a. An order of permanent injunction restraining the Defendants, their agents, officers, persons working under them and/or any persons acting on their instructions from evicting or in any other way interfering with the Plaintiff's possession of house No. 740 Rubia Estate, Nairobi unless the same is pursuant to an express Court Order.
 - b. An order directing the Defendants jointly and severally to repay all monies paid by the Plaintiff towards mortgage payments for purchase of House no. 740 Rubia Estate, Nairobi.
 - c. Costs of the costs.
4. The Plaintiff avers that by a Letter dated 24th July, 2013, the 1st Defendant demanded that she vacates House No. 740 Rubia Estate before the 8th August, 2013. The basis of the Notice was that the house was already sold to the Interested party as stated in HCCC No. 379 of 2009 in which the Court dismissed her Petition on the basis that the house 'had already been sold to another party'. The House was therefore not available to the Plaintiff.
5. The Plaintiff argues that by virtue of the Judgement aforesaid (Judgement in Petition 379 of 2009), the Defendants are estopped from purporting to evict her. She averred that it was only the Interested Party who upon obtaining a valid Court Order could evict her from the said House.
6. The Plaintiff stated that she had appealed against the Judgement in Petition 379 of 2009 therefore evicting her from the house would prejudice her appeal. The Plaintiff states that, the Defendants cannot justifiably evict her from the house where she had lived for more than ten years, while at the same time hold the purchase price the Plaintiff made for the house. There was no eviction order issued by any court hence the Defendants had no locus standi to evict her from the said house

Defendants' Statement of Defence

7. The Defendants filed a joint Statement of Defence dated 27th April, 2021 in which they denied the allegations levelled against them. The Defendants averred that the Letter dated 24th July, 2013 was written in utmost good faith pursuant to the Judgement in High Court Petition No. 379 of 2009 where the Learned Judge held that House No. 740 had been lawfully sold by Ministry of Lands, Housing and Urban Development to Johnson Muriuki Ruthuthi.
8. The Defendants stated that the suit premises had been lawfully sold by the 1st Defendant to Johnson Muriuki who was therefore entitled to vacant possession. As the Seller, the 1st Defendant was under a contractual obligation to deliver vacant possession of the suit premises as demanded by the Purchaser's Advocate vide the Letter dated 22nd August, 2013.
9. The Defendants further stated that the court having found that the Plaintiff had no right to the suit property, the Plaintiff was therefore a trespasser and in contempt of Court.
10. On the allegation of lack of a court order authorizing the Plaintiff's eviction, the Defendants averred that it was within their right to evict the Plaintiff from the house since she was neither an owner nor a tenant.



Defendants' Counterclaim

11. In their counterclaim, the Defendants reiterated their averments in the Defence and asserted that the Interested Party was the rightful owner of suit property. They explained that sometimes back in 2004, there was a resolution by the Government through the Ministry of Lands and Housing that all non-strategic government houses be sold to Civil servants to meet the emergent need for housing.
12. Subsequently, a list of the houses available for sale was circulated inviting applications from interested persons. Applications were to be accompanied by a minimum deposit of 10% of the Purchase Price. The Regulations governing the scheme were published in Kenya Gazette Supplement No. 58 of 2004 which amongst other issues limited officers 'to one house per civil servant family.' Sub-letting was prohibited and in case of violation, the house was to be repossessed and sold to another civil servant.
13. The Plaintiffs in the Counter –claim avers that the Defendant in the Counterclaim, had on 22nd April, 2004 applied for a house without disclosing that she was married to one Mr. Eric Micheni and was allocated House No. HG 740 Rubia. However, the allocation was rescinded in accordance with the Regulations governing the Scheme. Lilian Nkirote was staying with her husband in HG731 Rubia while subletting the House No. 740 Rubia to one Nancy Kabura Ndeke contrary to the gazetted regulations on the scheme.
14. The Plaintiffs in the Counter-claim aver that the Defendant submitted her application for House No. 740 Rubia Estate and knowingly misrepresented that she was single with one child while married to one Eric Micheni Muchiri. On the other hand, the said Eric Micheni Muchiri had applied for House HG 731 Rubia and had declared that he was married to Lilian Nkirote Micheni and that they were blessed with 3 children.
15. Subsequently, the Plaintiffs in the counter-claim, upon discovery of the marriage referred the application to the Scheme Management Committee which decided that one family could not buy two houses. The Defendant and Eric Micheni Muchiri were considered as one family and were duly informed vide the letter dated 10th March, 2005. Consequently, the Defendant was advised to submit her claim for refund for the deposit and to prepare to vacate the House No. 740 Rubia.
16. The Plaintiffs in the Counter-claim deny offering for sale the House No. 740 Rubia to the Defendant as alleged.
17. The Plaintiffs aver that Interested Party made an application and was allocated the House on 15th April, 2005 and he paid the purchase price in full. Further, that the court's judgement in High Court Petition No. 379 of 2009 delivered on 20th January, 2012, found that Lilian Nkirote had no proprietary right capable of being protected.
18. The Plaintiffs in the counter-claim accuse the Defendant of willfully and maliciously and without any colour of right, refusing to vacate the said house and handover vacant possession to the Interested Party herein.
19. The Plaintiffs in the Counterclaim therefore prays for;
 - a. An order of permanent injunction restraining the Plaintiff/Defendant in the Counterclaim, her agents, persons working under her or persons acting on her instructions from residing, entering or in any other manner whatsoever interfering with the Interested Party's possession and control of House No. 740 Rubia.



- b. A mandatory order directing the Plaintiff/Defendant in the counterclaim, her agents, persons working under her or persons acting on her instructions to deliver up vacant occupation of House No. 740 Rubia to the Plaintiffs in the Counterclaim.
- c. General damages.
- d. Costs of the suit.
- e. Interest on c and d above at court rates.

Interested Party's case

- 20. The Interested Party, Johnson Muriuki Ruthuthi (the Plaintiff in ELCC 1250 of 2016) avers that in 2004 the Government advertised for sale the non-strategic government owned houses to civil servants through the Ministry of Lands and Housing. Following the advertisement, he applied for and was allocated house No. HG 740 (LR/BLOCK 72/1961) Rubia Estate. He states that he paid the entire Purchase Price of Kshs. 1,760,000/= in full.
- 21. The Interested Party further states that at the time the house was being sold to him by the Government, the Plaintiff herein, Lilian Nkirote Marete, was in occupation on the basis of a tenancy agreement between her and the government.
- 22. It is the Interested Party's assertion that despite completing payment of the purchase price and being issued with a Certificate of Lease, he has been unable to take vacant possession as the Defendant has refused to vacate the house.
- 23. He accuses Lilian Nkirote Marete of fighting a losing battle by filing several suits against the Defendants herein being; H.C Misc. App. 433 of 2005, H.C. Petition No. 379 of 2009 and Application (Pet. 379 of 2009), all of which have been unsuccessful.
- 24. The Interested Party avers that the Plaintiff has refused to vacate and deliver vacant possession and is illegally in occupation of the said subject premises. He therefore prays for Judgement against the Plaintiff for;
 - a. A Declaration that the occupation of LR. No. Nairobi/ Block 72/1961 by the Defendant is illegal and a trespass on the suit premises.
 - b. The Defendant do deliver vacant possession of LR. No. Nairobi/ Block 72/1961 to the Plaintiff and/or his agents/ nominees.
 - c. Eviction orders be issued against the Defendant from House No. HG 740 (LR. No. Nairobi/ Block 72/1961) Rubia Estate, Nairobi in default of (b) above within a period determined by the Court.
 - d. An order of permanent injunction be issued restraining the Defendant her agents or any other person from interfering with the Plaintiffs House No. HG 740 (LR. No. Nairobi/ Block 72/ 1961) Rubia Estate, Niarobi.
 - e. Mesne profits be paid by the Defendant to the Plaintiff and be assessed by the Court.
 - f. The OCS Langata Police Station to enforce the orders for eviction.
 - g. Costs and interest of this suit.



Response to the Interested Party's case

25. Lilian Nkirote, the Plaintiff herein, filed an Amended Statement of Defence and Counterclaim to the Interested Party's (the Plaintiff in ELCC. No. 1250 of 2016). She avers that she was allocated House No. HG 740, Rubia Estate, Nairobi. Pursuant to the alleged allocation, she avers that she took possession of the said house as a tenant paying to the Government a monthly rent of Kshs. 16,000/=.
26. She avers that when the Government decided to sell the houses, she expressed interest in purchasing the House No. HG 740, Rubia Estate. She was advised to pay a deposit of Kshs. 300,000/=.

Counterclaim by the Plaintiff against the Interested Party

27. The Plaintiff aver that via the letter dated 10th March, 2017 she wrote to the National Land Commission(NLC) questioning the legality of the process of issuance of the Certificate of Lease to the Interested Party herein. She avers that she sought the nullification of the said Certificate of Lease for want of compliance with Sections 23 and 30 of the Land Act, 2012.
28. She claims that NLC wrote to the 1st Defendant seeking a clarification on the same but the Commission did not confirm whether the said Certificate of Lease was presented to it for signing and sealing. Further, she avers that the Nairobi County Government equally denied preparing, processing or in any way dealing with the lease in respect of the suit property. As such, the Plaintiff avers that the acquisition of the title to the suit property was marred with fraud and non-disclosure of material facts thus tainted with illegalities.
29. The Plaintiff herein in her Counterclaim against the Interested Party prays that;
 - a. A declaration that the Certificate of Lease dated 2nd February, 2016 was irregularly/illegally obtained through apparent fraud and material non-disclosure of facts.
 - b. The said Certificate of Lease dated 2nd February, 2016 be nullified and/or revoked.
 - c. The Plaintiff's (read Interested Party) suit be dismissed with costs together with interest thereon for such period and at such rate as the Court may determine.
 - d. Any such further relief as this Honourable Court may deem fit to grant.

Evidence adduced by the Plaintiff

30. The Plaintiff, Lilian Nkirote Marete testified as PW1 in support of her case. She stated that she is Civil Servant working with the Commission for University Education. She adopted the Witness Statement dated 8th June, 2017 as her evidence in-chief. She produced the documents in the List of Documents dated 8th June, 2017 which were marked as PE 1-9 in the order in which they are listed. She also produced the documents on the Supplementary List of Documents which were marked as PE 10-14 in the order in which they are listed in support of her case.
31. PW 1 stated that she has lived at Langata Rubia Estate, House no. HG 740 for over 18 years. She stated that back in 2003 she was allocated a house by the 1st Defendant herein. However, in the year 2004, she was re-allocated the suit property after the earlier one was broken into by a Divisional Officer from Kibera. Upon the said allocation, she averred that she started paying rent of Kshs. 16,000/= . In 2004, when the house was advertised for a tenant-purchase scheme, she made an application on the 8th September, 2004.



32. She alleges that it was verified that indeed she was a tenant hence directed to pay the deposit. She argues that she paid the deposit of Kshs. 300,000/= on 4th October, 2004 and was issued with a receipt to that effect. According to her, in 2005, the houses were transferred to the scheme and put under a mortgage to which she continued paying through a check off scheme with her final payment being on 17th September, 2010. The entire payment amounted to a sum of Kshs. 1,760,000/=.
33. PW1 further testified that she enjoyed peaceful possession of the house until the year 2005 when she received a Letter from the 1st Defendant indicating that her husband Eric Micheni, her now ex-husband, had already bought a different house. She was therefore not eligible for allocation because she was one family with Eric Mucheni. She states that at the time she was making the application, she had been thrown out by her husband and was staying alone with her first daughter. At the time of receipt of the Letter from the Ministry, she was paying for the mortgage.
34. It was PW 1's evidence that the Interested Party was not known to her. He had never been a tenant. The Ministry purported to re-allocate the house when she was already in occupation and paying the mortgage. She stated that upon receipt of the Letter from the Ministry, she filed the suit; High Court Misc. Application No. 433 of 2005 and was issued an order on 1st April, 2005. Despite the order, the Ministry went ahead and allocated the suit property to the Interested Party.
35. The Witness further stated that although the Lessor is Nairobi City County Government, the county denied processing and or in any way dealing with the lease in respect of suit property. She confirmed that she had been paying the rates for the suit premises. Regarding her marriage to Eric Micheni, the Plaintiff stated that she had filed a Divorce Case being Chief Magistrate Divorce Cause No. 41 of 2005. The divorce case though has not been concluded to date. She asserted that she has never sub-let the house to anyone. She prays for issuance of the orders stated in her Complaint.
36. In cross-examination by the Defendants' counsel, PW1 testified that she was indeed married to Eric Mucheni which marriage was formalized in 1991. Their divorce has not been finalized since 2005. She confirmed that she applied for the house in 2004 before filing for the divorce. During the application process, other than the receipt of Kshs. 1,000/=, she was not issued with any other document; not even the Letter of Offer or Acceptance was issued by the Ministry. Instead, she stated that she received the Letter dated 10th March, 2005 giving reasons why they had not issued her with a Letter of Offer.
37. The reasons given by the Ministry were that Mr. Eric Micheni had in a different application indicated they were married yet in her application she had stated that she was single. Further, that she had not adduced any documents confirming dissolution of the marriage.
38. PW 1 further informed the court that the final receipt she got for payment of the house was for Kshs. 372,000/=. In total she had paid a sum of Kshs. 1,760,000/= for the house. The Letter from the Ministry advised her to make a claim for refund for the deposit paid. She however did not apply for a refund as advised. She averred that she was unable to occupy the house initially allocated to her and that was the reason why they allocated her the suit property.
39. In the Miscellaneous Application before the High Court, she was granted leave to apply for Judicial Review orders. She could not confirm if her advocate filed for the Judicial Review orders.
40. During cross-examination by Counsel for the Interested Party, PW 1 confirmed that she had no letter of allocation from the ministry. Although she exhibited the Letter dated 7th November, 2006 addressed to Johnson M. Ruthuthi as PE 7, she was not sure if the Interested Party received the said Letter. She confirmed filing Nairobi Constitutional Petition No. 379 of 2009 which case was concluded and judgement was delivered in Nairobi on 20th January, 2012 by Justice D.S. Majanja. She restated that as at 2004, a decree dissolving the marriage had not been issued.



41. In re-examination, PW 1 averred that in 2004 when she made the application, she was living in the house as a tenant. She alleged that the Constitutional Petition was dismissed on a technicality for lack of jurisdiction hence the instant suit.
42. With that, the Plaintiff closed her case.

Evidence adduced on behalf of the Defendants

43. Mr. Boniface Mungai Ngochi, the Deputy Director Civil Servants Housing Department in the State Department for Housing testified as DW 1 in support of the Defendants' case. He adopted his witness statement dated 27th April, 2021 as his evidence in-chief. He also produced the documents listed on the Defendant's List of Documents which were marked as DE 1-6 in the order in which they are listed.
44. It was his evidence that the sale of the houses was preceded by a circular by the Permanent Secretary who is the Administrator of the Scheme with conditions for sale. One of the conditions was that a family is only entitled to one unit. For fairness, only one spouse could be allocated a house. The witness referred to DE 2 being an application form by Mr. Eric Micheni and DE 1 being the Letter to the Plaintiff informing her of the ministry's decision to reject her application.
45. Once an application is approved by the Scheme Management, the Applicant is then issued with a Letter of Offer. The Applicant is then required to accept the offer in writing. Thereafter, a Letter of instructions is written to the accounting officer confirming deduction of the mortgage instalments. No such instructions had been adduced in the instant suit. He confirmed that they advised the Plaintiff to make a claim for refund
46. DW 1 informed court that once the mortgage is paid in full, a Letter is addressed to the National Land Commission to issue a Letter of Allotment with a copy to the Chief Land Registrar and to the owner. No such letter was issued to the Plaintiff herein. The Letter was rather issued to John Muriuki Ruthuthi the Interested Party herein.
47. The witness further referred the court to DE 6 being the notice to vacate the suit property addressed to the Plaintiff. The essence of the Letter was to facilitate issuance of a vacant possession to the Interested Party. He further stated that the date of the application by Eric Micheni was 27th September, 2004 indicated that his spouse was Lilian Nkirote. On the other hand, the Plaintiff's application evidenced by a receipt dated 8th September, 2004 indicated that she was single.
48. In cross-examination by the Plaintiff's Counsel, DW 1 confirmed that he did not have the Letter written to National Land Commission in favour of the Interested Party. He could not confirm if the Interested Party had a title to the suit property. He stated that Nairobi City County does not participate in the process. He informed the court that the Interested Party was not a tenant in 2004.
49. DW 1 further testified that the tenants who were in occupation before issuance of the circular were evaluated in accordance with the terms and conditions of the circular. He affirmed that the Plaintiff made her application as a tenant. He confirmed the receipts adduced by the Plaintiff on account of mortgage repayment from the Commission for Higher Education.
50. He confirmed that there was a problem in not stopping the payment from the Plaintiff in 2005. Further, that no attempts had been made to offer an alternative house to the Interested Party. The Interested Party has not sued the Ministry for vacant possession. It was his evidence that the government could explore ways of settling the dispute as it had done with other disputes.
51. DW 1 also stated that he does not know one Nancy Kabura. He could not therefore prove the alleged sub-tenancy by the Plaintiff. He could also not confirm the particulars of fraud and misrepresentation



as he only relied on the information from the office. The allegations should therefore be expunged from the record.

52. During cross-examination by the Interested Party's Counsel, DW 1 stated that from the records in their offices, the Interested Party is the owner of the suit property having completed payment of the purchase price. He stated that the Plaintiff moved to court and that was the reason why they did not evict her.
53. He restated that that title is issued by the Chief Land Registrar upon a copy of the notice issued to NLC and the owner. He confirmed that they had not issued any Letter of Allotment to the Plaintiff herein.
54. In re-examination, DW 1 confirmed that the Interested Party was not a tenant of the suit property in 2004. It was necessary that one had to be a tenant to apply to buy a home. In 2004 however, the house became available. The Interested Party applied after it became clear that the Plaintiff was not eligible for purchase of the house since she had already benefited from the sale of another house as a spouse.
55. The witness emphasized that the Plaintiff was never issued with a letter of offer which is followed by an acceptance. No acceptance has been received from the Plaintiff. The Letter of offer contains the terms and stipulates the house number. The Letter of offer also provides the remittances to be made by the employer. He stated that they usually issue a clearance letter upon full payment of the purchase price.
56. At that point, the Defendants' counsel closed the Defence case.

Evidence by the Interested Party

57. The Interested Party herein, Johnson Muriuki Ruthuthi, testified in support of his case. He adopted as his evidence in-chief the Witness Statements dated 10th October, 2016 and that 31st January, 2020. He also produced the documents in the List of documents dated 10th October, 2016, a Further List of Documents dated 31st January, 2020 and the List of documents dated 6th February, 2023 in support of his case. The documents on the 3 lists were marked as 'I.P. E 1-23' in the order in which they are listed respectively.
58. The Interested Party testified that after he made all the payments, the Estate Manager wrote to the NLC to issue him with ownership documents for the suit property. He confirmed that he was familiar with the procedures for acquisition of the houses.
59. He asserts that the Lease he was issued with is in the name of County Government of Nairobi because it was County Land. It was done on behalf of the County Government of Nairobi. He prays that he be granted an eviction order against the Plaintiff herein as he is the owner of the house. He seeks an injunction restraining the Plaintiff herein from interfering with his enjoyment of the property. He also sought to be allocated the money he had lost by non-occupation of the house.
60. In cross-examination, the Interested Party stated that the house he bought is MG 740 Rubia Estate after being offered by the Permanent Secretary Ministry of Lands and Housing. The offer was only open to serving civil servants. It was a tenancy-purchase scheme. It was however not mandatory that a purchaser be in possession of the house.
61. He stated that he made a first deposit of Kshs. 1,000/= on 2nd December, 2004 for the application form. He thereafter paid a deposit of Kshs. 200,000/= on 24th December, 2004. He averred that though he viewed the house at the time of purchase, it was not vacant then. He was assured of vacant possession by the Permanent Secretary as the occupant was not qualified to purchase the house. He states that he paid a total sum of Kshs. 1,760,000/= and completed the payment in 2007.
62. He states that he received an offer dated 15th April, 2005 which he accepted on the 10th May, 2005 and made payments in December, 2004. Upon completing the payments, he sought vacant possession



from the 1st Defendant. He however did not exhibit the letter seeking vacant possession. He averred that he did not sue the Ministry for vacant possession despite having completed payment.

63. It was his testimony that he was issued with a receipt written HG 740 Rubia Estate. The Letter of offer made reference to House No. MG 740 LR. No. BLK 72/1961 Rubia Estate. He averred that he never sought for a clarification from the Ministry on the variance.
64. He informed the court that he was shown an alternative house vide the Letter dated 7th November, 2006, which he refused to take. He declined to accept the alternative house because it was a flat which was not commensurate with what he had intended to purchase. He wanted a mansionette. The Interested Party further averred that Lease was issued on behalf of Nairobi City County.
65. The Witness adduced a Letter from the 1st Defendant to NLC requesting them to process and release the title deed to the Purchaser of HG 740. He denied influencing the issuance of the title in his favour. He asserts that he was not agreeable to a refund of the monies paid for the purchase of the house; he wanted the house he had bought. The Interested Party further averred that the Plaintiff was not even qualified for the offer to purchase the house since was a junior officer.
66. In re-examination, the Interested Party stated that the parcel number was block 72/1961, Rubia Estate, which the Plaintiff also claims. He argues that he was an employee of the ministry and that is why he did not sue it. In any event, he Ministry had written letters to the Plaintiff to vacate the house.
67. He stated that he has never received any letter cancelling his title or terminating his contract. The title was issued by the NLC on request by the Ministry. That the houses were offered to all civil servants whether or not in occupation. He asserts that he is the registered owner of HG 740 which is on LR No. Block 72/1961. Counsel for the Interested Party then closed his case.

Court's Directions

68. The court directed parties to file written submissions. Both the Plaintiff and the Interested Party complied. The Plaintiff's submissions are dated 27th June, 2023 whereas the Interested Party's submissions are dated 29th May, 2023. The Defendants did not file any submissions. The Court has had a chance to read the submissions which now form part of the record of the court.

Issues for Determination

69. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows;
 - a. Whether the Plaintiff has established any proprietary rights over the suit premises
 - b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
 - c. Who is the lawful proprietor of the suit premises?
 - d. Whether the Interested Party (the Plaintiff in Elc 1250 of 2016) is entitled to the orders sought in his Plaintiff.
 - e. Whether the Plaintiff is entitled to orders sought in the Cross –claim against the Interested Party (the Plaintiff in Elc 1250 of 2016).
 - f. Are the Defendants entitled to the prayers sought in the Counter-claim against the Plaintiff in the main suit?
 - g. Which orders should the court issue?



- h. Who is liable to pay costs?

Analysis and determination

A. Whether the Plaintiff has established any proprietary rights over the suit premises

70. The Plaintiff has faulted the 1st Defendant's decision rejecting her application and allocating it to the Interested Party. It was her evidence that she was allocated the house in 2004 as a tenant paying a monthly rent of Kshs. 16,000/= . In 2004, when the house was advertised for sale under the tenant purchase agreement, she made an application on the 8th September, 2004. She alleges that she was directed to pay a deposit of Kshs. 300,000/= which she did. According to her, in 2005 the houses were transferred to the scheme and put under a mortgage scheme to which she continued paying through a check off system with her final payment being on 17th September, 2010. The payment amounted to a total sum of Kshs. 1,760, 000/=.
71. The Plaintiff alleged that she enjoyed peaceful possession of the house until the year 2005 when she received a Letter from the 1st Defendant indicating that her husband Eric Micheni, had already bought a different house. She was therefore not eligible for allocation because she was one family with Eric Micheni. She was therefore supposed to vacate the premises for the Interested Party to acquire vacant possession.
72. It is not disputed that the government offered for sale the non-strategic Government owned houses to civil servants as set out in Circular No. CON/LH/A/2/7/13 (hereinafter 'the Circular'). The Circular stipulated the requirements for one to qualify under the tenant purchase scheme. The terms and conditions included that;
- a. The applicant be a serving Civil servant who should produce certified copies of Payslips for the last three months,
 - b. First priority was to be accorded to occupying Civil Servants who are up-to-date on rent payments
 - c. The applicants were required to pay 10% deposit within 60 days
 - d. In order to ensure fairness to all Civil Servants, offers were limited to one house per Civil Servant family.
 - e. That any sale or transfer of the house could only take place 8 years after completion of payment of the purchase price and with approval of the management committee.
73. From the evidence adduced herein, there was an express condition that one family could only be allocated one house. Although the Plaintiff contends that at the time of allocation, she had separated with her then husband, Eric Micheni, the divorce proceedings were yet to be concluded. The Plaintiff was still for all intents and purposes legally married. In the absence of a Divorce Decree at the time of the application, I see no fault in the Housing Scheme Committee's decision in declining the application.
74. Further, DW 1 stated that once an application was approved by the Scheme Management, the Applicant was then issued with a Letter of Offer. No such letter has been adduced by the Plaintiff. The Applicant was then required to accept the offer in writing. Thereafter, a Letter of instructions had to be written to the accounting officer confirming deduction of the mortgage instalments. No such instructions have been adduced in the instant suit. The Plaintiff has therefore not proved that the house was offered to her for purchase.



75. In my view, the Plaintiff in her application dated 22nd September, 2004, made an offer to the Defendant to purchase the house. The offer was not accepted. In fact, it was expressly rejected vide the letter dated 10th March, 2005.
76. In my view the applicant's case is misguided as the terms of acquisition of the House were clearly spelt out in the Circular. Once the applicant failed to meet the terms of the Circular, no contract could be concluded.
77. Regarding the mortgage, having already found that the Plaintiff had no contract whatsoever with the Defendant, the issue of a mortgage does not arise.
78. It is therefore my finding that the Plaintiff has not proved any proprietary interest on the suit property.

b. Whether the Plaintiff is entitled to the orders sought in the Plaint

79. At this juncture it important to highlight the numerous proceedings or suits instituted by the Plaintiff over the suit property and against the same parties. This is information that has been presented before the court in form of evidence adduced by the parties in this case.

80. To start with, the Plaintiff filed High Court Judicial Review Misc. Application No. 433 of 2005; Republic –vs- the Permanent Secretary, Ministry of Lands and Housing ex parte Lilian Nkirote, seeking to quash the decision of the Defendant herein in declaring her ineligible to purchase the house and to prohibit the Defendant from evicting her or selling it to anybody else other than herself. Learned Judge, Wendoh J. (as she then was), while dismissing the Application for being incompetent and unmerited, noted that;

“.... The Applicant is challenging the decision of the Permanent Secretary declining to sell to her House No. HG 740 Rubia Estate. If the Government made an offer to civil servants to sell its non-strategic houses, the Applicant made a Counter offer and paid a deposit but the Respondent rejected the Applicant's counter offer and gave reasons for so doing. Had the Respondent accepted the Counter offer, a contract of sale of the said house would have been concluded as between the parties.....

....The Applicant has not pointed to any statutory duty that has been breached by the Permanent Secretary to warrant the issuance of the Judicial Review orders”.

81. The Plaintiff expressed her intentions of appealing against the said decision by lodging a Notice of Appeal against the Judgement but it is not clear whether she filed the actual appeal.

82. The second suit was a Constitutional Petition being High Court Petition No. 379 of 2009; Lilian Nkirote Marete –vs- The Honourable Attorney- General and Johnson Muriuki Ruthuthi (Interested Party).

83. The Plaintiff filed this Constitutional Petition seeking declarations that her Constitutional rights had been violated by the Defendant herein in refusing to sell the house to her and selling it to the Interested Party. Majanja J while dismissing the suit on 20th January, 2012 noted as hereunder;

“.....in this case, the Petitioner made an offer through the application dated 22nd September, 2004. That offer was rejected by the letter dated 10th March, 2005. I hold that no contract was concluded as such no proprietary right capable of being protected by the then Section 75 has been established.”



84. The third matter filed by the Plaintiff was High Court Petition No. 379 of 2009; Lilian Nkirote Marete –vs- The Hon. Attorney General.
85. The Plaintiff sought an injunction to restrain the Defendant from evicting her from the suit property pending appeal against the Judgement by Majanja J. Lenaola J (as he then was), while dismissing the application for lack of an arguable appeal noted at Paragraph 12 that;
- “ The house has since been sold to one, Johnson Muriuki Ruthuthi who has been denied possession since April 2005 when he paid the initial deposit for the house....
- I have come to the conclusion, that the continued hardship to the said Ruthuthi, is inequitable. He has been denied access to a house he lawfully bought more than eight years ago by a litigant who has twice been told by the High Court that she has no genuine claim to the disputed house. To my mind, that is a good sign that her claim may be frivolous...”
86. The existence of the above court pronouncements by the High Court has not been disputed. It is unfortunate that this court had to redo this case all over again. Section 7 of the *Civil Procedure Act* prohibits the ‘to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’ The issue however was not brought to the attention of the court prior to the hearing of this case.
87. It is evident the High Court had already made pronouncements on the ownership of the suit property. The issue of ownership has been determined. In the absence of a reversal order from the Court of Appeal, this court has no basis of varying or interfering with the orders.
88. I will now turn to the prayers sought by the Plaintiff in the instant suit, the Plaintiff seeks a permanent injunction restraining the Defendants from evicting her from the suit premises. Having found that the Plaintiff has no proprietary rights over the disputed house, the court has no basis in granting the said order. I decline to issue the first prayer.
89. The second prayer sought by the Plaintiff is for a refund of all the monies paid by the Plaintiff towards the purchase of House no. 740 Rubia Estate, Nairobi. It is not in dispute that the Plaintiff paid a total sum of Kshs. 1,760, 000/=. The Plaintiff has adduced receipts confirming the said payments. It is interesting that the Plaintiff sought the first and second prayer. The second prayer was not sought as an alternative prayer. She sought an order to prevent her eviction from the suit property at the same time seeking a refund of the monies paid. She sought to have her cake and to eat it as well, literally speaking.
90. The Defense witness confirmed the receipts adduced by the Plaintiff on account of payments from the Commission for Higher Education. DW 1 further acknowledged that there was a problem in not stopping the payment from the Plaintiff in 2005. He affirmed that they had however advised the Plaintiff to make a claim for refund. It is the claim now before me.
91. Based on the foregoing, it is my finding that the Plaintiff is entitled to a refund of the sum of Kshs. 1,760,000/= from the Defendants. I grant her the order of refund. She has not sought that the same be paid with interest. I would not have awarded her interest anyway considering the peculiar circumstances of this case and also having in mind that she has remained in the house, the subject matter of this suit in spite of the unequivocal pronouncements from the courts and in spite of the fact that she has no proprietary rights of the same.



c. Who is the lawful proprietor of the suit premises?

92. The Interested Party testified that after his application was accepted, he made all the payments due towards the purchase of the House No. 740 Rubia Estate. He testified that upon full compliance he was issued with a Certificate of Lease to prove his ownership of the house in dispute. The Defendants confirmed that in deed the Interested Party was rightfully issued the Certificate of Lease.
93. In addition, the Learned Judges in the previous suits discussed earlier in this decision held that Interested Party lawfully acquired the suit property. My finding is that the Interested Party is indeed the lawful owner of the suit property. I will say more on this aspect as I discuss the next issue.

d. Whether the Interested Party (the Plaintiff in ELCC 1250 of 2016) entitled to the orders sought in his Plaintiff?

94. The law is clear on the position of a holder of a title in respect to land. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides that;
- “Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
95. Section 25 (1) of the said Act further provides that:
- “the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”
96. Section 26(1) of the [Land Registration Act](#) provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;
- a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;
 - b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
97. The Interested Party has proved that he lawfully purchased the subject house from the 1st Defendant and was subsequently registered as the owner thereof.
98. The Plaintiff has not demonstrated any ground to impeach the Interested Party’s title to the suit property. The plaintiff is therefore entitled to protection of the said title as provided for under the [Land](#)



Registration Act No. 3 of 2012. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that:

“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”

99. As the rightful owner of the suit property, the Interested Party (being the Plaintiff in Elc 1250 of 2016) is entitled to vacant possession and peaceful occupation of the said premises. The court therefore grants prayers (a), (b), (c), (d) and (f) as prayed for in the Plaint in ELCC 1250 of 2016.

100. The Interested Party (as the Plaintiff in ELCC 1250 of 2016) has also sought mesne profits as against the Plaintiff in the main suit.

101. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;’

102. Order 21 Rule 13 of the Civil Procedure Rules on the other hand provides as follows:-

13.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

103. The Court of Appeal in the case of Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR categorically stated that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows:-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne



profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

104. The Learned Nyamweya J in the case of *Karanja Mbugua & Another -vs- Marybin Holding Co. Ltd* [2014] eKLR stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*.”

105. In the instant suit, the Interested Party sought mesne profits but left it to the court to assess. He did not particularize the mesne profits claimed. In the case of *Mwaya Wa Kitavi and Another –vs- Peter Kitemwa Muia NRB ELC No. 10 of 2013*, where the claimant alleged trespass and sought eviction orders as well as mesne profits of Kshs. 3,000/= per month, J. L. Onguto rendered himself as follows:

“The Plaintiffs sought the damages in the form of mesne profits which means “the profits of an estate received by a tenant in wrongful possession between two dates”. see Black’s Law Dictionary 9th Edition. In legal parlance, it is the name given to damages for trespass brought by a landlord against his tenant where the latter fails to quit demised premises upon termination of a lease: see *Bramwell vs. Bramwell* [1942] 1KB 370. It must arise from that particular relationship of landlord and tenant. It is one of the few ties, which continues to bind the landlord-tenant relationship after termination. It is also the position in law that mesne profits are to be claimed by the landlord at the rate of the letting value of the premises without the need to prove that he could have let the premises during the period of the tenant’s continued illegal occupation. This remedy is however not available, in my view, to ordinary trespass and illegal continued occupation, where the remedy available would be a remedy in injunction and or in damages for illegal intrusion (trespass) which damages may be ordinary general damages or proven special damages in addition to any aggravated damages where the trespass is high handed and insolent: see *Jolliffe –v- Willmet & Co.* [1971]1 All ER 478”.

106. In the instant case there was previously no such landlord and tenant relationship. Instead the Interested Party came into the picture when the Plaintiff was already in occupation of the house as a Tenant. The Plaintiff’s action in keeping possession, remaining on the suit property and placing items on the same made his actions actionable *quare clausum fregit* [he broke the close]. The Interested Party could not seek to recover any profits wrongfully made by the Plaintiff even by way of rent. Instead the Interested Party would have been entitled to general damages which is a “retrospective compensation for past wrongs” . See the case of *Straman East Africa Limited -vs- Hassan Guyo Wakalo* [2014] Eklr. The Interested Party did not however seek General Damages. I find no basis therefore for granting him the said prayer.

e. Whether the Plaintiff is entitled to orders sought in the Cross –claim against the Interested Party (the Plaintiff in Elc 1250 of 2016)

107. The Plaintiff in the lead file, Lilian Nkirote, in her Counterclaim against the Interested Party, in Elc 1250 of 2016, prays for;
- i. A declaration that the Certificate of Lease dated 2nd February, 2016 was irregularly/illegally obtained through apparent fraud and material non-disclosure of facts;
 - ii. the said Certificate of Lease dated 2nd February, 2016 be nullified and/or revoked;



- iii. The Plaintiff's (read Interested Party) suit be dismissed with costs together with interest thereon for such period and at such rate as the Court may determine.
108. Its trite law that fraud must be pleaded and proved. The Plaintiff did not prove any fraud, illegality or irregularity against the Interested Party to justify the nullification of the lease. The Certificate of Lease as already noted confers upon the Interested Party an absolute and indefeasible title. Having held that the Interested Party is lawfully registered as the proprietor of the subject, he is entitled to protection of the said title as provided for in law.
109. The court's finding is that the Plaintiff's (Lilian Nkirote's) Counter-claim in ELCC 1250 of 2016 has no merit and the same is dismissed with costs to the Interested Party (the Plaintiff therein).

f. Are the Defendants entitled to the prayers sought in the Counter-claim against the Plaintiff in the main suit?

110. As stated earlier, the Defendants raised a Counter-claim against the Plaintiff for;
- a. An order of permanent injunction restraining the Plaintiff/ Defendant in the Counterclaim, her agents, persons working under her or persons acting on her instructions from residing, entering or in any other manner whatsoever interfering with the Interested Party's possession and control of House No. 740 Rubia.
 - b. A mandatory order directing the Plaintiff/ Defendant in the counterclaim, her agents, persons working under her or persons acting on her instructions to deliver up vacant occupation of House No. 740 Rubia to the Plaintiffs in the Counterclaim.
 - c. General damages.
 - d. Costs of the suit.
 - e. Interest on c and d above at court rates.
111. As for the first and second prayers by the Defendants, I stated that the Interested Party is entitled to quiet and peaceful possession and occupation of the suit property. Having further held that the Plaintiff has no proprietary interest in the subject house despite being in occupation of the house, it follows then the Plaintiff must vacate the house to enable the Interested Party acquire vacant possession as contracted with the Defendants.
112. On general damages, the trespass was against the Interested Party's property. The Defendants confirmed sale to the Interested Party. In addition, the Defendants admit that it was erroneous for the 1st Defendant to continue receiving the remittances for the purchase of the house despite having sold the house to the Interested Party. In the circumstances, I find no basis to grant the Defendants the damages sought.
113. I need to address the issue of costs. As between the Plaintiff and the Defendants, I find it appropriate, considering the circumstances of this case that each party bears its own costs. However, as regards the case between the Interested Party, the Interested party shall be awarded costs as against the Plaintiff. His case against the Plaintiff has succeeded and there is no reason to deny him costs.

g. Which orders should the court issue?

114. Ultimately, and based on the foregoing analysis, it is accordingly hereby ordered as follows:



- a. An order of permanent injunction be issued restraining the Lilian Nkirote Marete, her agents or any other person from interfering with the house No. HG 740 (LR. No. Nairobi/ Block72/1961) Rubia Estate, Nairobi.
- b. A Declaration is hereby issued that the Interested Party, Johnson Muriuki Ruthuthi is the lawful owner of the house No. HG 740 LR. No. Nairobi/ Block 72/1961 and the occupation of the said house by Lilian Nkirote Marete is illegal and amounts to trespass.
- c. Lilian Nkirote Marete to deliver vacant possession of the house No. HG 740 LR. No. Nairobi/ Block 72/1961 to the Interested Party, Johnson Muriuki Ruthuthi and/or his agents/ nominees within 30 days from the date of this judgement.
- d. In default of (c) above eviction orders be and are hereby issued against Lilian Nkirote evicting her from House No. HG 740 (LR. No. Nairobi/ Block 72/1961) Rubia Estate, Nairobi. The Interested Party will be at liberty to execute the eviction orders against Lilian Nkirote Marete in case of non-compliance with (C) above without any further reference to this court.
- e. The OCS Langata Police Station to enforce the orders for eviction.
- f. The Defendants are hereby ordered jointly and severally to refund the Plaintiff, Lilian Nkirote Marete, the sum of Kshs. 1,760, 000/= forthwith. This sum of money shall attract interest at court rates from the date of this judgement until payment in full.
- g. The Plaintiff and the Defendants shall bear their own costs of the suit.
- h. The Plaintiff shall pay the Interested party costs of this suit. For purposes of assessment of costs, the consolidated suits shall be considered as one suit.

It is ordered

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY NOVEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Mwathe alongside Mr. Marunja for the Plaintiff

N/A for the Defendants and Interested Party

Yvette, Court Assistant.

M. D. MWANGI

JUDGE.

