



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO 189 OF 2014**

**MUNIDI OKEMBA LORE.....PLAINTIFF/APPLICANT**

**VERSUS**

**L W G.....DEFENDANT/RESPONDENT**

**JUDGMENT**

1. By a Plaint dated 10<sup>th</sup> October 2014, the Plaintiff M O L seeks the following Orders against L W G, the Defendant:-

***a) An Order of possession of all that property known as Plot No. [particulars withheld](Original [particulars withheld]/12) Watamu CR No. [particulars withheld] and the immediate ejection therefrom of the defendant and any other person claiming under her;***

***b) An Order of declaration (sic) declaring the Defendant as a trespasser in all that property known as Plot No. [particulars withheld](Original [particulars withheld] /12) Watamu CR. No [particulars withheld] and subsequently an order of eviction requiring the defendant to give vacant possession of all that property known as Plot No. [particulars withheld] (Original[particulars withheld] /12) Watamu CR No. [particulars withheld] ;***

***c) An Order of permanent injunction directed to the defendant restraining her by herself, servants, agents and/or employers from trespassing, occupying, hiring, continuing to live, staying and/or interfering in any way with the plaintiff's quiet possession, use, occupation, development and proprietorship of the suit property being all that piece of land known as Plot No.[particulars withheld] (Original No. particulars withheld/12) Watamu CR No. [particulars withheld]; and***

***d) Costs of this suit and interest thereon at court rates.***

2. Upon being served with the suit, the Defendant filed on 3<sup>rd</sup> November 2014 her Written Statement of Defence and counterclaimed against the Plaintiff for an order that:-

***(i) The sale of the subject property herein being Plot Number [particulars withheld](Original [particulars withheld]/12) to the Plaintiff through a Memorandum of Sale entered into between the Auctioneers and the Plaintiff be declared a nullity; and***

***(ii) The costs of the suit and the counterclaim be granted to the Defendant.***

**THE PLAINTIFF'S CASE**

3. At the trial hereof, the Plaintiff testified as the sole witness in support of his case wherein he adopted as his evidence-in chief the Statement he had filed earlier on 14<sup>th</sup> October 2014 as well as depositions contained in the affidavits sworn on 10<sup>th</sup> October 2014 and 31<sup>st</sup> October 2014. The plaintiff further produced as a bundle of exhibits the List of Documents filed in court on 14<sup>th</sup> October 2014 as well as his further List of Documents filed in Court on 11<sup>th</sup> May 2016.

4. The gist of the Plaintiff's case is that on or about 18<sup>th</sup> July 2013, he purchased the suit property from Equity Bank Ltd pursuant to an auction sale conducted by the Bank on the property on the 26<sup>th</sup> April 2013 while the Bank was exercising its Statutory Power of sale to recover loan arrears owing and outstanding from a debtor who was then the registered proprietor of the suit property. It was the Plaintiff's case that he became aware of the Auction Sale from an advertisement carried out by Keysian Auctioneers in the Daily Nation of 4<sup>th</sup> April 2013. A copy of an extract of the advertisement carried in the Newspaper was produced in Court by the Plaintiff as Plaintiff Exhibit No. 4. In addition, the Plaintiff produced in Court at least 9 other documents in support of his case that the property was sold to him at the auction

as advertised.

## **THE DEFENCE CASE**

5. The Defendant equally testified in support of her defence and counterclaim as her sole witness. She equally adopted as her evidence-in-chief her Written Statement dated 31<sup>st</sup> November 2014 as filed in Court on 3<sup>rd</sup> November 2014 as well as a number of affidavits she had filed in Court in respect to an application filed at the interlocutory stage. She also produced and relied on a number of documents contained in her List of Documents filed in Court on 3<sup>rd</sup> November 2014.

6. In support of her case, the Defendant told this Court that she was the estranged wife of one J S who was originally the registered owner of the suit property. She testified that she met the said Strobel in Lamu in 1996 and the two fell in love and thereafter moved to Watamu where they settled and lived as man and wife for about 15 years. The Defendant told the Court that before they settled in Watamu, they both visited the Defendant's home in Tetu Constituency, Nyeri, where Strobel introduced himself as her fiancé. In accordance with Kikuyu Customary Law, the traditional liquor 'Muratina' was shared during the occasion by S and the Defendant's relatives to signify the intended union.

7. The Defendant informed the Court that she later in 1997 joined S as his wife whereupon they proceeded to purchase the suit property. The final payments were done by Mr. S while he was in Italy and the Defendant processed the transfer in Mr. S's name before she took the original documents to him in Germany. The Defendant testified that she visited Germany for the first time in the year 2000 when S prepared a mock wedding to signify, introduce and to inform all his family that she was his wife. In support of this position, the Defendant produced a photograph in which she was dressed in a wedding attire as they celebrated with S. She however admitted that they never married formally and hence she had no Marriage Certificate.

8. Further the Defendant testified that they later had some differences with S and she sued him around 2006 for a portion of what she considered their matrimonial property. While S formally gave her another property on the way to Jacaranda in Watamu, the Defendant continued residing in the suit property knowing it belonged to S and herself. She was therefore surprised to hear that the house which she considers matrimonial property had been sold to the Plaintiff.

## **ISSUES FOR DETERMINATION**

9. From the evidence and the material placed before me, I think three major issues arise for my determination. These are:-

- a) Whether the Defendant has any right to Plot No. [particulars withheld] Watamu;
- b) Whether the Sale of the suit property to the Plaintiff was fraudulent and illegal and thus amounted to a nullity; and
- c) Who should bear the costs for this suit.

## **WHETHER THE DEFENDANT HAS ANY RIGHT TO THE SUIT PROPERTY**

10. It is the Plaintiff's case that he purchased the suit property on 18<sup>th</sup> July 2013 after participating in a Public Auction conducted by Keysian Auctioneers on 26<sup>th</sup> April 2013. Upon completion of payment of the purchase price, Equity Bank Ltd caused the suit property to be transferred into his name. However when he visited his newly acquired property he was utterly shocked to find a stranger in occupation of the same. According to the Plaintiff, he politely and courteously explained to the said stranger that he had purchased the property and that she should now leave the premises. His plea however fell on deaf ears and he was therefore compelled to file this suit.

11. On her part the Defendant denies that she is a stranger to the property and/or that she invaded the same. It is her case that the property in dispute was jointly purchased by herself and one J S, a German national with whom they were then cohabiting as husband and wife. She told this Court that the final payment for the property was done by S while he was in Italy but she is the one who processed the transfer in S's name before taking to him the original documents in Germany.

12. The Defendant told the Court that they lived together with S from 1996 to 2006 when they parted ways due to a disagreement. S moved to another property situated at Turtle Bay while the Defendant remained in the property which is the subject matter herein. She has since lived in the suit property undisturbed save for a brief moment in 2007 when S went there with a girlfriend in the defendant's absence and threw out her son therefrom. She however went to Court and was reinstated to the house.

13. It is apparent to me that the Plaintiff does not contest the circumstances under which the Defendant came to occupy the suit property. They however contest the Defendant's claim that she was married to the said J S and that the suit property comprised of their matrimonial property. While conceding that the suit property was initially registered in the name of J S, the Plaintiff avers that the suit property was transferred to S's "wife". But the said "wife" according to the Plaintiff was not the Defendant herein but another woman by the name F M A. The Plaintiff has indeed annexed in their Bundle of Documents a Marriage Certificate indicating that S married the said F M A at Mombasa on 5<sup>th</sup> November, 2001. That would be around the same time the Defendant claims to have been living with S as husband and wife and just one year from the time the Defendant's says S took her to Germany where they had a mock wedding of sorts.

14. Be that at it may be, it is apparent to me that the Defendant had been residing in the suit property for sometime with the full knowledge of S who was previously the registered owner of the suit property. It is also apparent that following their differences, the Defendant and the said S at one time or the other fought over the ownership and occupation of the suit property.

15. By an Originating Summons filed at the High Court in Malindi, being Civil Suit No. 8 of 2012, the Defendant filed a suit against the said

J S seeking inter alia, a declaration that the suit property was acquired during their marriage and that hence the same is owned jointly. That suit has not been concluded and remains pending for determination.

16. The conflicts the Defendant and the said S went through are further manifest from a letter attached to the Defendant's Further Replying Affidavit(Annexure 'LWGB') sworn and filed herein on 31<sup>st</sup> October 2014. It is clear from the Attorney General's letter dated 23<sup>rd</sup> June 2010 that at the time the Defendant herein had filed a criminal complaint against J St and one S W for theft of household goods. Advising the DCIO Malindi against the prosecution of the two suspects, the Attorney General wrote as follows in the detailed two page letter:-

**"RE: WATAMU IF 1/2010**

**AN ALLEGED THEFT OF HOUSEHOLD GOODS**

**SUSPECTS: J J S AND S W**

**COMPLAINANT: L W G**

**Your letter Ref: CID/SEC/4/4/VOL. XXV/26 dated 8<sup>th</sup> June, 2010 forwarding above captioned matter to our offices for perusal and advice refers. We have perused the same very carefully.**

**It is clear that E1(S) and DI(the Defendant herein) were husband and wife but later separated. In 2006, E1 instituted a Civil suit against D1. D1 left for Germany in May 2007 and came back to Kenya on 10/9/09. E1's case proceeded until November 2008 when the Court ruled that the occupants of the house namely D2 and D3 to (be evicted) from E1's houses At Watamu new road.**

**D2 and D3 went to Court on 25/11/08 and on proceeding back to the house in question at Watamu road they were denied access to the compound, their household goods and equipment. It was not until 10/9/09 that they managed to access the house but did not find any of their properties therein.**

**From the Police File, in Sub-File 'C', it appears the Malindi Court issued injunctory orders on 7/11/08 against D1 and/or her children, servants and agents from interfering with Plot No. [particulars withheld] Watamu. Similarly, on 9/12/09 further injunctory orders were issued whereupon the OCPD Malindi was to ensure the injunctory orders were complied with. As of the time the injunctory Orders were being issued, D1 was not in the Country but D2 and D3 were around. Ideally, D2 and D3 ought to have moved their goods but they alleged that(they) were denied access to the property on 25/11/08.**

**On 13/1/09, E1 and E2(S W) went to D9 Whereupon they signed a document and an inventory was taken of all the goods in the Watamu House before they were moved to D7's rental house. D4, D5 and D6 were present as the inventory was being taken and as the goods were being moved.**

.....

**Kindly inform the complainant(s) that the nature of the issues arising herein are of civil nature and that they should seek for civil remedy in court, with the assistance of an advocate of their choice if they wish"**

.....

17. I have quoted the letter from the Attorney- General's office in extenso because it is clear to me that it offers a clue as to what subsequently happened leading to the filing of this suit. From the material placed before me, it is clear that the Defendant herein resolved henceforth to secure her entitlement to this and two other properties acquired when they cohabited with S while S on the other hand appears to have hardened his resolve to have the Defendant removed from the suit property at whatever cost.

18. I say so because, according to the Plaintiff, the suit property was charged by Equity Bank Ltd for a loan of Kshs 1 Million prior to its being auctioned. The subject loan was apparently lent to S N W who failed to pay the same thus leading to the auction of the property. This S N W is the one the Defendant describes as S's girlfriend and is the very same one who was involved in the botched attempt to evict the Defendant from the suit property as described in the Attorney General's letter dated 23<sup>rd</sup> June 2010 aforementioned.

19. As it were, the Defendant took the advise of the Attorney General and moved to Court vide Malindi CMCC No. 217 of 2011; **Lucy Wangari Gachara and 2 Others –vs- Joseph Joachim Strobel** seeking orders to be reinstated into the suit property. She was reinstated into the suit property and on 15<sup>th</sup> September 2011, the Chief Magistrates Court also issued orders restraining S from transferring or charging another of the properties the couple shared known as LR No. Gede/Kirepwe 'B'/[particulars withheld]. Those orders were registered against that title on 16<sup>th</sup> September 2011. It would however appear that no such order was registered against the title to the suit property.

20. The reinstatement of the Defendant into the suit property appears not to have been taken kindly and it is apparent that a scheme was orchestrated by S and the said S N W to deprive the Defendant of whatever entitlement she had to the suit property.

21. A perusal of the entries made on the title indicate that J S transferred the suit property, in consideration of love and affection to one F M A on 5<sup>th</sup> February 2010. According to the Plaintiff, this is the woman S married at Mombasa in the year 2001. No explanation was however offered as to why the land which was bought in 1999 was being transferred to her in 2010. And despite the Defendant's protests that there

was no such a person married to S, no explanation was offered by the Plaintiff as to her whereabouts.

22. Whatever the case, some eight months after the land was so transferred to her, the said F M A is equally shown to have transferred the same property, again in consideration of love and affection, to S N W on 26<sup>th</sup> October 2010. S then purportedly charged the property to Equity Bank on 7<sup>th</sup> September 2011 for a loan of Kshs 1 Million which she by design or otherwise failed to remit thus leading to the auctioning of the suit property some one and a half years later.

23. In my mind, if indeed S charged the property to Equity Bank Ltd, her actions were clearly actuated by malice and were, indeed fraudulent. I say so because S knew that the Defendant had been living in the suit premises and had been reinstated therein following the institution of a suit she was aware of. In a Supporting Affidavit sworn by S on behalf of S after the Defendant lodged Malindi CMCC No. 217 of 2011 aforesaid, Susan depones at paragraphs 1 and 4 thereof as follows:-

***“1. That I am an adult female of sound mind and a resident of Mombasa County. I know the Defendant named in this suit who also happens to be a personal friend. I talk to the Defendant regularly on phone and I am familiar with matters of fact relative to his health.***

***4. That I learnt that Mr. S has been hospitalized in Munich, Germany for over one month since October 2011. According to his information given to me on phone (sic), he was released from hospital in late November 2011 or thereabouts and he is reportedly very weak to travel out of his country to come and fight this suit. He had asked me to liase with his lawyer in Kenya until he is strong enough to travel to Kenya and answer the Plaintiff's claim.”***

24. From the Plaintiff's Supplementary Affidavit sworn and filed herein on 31<sup>st</sup> October 2014, J S purchased the suit property in 1999 for a sum of Kshs 1,500,000/=. Eleven years later, S used the property to secure a loan of Kshs 1000, 000/= on 7<sup>th</sup> September 2011 and how the loan ballooned to a sum of Kshs 10,220,000/= for which it was auctioned on 26<sup>th</sup> April 2013 is a matter that would require some explanation from both S and the Bank. The two are however not parties in this suit. Why the Plaintiff chose not to enjoin the Bank in seeking orders of vacant possession is again one of those mysteries.

25. As it were, the Defendant has filed at the High Court in Malindi Civil suit No. 8 of 2012(OS) wherein, I note, both S and the Bank have been enjoined as Defendants. I think many of the issues that occupied my mind in regard to this dispute should be ventilated and resolved in that suit.

26. For now I am not persuaded that the Defendant was a stranger and/or a trespasser in the suit property as alleged by the plaintiff. Courts of law exists to do justice to the parties. In the matter before me, it would be extremely unjust to order the eviction of the Defendant from the suit property in which she has lived since 1996, more so when she has filed and has pending a case which seeks a number of declarations over her entitlement to the same.

27. The long and short of it is that the Plaintiff's claim against the Defendant is disallowed. The purported sale of the subject property being Plot No. [particulars withheld] (Original [particulars withheld]/12) to the Plaintiff is hereby accordingly nullified.

28. The Defendant shall have the costs of this suit and the counterclaim.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of May, 2018.**

**J.O. OLOLA**

**JUDGE**