



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO 772 OF 2013

ESTHER WAMBUI GACHANJA.....PLAINTIFF

VERSUS

GREASHON MUHORO GITHINJI.....DEFENDANT

JUDGMENT

This is a consolidated suit being *High Court Civil Suit No 2263 of 1998* and *Chief Magistrate Civil Case No 7357 of 1998*. By a Plaint dated *2nd October 1998*, the plaintiff filed a claim against the defendant and judgment for:-

- a. A declaration that a portion of 100 ft by 50 ft in LR No Makuyu/ Makuyu/ Block1/1159 which the plaintiff had developed belonged to her.*
- b. An order that the defendant transfer the said portion of 100ft by 50ft out of LR No Makuyu/Makuyu/Block 1/1159 to the plaintiff.*
- c. Alternatively the defendant do pay to the plaintiff the current market value of the said plot developments including Posho Mill and the Pump in the said portion of LR.No Makuyu/Makuyu/Block 1/1159.*
- d. General damages*
- e. Costs and interest at Court rates.*

The plaintiff's claim is as follows; that sometimes in 1993 the plaintiff and the defendant entered into a land sale agreement wherein the defendant sold to the plaintiff a portion of **100ft by 50ft** out of **LR No Makuyu/ Makuyu/Block 1/1159** for an agreed purchase price of **Ksh 39,500/=** which sum was duly paid to the defendant and the said agreement was reduced into writing on **20th June 1995**. She stated that she disclosed to the defendant that she intended to build shops and residential rooms for purposes of business. That pursuant to the agreement, the defendant measured a portion of **100 ft by 50 ft** out of the land within Makuyu Township which the plaintiff honestly believed was **LR No Makuyu/Makuyu/Block 1/1234** and was physically identified to the plaintiff by the defendant. She entered into occupation of the plot between 1993 and 1994 and constructed permanent building comprising of 12 residential rooms and two shops and installed electricity and a Kerosene Pump. She then commenced a posho mill and Kerosene Pump business within the said business and rented the 12 rooms and is in possession of the premises to date. She further averred that she had been under the honest impression that her building is erected on **LR**

No Makuyu/Makuyu/Block 1/1234 as per the said agreement and identification by the defendant until **22nd September 1998**, when the plaintiff confirmed from the area survey map that the defendant misrepresented the actual land reference number while entering into the agreement in the land reference number for which the plaintiff and defendant were constructing for was **LR No Makuyu/Makuyu/Block 1/1159** which the defendant showed the plaintiff but in the agreement the defendant indicated **LR No Makuyu/Makuyu/Block 1/1234** which was far away from the township. She listed the particulars of misrepresentation as selling the plaintiff **LR No Makuyu/Makuyu/Block 1/1234**, while he knew the land reference number for which she was buying a portion was of **LR No Makuyu/Makuyu/Block 1/1159**, which he physically identified and showed the plaintiff. The defendant allowed the plaintiff to construct 2 commercial shops and 12 residential rooms at great expense knowing the land reference number is **LR No Makuyu/Makuyu/Block 1/1159** and not **LR No Makuyu/Makuyu/Block 1/1234**, he misrepresented to the plaintiff that the land which was within Makuyu township was **LR No Makuyu/Makuyu/Block 1/1234**. She argue that she had done extensive developments on the said building and installed three phase electricity, posho mill and the pump. She further stated that the defendant had threatened to evict her from the said building demanding rent and harassing tenants.

This claim has been contested by the defendant who filed his defence and counterclaim on **9th November 1998**. He denied that the portion that was sold to the plaintiff was within Makuyu Township. He added that the plaintiff, the defendant and one William Gachanja [deceased] travelled to the property **LR No Makuyu/Makuyu/Block 1/1234** located outside Makuyu Township to view the property the subject matter of the sale agreement. He denied that the plaintiff constructed any building or any installations made by her. He stated that the plaintiff was unlawfully in possession and occupation of the defendants premises located in **LR No Makuyu/Makuyu/Block 1/1159**. He further claimed that the plaintiff was aware of the property she was buying because she lodged a caution on **LR No Makuyu/Makuyu/Block 1/1234** to safeguard her interest and added that he had no contract agreement with the plaintiff on **LR No Makuyu/Makuyu/Block 1/1159**. He stated that the plaintiff did not construct any building on his property as alleged by her.

In his counterclaim, he stated that the plaintiff was in unlawful occupation of his premises at **LR No Makuyu/Makuyu/Block 1/1159** and despite notice to vacate the premises she has continued to be a trespasser. The defendant avers that since **April 1998**, the plaintiff has unlawfully held herself out as the land lady of the premises at **LR No Makuyu/Makuyu/Block 1/1159** and has unlawfully been receiving rents from the defendant's tenants who occupy various rooms in the defendants said premises. He particularized the amount due to him as rent of 12 rooms at the price of **Ksh 550/=** per month from **April 1998 to October 1998** as **Ksh 46,200/=**. He stated that he had a tenancy agreement with the plaintiff's husband but the same was not extended to the plaintiff. He prays that the suit be dismissed with costs, a declaration that the plaintiff is wrongfully and unlawfully in occupation of the defendant's premises at **LR No Makuyu/Makuyu/Block 1/1159** and an order that the plaintiff do pay the defendant **Ksh 46,000/=** being monies she had collected as rent and all further rent as they continue to accrue.

When the suit came up for hearing, the plaintiff gave evidence and called three witnesses. On his part, the defendant gave evidence and called two witnesses. The plaintiff **PW1** stated that the defendant was her **brother in law** and a brother to her late husband. She averred that in 1993 she had a transaction with the defendant where he sold her land in Mukuyu town. The size of the suit property was **100 X 50** and the purchase price was **Ksh 39,500/=** which she paid him. The defendant later physically showed her the plot and they later reduced the agreement into writing on **20th June 2005**, which she exhibited in court. She further stated that she constructed rental rooms in 1993, installed electricity and went into business. She stated that she had a Kerosine tank in her premises and also installed a Posho Mill which was still in operation. She also stated that she let out the rooms to **Kakuzi Co. Ltd** who they used to pay her rent. She stated that the plot she bought was in Makuyu Township and not outside the township as alleged by the defendant and that she was never stopped by the defendant when she was constructing the premises. She contended that when her husband passed away in February 1998 and at that time the defendant claimed the plot as his. The defendant sent auctioneers to levy distress, but she objected to the distress by filing a suit **CMCC No. 7357/1998**, now consolidated with this suit. She claims for damages for illegal attachment of her goods worth **300,000/=**

On cross examination she was shown a sale agreement of **LR No Makuyu/Makuyu/Block 1/1234**, and she stated that she was claiming **Makuyu/Makuyu/Block 1/1159**. She further stated that she entered into a sale agreement for purchase of **1159** and not **1234** and added that she never carried an official search to ascertain the number of the property she purchased and believed that what she purchased was **1159**, since that was the only plot the defendant had in Makuyu township and that **plot No 1234** did not exist in Makuyu township. When shown the caution lodged in her favour on Plot No **1234** dated **2nd February 1998**, claiming purchaser's interest, she admitted that the agreement bore that number and therefore confirmed that what she bought was **plot No 1234** and not **Plot No 1159**. She also confirmed that she did not lodge any caution on **Plot No 1159** and neither has she obtained any restraining orders against the defendant on **plot 1159** from transferring or selling it. She stated that she came to know that she had constructed on was **1159** in **March 1998**. She stated that she did not ask for transfer of the plot after payment of the purchase price for the suit premises because she believed on the mutual trust they had with the defendant. She stated that when she bought the premises, there were no buildings. That she built on her portion and later the defendant came to construct his which was incomplete. She further stated that the place was surveyed before she started construction and the defendant showed her where to construct. She also clarified that she had two shops and not three as earlier stated. She also stated that she never lost any goods as they were not taken away.

PW2 Samuel Mwangi Wachira, who is a construction worker stated that he did some work for the plaintiff. He testified that he was given a building plan and there were 2 shops and a store at the front and the building had twelve rooms. He also stated that he put up the structures within Makuyu Township.

PW-3 Mwangi King'ori, testified that he worked for Kakuzi Limited as an Administration Manager since **1996**. He further testified that in 1998, the Company rented premises for staff outside the company premises from Mrs. Esther Gachanja. It was his further testimony that the houses were rented from **July 1997 to October 1998**. He also testified that Kakuzi had an agreement with the plaintiff for renting 21 houses. He further stated that Kakuzi Limited did not rent any house to the defendant.

PW-4 Zacharia Makenzie Ndeti, a valuer by profession stated that the plaintiff sought for his services on two occasions in 1998 and 2004 for valuation of the premises. He produced a valuation report dated 9th October 1998. He stated that he considered the construction, accommodation and the building, service, occupants, state of repair, neighborhood and structure. He stated that the value of the property as at the time of the valuation was **Ksh 800,000/=** and in the year **2004**, which showed the value of the building at **Ksh 1,200,000**. He stated that he used depreciated replacement cost approach where the replacement cost approach remained the same but the figure changes because a cost of construction goes up. That they don't use historic cost approach in valuing property but use current costs when replacing for a building to give current market value.

On his part, the Defendant gave and called two witnesses to support his case. **DW-1 Greashon Muhoro Githinji**, the defendant testified that he sold **plot No Makuyu/Makuyu Block 1/1234** the size of **1/8 of acres**, a portion out of the whole **two (2) acres**. He showed a copy of the agreement dated **20th June 1995**, but did not transfer it to the plaintiff. He explained that he could not transfer the portion to the plaintiff for the reasons that the plaintiff had lodged a caution on the said land in **1998**. He clarified that he showed the plaintiff the portion of land indicated in the sale agreement and indicated that he even gave the plaintiff a copy of the title deed to **1234**. He stated that the plaintiff paid him **Ksh 39,500/=** and added that he would not sell the **1159** plot at that amount. He stated that the plaintiff's husband was his tenant for two years before the plaintiff took over. He further stated that there were two phases in the construction and the 2nd phase that is incomplete was also his. He added that the plaintiff installed electricity in phase one so that she could run a posho mill and kerosene shop. That the rest of the 12 rooms had been let out. He also stated that the plaintiff did not install the Kerosene pump on her property but he and even had to seek his permission to install the kerosene pump. He further stated that he had not subdivided the land by the time he was selling it to the plaintiff and it was not identifiable and that the land has not been subdivided because it has a caution. He acknowledged that there was a building in **plot No 1159**, which is on plot **50 x 100 ft**. That it is also occupied by the plaintiff. He disputed the fact that the plaintiff constructed the building on the property and stated that he was the one who constructed the building. That he sent auctioneers to distress rent on her for failing to pay rent. He distressed for rent of

Ksh 52,000/= 10 years ago and it was indicated in the counterclaim. He contended that the plaintiff entered into the premises in **1995** and never paid rent.

DW-2 Mathew Kimotho Gitau, stated that he was a draftsman and drew building plans and supervised construction work and worked for the defendant. He stated that he drew a plan in 1993 and took it for valuation. That the plans were for plot in Makuyu being **Makuyu/Makuyu Block 1/1159**. He mapped up the portion that he wanted to put up the building and the plan was in calculation of to plot No **Makuyu/1159**. He stated that the block measure **50x 100 meters** and had six shops and 14 rooms and that the blocks were identical. The middle wall was the common one. That the rooms were single in size on both wings. He stated that the construction of the building was done by Bernard Kamau and he was the supervisor. He was paid **Ksh.7,00/=** for the plans and **Ksh.700** for every day he came to supervise. He stated that the plaintiffs building plans were not approved neither did the plaintiff visit the site during construction. On cross examination he stated that he had a diploma in construction and engineering .He further stated that draftsmen assist architects in submitting drawings for approval under the consulting architect because he needed an architect to work under so that he could submit his work. He added that the plot was in a farm and they therefore needed change of user which they did. He knew the plaintiff and that she constructed one portion of the building.

DW3 Bernard Kamau Mwangi, adopted his written statement which he signed on **9th December 2013**. He stated in his statement that the defendant gave him construction work in 1994 in Makuyu town. The defendant bought construction materials and he did the construction and was paid for labour. He would supervise all the laborers. He further stated that he used the building plan drawn by **Mathew Kimotho Gitau**, who also supervised the construction. He further stated that the construction of the buildings was to be done in two phases the first being three shops and 1 room and there was also phase two. He stated that the defendant could not complete the second phase because he ran out of finances. He also added that both phases shared a common foundation and a wall in the middle and each phase occupied an area of **100ft by 50 ft**. On cross examination he stated that he was on contract and was paid daily since he acted as a foreman.

Parties filed their written submissions. Both parties highlighted their pleadings and evidence in court.

I have considered the plaintiff's suit as pleaded and the evidence tendered by the plaintiff in proof thereof. I have also considered the defendant's statement of defence, the counterclaim and the evidence that was tendered by the defendant in his defence. I have also considered the respective written submissions by the advocates for the parties. The parties did not frame issues for determination by the court. From the pleadings and the evidence tendered before me, the following in my view are the issues that arise for determination in this suit;-

- a. Whether the plaintiff bought an interest in LR No Makuyu /Makuyu /Block1/1159.**
- b. Whether the plaintiff constructed the building on LR No Makuyu /MakuyuBlock1/1159.**
- c. Whether the defendant is entitled to rent claimed in the counterclaim**

The facts that are not in contention are that the parties herein got into a sale agreement for the purchase of a portion of **100ft by 50ft** from the defendant. It is also not in dispute that the plaintiff occupied the building that was constructed on **LR No Makuyu/Makuyu/Block1/1159**, and conducted her business wherein she ran a kerosene pump, a posho mill and rental houses where she rented the 12 rooms in Mukuyu Township.

- a. Whether the plaintiff bought an interest in LR No Makuyu /Makuyu /Block1/1159**

Both parties produced and relied on a sale agreement dated 20th June 1995 between the plaintiff and the defendant for a consideration of Ksh 39,500/= for a portion of land in **LR No Makuyu/Makuyu/Block1/1234**. It was the defendant's evidence that he showed the plaintiff the portion of land sold to her but had not transferred it to her names. The plaintiff also confirmed in her plaint that this property was situated

outside Makuyu Township. The plaintiff has further at paragraph 9 of her plaint stated that she had the honest belief that the building was erected in **Makuyu/Makuyu/Block1/1234** as per the sale agreement. In her evidence in court she stated that she purchased **LR No Makuyu/Makuyu/Block1/1234** from the defendant and even lodged a caution on the said property to protect her interest as a purchaser. It is therefore the conclusion of this court that the plaintiff purchased a portion of 100ft by 50ft from **LR No. Makuyu /Makuyu/Block1/1234** from the defendant and not **LR No. Makuyu/Makuyu/Block 1/1159**.

From the evidence tendered in court by the plaintiff and the defendant the building within which the plaintiff was conducting her business was constructed on **LR No. Makuyu/ Makuyu /Block1/1159**. The plaintiff's allegation that the defendant misrepresented himself that he was selling her a portion in **LR No Makuyu/Makuyu/Block1/1159** is not credible because she had the chance to conduct a search at the Lands Registry to confirm what property she was purchasing from the defendant and that she ought to have confirmed that the physical location of the property she was purchasing was reflected in the title deed. Since she did not show the court that she conducted any search on the suit property. The Plaintiff therefore cannot turn around and claim misrepresentation on the part of the defendant.

b. Whether the plaintiff constructed the building on LR No Makuyu/ MakuyuBlock1/1159

The plaintiff claimed that she constructed the building that rested on **L.R No Makuyu/Makuyu/Block1/1159**. It was her evidence that the construction lasted from 1993 to 1995 and she was never stopped by the defendant from constructing. She further stated in her evidence in court that there was mutual trust between her and the defendant and she did not expect any problems with the defendant. When shown the building plans that she had produced in court, she stated that the plan did not have any stamp of approval by the Makuyu Town Council. The plan related to **LR No Makuyu/ Makuyu /Block1/1159 and not 1234**. The defendant on the other hand produced his building plans that were approved by the Ministry of Health and the Town Council of Makuyu on **5th July 1993** where according to the plan, the 1st part consisted of 12 living rooms and three shops and the 2nd part consisted of 12 rooms, 3 shops and 3 stores all in the same foundation. The plaintiff tendered evidence of installation of electricity in the building at Ksh 88,500/= and payment of the meter box at Ksh 20,000/= the defendant also confirmed that the plaintiff installed the electricity after they had agreed with the plaintiff's husband on the installation. He stated that the plaintiff occupied the entire 1st part since 1998 when the plaintiff's husband became his tenant. The defendant testified that the plaintiff's husband paid the defendant rent for Ksh 3800 per month and they agreed that after the installation of the 3 phase electricity he would not pay electricity until he had recovered the cost of installing electricity. The plaintiff did not dispute the defendant's claim that the plaintiff's husband was his tenant.

From the above evidence it is safe to conclude that the building belonged to the defendant who rented it to the plaintiff's husband. I do believe that the agreement between the defendant and the plaintiff's husband on the installation of electricity was that the plaintiff's husband would not pay rent so that he can recover the money expended in installation of electricity.

c. Whether the defendant is entitled to rent claimed in the counterclaim.

The defendant in his counterclaim has stated that he wants the plaintiff's suit dismissed, a declaration that the plaintiff is unlawfully in occupation of **LR No Makuyu/Makuyu/Block1/1159** and that the plaintiff should pay the defendant **Ksh 46,000/=** as rent arrears.

The defendant has not proved his case that he had a tenancy agreement with the plaintiff for him to claim rent arrears from the plaintiff. His claim is that he had an agreement with the plaintiff's husband as a tenant. I find that this claim is not available for the defendant because the Court cannot presume that the plaintiff will in fact continue renting premises and if so, at what rent. This is a special damage claim which must not only be specifically pleaded but also proved. It cannot be left to speculation and therefore that claim cannot stand and the same is disallowed.

Having now considered the pleadings in general, the available evidence and the Written Submissions, the Court makes the following findings:-

a. The plaintiff is in unlawful occupation of the defendant's premises at LR No Makuyu/Makuyu/Block1/1159.

b. The caution lodged on LR No. Makuyu/Makuyu/Block 1/1234 is hereby vacated and the defendant should transfer title to the plaintiff on the portion of land she purchased within 90 days of vacating the said caution.

c. The plaintiff should vacate the said premises within 90 days of reading this judgment failure to which the defendant be at liberty to evict the plaintiff.

d. The Plaintiff's suit is dismissed.

e. Each party to bear their own costs.

It is so ordered.

Dated, Signed and Delivered this *23rd* day of *July,2015*

28 days Right of Appeal

L.GACHERU

JUDGE

23/7/2015

Before Hon.Gacheru Judge

Court Clerk Nyangweso

In the presence of :-

Mrs Kiranga holding brief Mr Mwangi Chege for the Plaintiff

M/s Kibathi for Defendant

Court:

Judgement read in open Court in the presence of the above advocates.

28 days Right of Appeal.

L.GACHERU

JUDGE

M/s Kiranga : I apply for typed copies of the proceedings and Judgement.

Court.

Typed copies of the proceedings and Judgement to be supplied to the parties upon payment of the requisite fes.

L.GACHERU

JUDGE

23/7/2015