



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 791 OF 2015**

**VAN DE GRAAF BERNADUS PAULUS MARIA.....PLAINTIFFS**

**VERSUS**

**ZACHARIA KUYA OKATA.....DEFENDANT**

**JUDGEMENT**

The Plaintiffs' suit was dismissed with costs on 17/1/2005. After dismissal of the plaintiffs' suit, the only pending matter for determination is the counter claim. It was the defendant's counter claim that he purchased plot No. West Bunyore/Ebusakami 1852 from Dr. Osuga Odek for Kshs. 10,000 in 1982 and plot number West Bunyore/Ebusakami/ 2745 from Amos Mbega Olango for Kshs. 1,500 during the year 1986. The Defendant denied having authorized the Plaintiffs to keep his land certificate and denied having authorized the plaintiffs to build a residential house on the land at Kshs. 200,000/-.

The Defendant claims that the agreement between the plaintiff and defendant is void and illegal as the plaintiff is a foreigner and with no capacity to own land in Kenya. The Defendant agreed that the plaintiff was a tenant of the defendant on parcel number West Bunyore/Ebusakami 1852 at a rent of Kshs. 1,200 per months. The defendant claims that the plaintiff is in arrears of rent of Kshs 3,600 for the months of November, October and December 1986 when the Defendant claimed with the mesne profits. The Defendant claimed costs and interest.

When the counter claim came up for hearing, the Defendant and counter claimant stated that he is a farmer married with 2 wives. He owns plot No. West Bunyore/Ebusakami 1852. He is the registered owner of the plot. He constructed 3 houses on the said plot. He allowed the plaintiff to move to the house with his wife. The Plaintiff was to pay Kshs. 1,200 per months. The Plaintiff moved into the house in 1983. He did not pay rent for October, November and December 1986 totalling to Kshs. 3, 600/-. In 2007, the house was valued for Kshs. 8,000. He stated that he bought the house from Dr. Ogaga.

On cross-examination by Mr. Njoga learned counsel for the Plaintiff, he states that he became registered in 1983 and constructed in 1982. He did not produce any document to show that he constructed the house. He did not produce the sale agreement. The plaintiff moved into the plot in 1983 vide a mutual agreement that was verbal and moved out in the year 2000.

The plaintiff on his part gave his evidence in the defence to counter-claim that he is an Engineer by profession. In 1996, he originated a case against the defendant Zachary Kuya Okata. The case was dismissed for want of prosecution. His statement filed on 1/9/2012 was adopted as evidence in chief. He produced documents in support of his defence. He produced the technical drawings. He produced documents to show that he constructed the house. He stated that the building cost him Kshs. 200,000 in 1983. He lived in the house between 1983 – 2000. He was not a tenant to the defendant. He claims that he did not board a plane to steal land from Kenya.

On cross examination, he states that he has no sale agreement for the purchase. He states that he land was purchased by him and registered in the name of the defendant. The drawings were not opposed. His name does not feature on the contract. He used his car in exchange for the building materials that built the house.

The Plaintiff called Mr. Francis Owino Onyaro a contractor in the name of Macalder Builders Co-operative Society who stated that he constructed the building for the plaintiff. The defendant did not participate in the constructions.

I have considered the pleadings, the defence and counter-claim and reply to defence and defence to counter claim and the submissions on record and do find that the Defendant has not demonstrated that he obtained a clean title especially due to the fact that there is no sale agreement between the Defendant and Dr. Osaka. The plaintiff on the other hand proved that he constructed the house and stayed in the same from 1983 to the year 2000 without paying rent to any person including the defendant. There is no evidence that the Defendant has ever been in possession of the property. There is no evidence that the plaintiff rented the property from the Defendant. There is no evidence that the plaintiff ever paid rent to the defendant. Other than holding a title deed, the defendant has no evidence of any process of acquisition of the land.

The Plaintiff on the other hand has produced evidence that he constructed the house on the land, lived in it with his former wife who still occupies the house to-date and does not pay rent to the defendant. This court finds that the Defendant has not proved his counter claim on a balance of probabilities and the same is dismissed with costs to the Plaintiff. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**