



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT MALINDI

ELC CASE NO. 182 OF 2017

VERONICA MWIKALI FORSTER

(suing through Attorney

SALIM SWALEH MOHAMED).....PLAINTIFF

-VERSUS-

MUSTAFA ALI SHEKUE.....DEFENDANT

JUDGMENT

By a Plaint dated 15<sup>th</sup> August, 2017, the Plaintiff herein sued the Defendant seeking the following orders: -

- a) *Permanent injunction restraining the Defendant by himself, his agents, servants and/or any other person acting on his instructions from entering, remaining, occupying, renting, interfering and/ or in any manner dealing with the Plaintiff's premises known and referred to as apartment No. 1 and 2 on the Plaintiff's VILLA VERONICA.*
- b) *Alternatively, for an order of eviction from the said premises.*
- c) *Costs of the suit.*
- d) *Any other and or further orders this Honourable Court may deem just and fit to grant.*

PLAINTIFF'S CASE

The Plaintiff filed this suit through a Special power of Attorney to Salim Swaleh Mohammed.

PW1 testified and stated that he filed this suit on behalf of Veronica Mwikali. It was his evidence that the Plaintiff had a building named after her as VILLA VERONICA on a piece of land that she purchased from ABDALLA BAKSHWEIN the owner of all that parcel of land known as Plot No. 21 Watamu. That the Plaintiff had her portion transferred in her favour as  $\frac{1}{4}$  acre undivided share from the said Plot No. 21 Watamu.

PW1 further stated that the Plaintiff rented out apartment No. 1 and 2 to MARIA EYER sometimes in the year 2000 paying monthly rent of Kshs. 20,000/- per month and at the time, MARIA EYER stayed with FRANCIS KAZUNGU.

PW1 testified that Maria later rented out apartment No. 2 to a Mr. Jacob and collecting rent of Kshs. 30,000/- without the consent of the Plaintiff and that at that time, Maria was not paying rent to the Plaintiff hence she was in arrears.

PW1 told the court that Maria died sometimes in March 2017 and left the premises locked to date with the keys being with the Defendant who is claiming ownership of the apartment. He stated that upon the demise of Maria Eyer the tenancy automatically terminated and the Defendant has no legal basis to the possession and occupation of the premises.

PLAINTIFF'S SUBMISSIONS

Counsel reiterated the Plaintiff's evidence and stated that the Plaintiff has proved that she is the registered owner of the suit property Villa

Veronica on Plot No. 21 Watamu having bought a portion of land measuring a quarter of an acre of undivided share from Abdalla Salim Bakshweni.

Counsel submitted that the Plaintiff produced a transfer dated 26<sup>th</sup> November, 1983 which was recorded as entry 12 in the Certificate of Title and that the property was named after her own name Villa Veronica.

It was counsel's submission that the Plaintiff was the registered owner of Villa Veronica way before she got married in 1988 and that the allegation by the Defendant that Maria Eyer bought the suit property from Forster Fritz is not substantiated since there is no Sale Agreement, no consideration and no transfer by the Defendant. Further that she has been paying land rates on the said property.

Counsel urged the court to grant the orders as prayed in the plaint together with costs.

### **ANALYSIS AND DETERMINATION**

The Defendant was served with summons to enter appearance and filed a Notice of Appointment of advocates vide Onchangu & Co Advocates who responded to the Notice of Motion for injunction which was dismissed by the court as the Plaintiff had not established a prima facie against the Defendant.

There was a Notice of Change of Advocate from Onchangu & Co advocates to Mouko & Co Advocates but the said Advocates neither filed a defence nor defended the suit. The suit therefore proceeded undefended.

The fact that a suit is undefended is not a free ticket to getting the orders sought. The Plaintiff is still duty bound to prove her/his case on a balance of probabilities. The Plaintiff has to discharge the burden of proof as was held in the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, where the Court stated: -

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

The issues for determination are whether the Plaintiff is the registered owner of the suit land and whether she is entitled to the orders sought. The Plaintiff claims to be the owner of the suit property having bought the same in 1983 from ABDALLA BAKSHWEIN and named it Villa Veronica. The ruling by Hon. Olola J in this matter stated in part that: -

***“I note from the materials placed before me that while the Plaintiff claims to be the registered owner of the suit property, entry No. 12 on the Certificate of Ownership attached to her supporting affidavit indicates that the transfer done on the 26<sup>th</sup> November, 1983 was made to and is registered in the name of Villa Veronica. While the Plaintiff who goes by the name Veronica Mwikali Forster may have some connection to the said Villa Veronica, I did not think that the two names referred to the same thing or person. As it were, Villa Veronica sounded to me more like a business name and nothing was placed before me to explain any connection between the said Villa Veronica and the Plaintiff.”***

The Plaintiff has not discharged this burden. I expected the Plaintiff to explain the connection with Villa Veronica during the hearing the court having raised it in the ruling that dismissed the Plaintiff's application for injunction. Is Villa Veronica a registered business name or a company. This is not clear from the pleadings and the evidence.

There are many questions that remain unanswered regarding the ownership of the said villa as entry No. 12 is in respect of Villa Veronica whose relationship with the Plaintiff is not proven. There are also further entries from No. 13 to 79 which are transfers to other parties who are not parties to this suit. No explanation has been made as to the various entries subsequent to entry No. 12.

It is also on record that the Plaintiff has on various occasions tried to evict Maria Eyer (deceased) from the suit premises as per **Malindi PM's Civil Case No 350 of 2008** but the Plaintiff was unsuccessful. Further that the Plaintiff attempted to forcefully evict Maria Eyer but she was charged in **Malindi Criminal Case No 727 of 2013** with the offence of forcible detainer contrary to Section 90 of the Penal Code.

I find that the Plaintiff has not proved her case on a balance of probabilities and is therefore dismissed with no orders as to costs as the Defendant did not defend the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF MARCH, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***