



REPUBLIC OF KENYA

High Court at Kitale

Civil Case 94 of 2004

EZEKIEL TOO.....PLAINTIFF.

VERSUS

YOHANA KIPSANG KIPTIANG'N.....DEFENDANT.

J U D G M E N T.

In this suit, the plaintiff, **Ezekiel Too**, is asking for a declaratory order to the effect that **Plot No. 9 Chebarus Centre** belongs to him and therefore there should issue an order for the eviction of the defendant, **Yohana Kipsang Kiptiangin**, from therein. In addition to the foregoing, the plaintiff is asking for mesne profits at Ksh. 1,500/= from 11th July, 2003 upto the time the defendant shall vacate the property.

In the plaint filed herein on 27th September, 2004, the plaintiff avers that he is the owner of land known as plot No. 9 at Chebarus centre having purchased it from one Johana Ikatwa on 11th July, 2003 at which time the defendant was a tenant thereon and was duly informed of change of ownership and required to remit rent to the plaintiff from that 11th July, 2003.

The plaintiff avers that despite several demands made by him, the defendant refused to pay rent and was thus informed in writing that he should vacate the property but failed to comply.

It is for the said reasons that the plaintiff now prays for judgment against the defendant.

The defendant filed a statement of defence on 27th October, 2004 denying the plaintiff's claim of ownership of plot No. 9 Chebarus Centre and his (defendants) alleged tenancy on the property. He avers that the property belongs to him and that at no time had it been sold to the plaintiff by one Johana Ikatwa.

The defendant contends that the tenancy agreement was between himself and the said Johna Ikatwa and that the plaintiff was only a tenant on the land.

The defendant therefore prays for the dismissal of this suit with costs.

In his testimony, the plaintiff (PW1) contended that the defendant is a tenant in a shop which he (PW7) purchased from **Yohana Kikatwa** or **Johana Ikatwa (PW3)** on 11th July, 2003 at a purchase price of Ksh. 30,500/=. The shop was described as plot No. 9 Chebarus Trading Centre. The relevant sale agreement (Pexh. 1) was signed by both purchaser and seller.

The plaintiff said that after purchasing the property, it was transferred into his names by the chairman of the centre who kept a list of all shop owners at the centre. The list was produced and marked P. Exh. 2. It indicated that the name of Yohana or Johana was submitted for that of the plaintiff on the 29th

September, 2003.

The plaintiff stated that a month after purchasing the property he notified the defendant of the change of ownership of the shop but the defendant refused to recognize him as the new owner. The plaintiff then instructed his lawyer to issue a notice to the defendant to vacate the property. This was done on 7th August, 2004. The notice was produced (P.Exh. 3). The plaintiff said that the defendant replied to the notice by a letter dated 1st September, 2004 (P.Ex. 4) from his lawyers. However, the defendant never vacated the property and refused to pay the monthly rent of Ksh. 800/=.

The deputy secretary of the committee that runs the said trading centre was **Joseph Kimngetich Sanga (PW2)**. He testified in support of the plaintiff and said that Yohana Ikatwa had a plot and a shop at the centre. The plot was No. 9 and the shop was rented to the defendant by Yohana. Adjacent to plot No. 9 was plot No. 8 belonging to the defendant.

Kimngetich (PW2) went on to state that on the 11th July, 2003, plot No. 9 was sold by Yohana to the plaintiff and the charge was effected in the appropriate list (P. Exh. 2). He confirmed that one Philip Kipkemboi Chepskwony was the person who sold plot No. 8 to the defendant but the change was not effected in the list. He contended that plots No. 8 and 9 are distinct plots and denied that there ever existed a plot identified as No. 9B.

Johana (PW3), indicated that he used to operate his shop but when he became sickly, he leased it to the defendant at a monthly rent of Ksh. 300/=. there was no formal agreement but there was a rental payment book (P. Ex. 7). A formal agreement (P. Exh. 8) was made and signed later.

Johana said that the defendant regularly paid his rent but stopped doing so later. Therefore, Johana decided to sell and did sell the plot to the plaintiff for Ksh. 30,000/=. An agreement (P. Exh. 1) was effected accordingly.

Johana confirmed that the defendant refused to vacate the property and has remained thereon without paying rent. Johana also confirmed that there was no plot 9B allegedly leased to the defendant. He (PW3) said that he purchased the material property in 1983 from a person called Wamalwa. An agreement dated 4/9/83 was produced (P. Exh. 9).

On his part, the former assistant chief **Philip Koech (PW4)**, indicated that a dispute arose between Johana and the defendant regarding the payment of rent of the premises leased to the defendant by Johana. He (PW4) convened a meeting of elders to resolve the matter. The matter was deliberated and it was resolved that Johana would offset his rent to cater for expenses incurred by the defendant in repairing the premises and that the defendant would vacate the premises since they had been purchased by a third party. The proceedings of the elders were produced (P. Exh. 10).

The chief (PW4) indicated that the defendant refused to authenticate or approve the decision reached by the elders. A village elder, **Eliud Soi (PW5)**, indicated that plot No. 9 was a commercial plot which was rented out to the defendant by Yohana but they later disagreed over rental payment. Eventually, Yohana sold the plot to the plaintiff for Ksh. 30,500/= in an agreement witnessed by Eliud (PW5).

In his testimony, the defendant (DW1) stated that he purchased the material plot No. 9 in the year 2001 from one Philip Kipkemboi Chepskwony. The appropriate sale agreement dated 20th December, 2001 (D. Exh. 2) was produced.

The defendant insisted and maintained that he purchased plot No. 9 and not plot No. 8 as alleged by PW2. He said that the plaintiff never purchased the plot from Yohana as alleged and that he (defendant) had never leased the property from the plaintiff.

The defendant further stated that he once leased a shop belonging to Yohana or John and produced the relevant agreement (**D. Exh. 1**). He stated that he had leased plot No 9B from Yohana and that was the plot sold to the plaintiff and not plot No. 9 which belongs to him (Defendant).

The defendant contended that the plaintiff's claim against him was not justified and now prays for its dismissal with costs.

It is apparent from all the foregoing evidence that the ownership of the so called plot No. 9 at Chebarus trading centre is the bone of contention. Both the plaintiff and the defendant lay claim to the plot.

The plaintiff said that he purchased the plot from Johana or Yohana (PW3) who confirmed as much as supported by Kimnetich (PW2), and Soi (PW5). Yohana was categorical with sufficient support from the plaintiff (PW1), the deputy secretary (PW2), the Chief (PW4) and the village elder (PW5) that he sold plot No. 9 to the plaintiff at a time when it was leased to the defendant.

The defendant did not dispute that a shop had been leased to him by Yohana (PW3) but he contended that the shop was on plot 9B and not plot No. 9 which he purchased in the year 2001 from one Philip Kipkemboi Chepkwony.

The defendant contended that the plaintiff purchased plot No. 9B from Yohana and not plot No. 9.

The sale agreements produced by both the plaintiff and the defendant (i.e. P. Exh. 1 and D. Exh. 2) indicated that plot No. 9 was sold to both of them by two different people at different times.

Yohana (PW3) confirmed that he sold the plot to the plaintiff but Philip Kipkemboi was not called to testify to confirm as much in respect of the defendant.

Be that as it may, it was evident that the subject plot was plot No. 9 but that there were two other plots near or adjacent to it i.e. plots No. 8 and No. 9B. In view of the conflicting sale agreement regarding a single plot No. 9 and in view of the fact that it would not be ruled out that this plot No. 9 may also be part and parcel of plot No. 8 or plot No. 9B and in the absence of a boundary map due to the fact that there were all unregistered plots it would be difficult to identify the actual plot sold to the plaintiff by Yohana (PW3) and that sold to the defendant by the individual called Philip Kipkemboi Chepkwony.

Apparently, both the plaintiff and the defendant were not certain of the actual position and identity of the plot each was separately purchased from different vendors.

Neither the plaintiff nor the defendant have any legal title to the material plot. None showed any legal title from the previous "owners" such as Yohana (PW3) who said that he purchased the plot from one Mzee Wamalwa but did not also produce any legal title from the said Mzee Wamalwa.

The sale agreements produced herein by either party do not suffice in proving legal ownership of the plot by either party (i.e. the plaintiff and defendant). At the very least, the agreements merely serve to show that both the plaintiff and the defendant have a common interest in the plot being described as plot No. 9. So, their dispute should not be with one another but with those who sold them the plot. Such dispute would essentially be contractual by way of specific performance and/or a claim for damages for breach of contract.

Without proof of ownership of the said plot No. 9 and in the absence of a clear boundary map to show that the plot is actually distinct from the other plots No. 8 and No. 9B, this suit by the plaintiff against the defendant is unsustainable in as much as it was ill-advised. It may as well be that both the plaintiff and the defendant are in unlawful occupation of property belonging to some other person.

In sum, this suit is dismissed for want of merit. Each party shall bear own costs.

[Delivered and signed this 13th day of November, 2012.]

[In the presence of Mr. Ramadhan for plaintiff and Mr. Onyancha for the defendant.]

J.R. KARANJA.

JUDGE.