



REPUBLIC OF KENYA



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**Mutinda v Kwetu Sacco Society Limited & another (Environment & Land
Case 99 of 2016) [2022] KEELC 4877 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 99 OF 2016
CA OCHIENG, J
SEPTEMBER 22, 2022**

BETWEEN

JOYCE MWIKALI MUTINDA PLAINTIFF

AND

KWETU SACCO SOCIETY LIMITED 1ST DEFENDANT

JOHN KATAMA NZIOKI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated the September 2, 2016, the plaintiff seeks the following orders:
 - a. A permanent injunction be issued restraining the defendants by themselves, agents, servants, employees or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the plaintiff over all that property identified as plot number 39A renamed number 14 Matuu Market, within Machakos County.
 - b. An order revoking the illegal notice issued to the tenants of plot number 39A renamed 14, Matuu Market.
 - c. An order directing the refund of the rental income lost to date.
 - d. Damages and trespass.
 - e. Costs of this suit.
 - f. Any other relief the honourable court may deem fit and expedient to grant.
2. The 1st defendant in its Defence dated the April 20, 2018 contended that all the beneficiaries to the estate as well as the plaintiff had no objection to the purchase of the suit property. It insists the plaintiff in purporting to oppose the decisions of the other beneficiaries filed the instant suit and hence has



unclean hands. It denies the particulars of fraud and insists the same is made in bad faith. It avers that this suit is aimed at interfering with its right and interest over the suit property for which it had acquired at a consideration and is now suffering loss as well as damage for which it holds the plaintiff including the other beneficiaries liable. It reiterates that the plaintiff's claim is incompetent and bad in law.

3. The 2nd defendant filed his statement of Defence on April 20, 2018 denying the averments in the Plaintiff except the descriptive. He contends that the decision to dispose off the suit property to the 1st defendant was prompted largely by the need to raise funds to cater for the ill health of a beneficiary to the estate one Tasani Nzioki (deceased). Further, that all the beneficiaries to the estate including the plaintiff had no objection to the said disposal. He insists the plaintiff has come to court to oppose the decision of the beneficiaries and hence has unclean hands. He denies the particulars of fraud and contends that the same is made in bad faith. He explains that this suit is aimed at the plaintiff achieving her objective of dealing with the suit property to the exclusion of other beneficiaries and thereby circumventing the confirmation of the grant in Nairobi Succession Cause No 2664 of 2002 In the matter of the estate of Esther Nzioki Mita. Further, that as a result of the plaintiff's conduct, the 2nd defendant including the other beneficiaries have commenced proceedings in the aforementioned succession cause to revoke her appointment as an administrator. He insists this court does not have jurisdiction to handle this matter and the plaintiff's claim is incompetent as well as bad in law.
4. The matter proceeded for hearing where the plaintiff had one witness while the defendants failed to call any witness.

Evidence of the Plaintiff

5. The plaintiff as PW1 adopted her witness statement and produced various documents as exhibits. It was her testimony that the 2nd defendant including two of her other brothers namely Tasaru James Mita and Paul Ngao Musyoki colluded when the Nairobi HCC Succession Cause No 2664 of 2002 in respect to their late mother's estate (Esther Nzioki Mita) was still pending and sold plot number 39A Matuu Market (14 Matuu Market) hereinafter referred to as the 'suit land', to the 1st defendant vide a Sale Agreement dated the May 4, 2016. She confirms that together with the 2nd defendant, they were administrators to their deceased's mother's estate. It was her testimony that in May 2016, she discovered an individual in collusion with the 2nd defendant had impersonated her by forging her National ID and thereafter proceeded to write a letter dated the April 28, 2016 to the 1st defendant's manager purporting to surrender her powers to her brothers Tasaru Nzioki, Paul Ngao and John Nzioki respectively, by authorizing them to sell the suit land. She further explained that the suit land was sold to the 1st defendant before the grant in respect to their mother's estate was confirmed. She denies granting her consent for sale of the suit land and insists her signature was forged and she reported the matter to Matuu Police Station but the elders prevailed upon her not to push the matter as her brothers were family and could be prosecuted. She insists, except for the three brothers who received proceeds of the sale of the suit land, none of the other beneficiaries received any monies. She further confirmed that the 1st defendant had issued a notice for the tenants to pay rent into its account but she issued a contra notice dated the July 18, 2016 directing them to stop doing so and advising them to deposit rent into her account. Further, that the proceeds of the rent have been used to cater for her sisters personal needs and her late brother's medical as well as funeral expenses.
6. She produced the following documents as exhibits: Grant of Letters of Administration Intestate for the estate of the later Ester Nzioki Mita issued on January 10, 2003; letter dated May 21, 2016 to the sub county Administrator Yatta Sub County; letter dated April 28, 2016 authored by the impersonator to the Kwetu Sacco; copy of National Identification Card of the impersonator; copy of the plaintiff's National Identity Card; letter dated April 28, 2003 to the clerk, Machakos County Council; copy of



Gazette Notice dated November 29, 2002; letter dated June 14, 2016 to the Chief Executive Officer, Kwetu Sacco Society Limited; notice done by Kwetu Sacco Society Limited to the tenants of plot 39A now renamed 14, Matuu Market notifying them of the purported change of land and rent account; letter dated June 14, 2016 to the Sub County Administrator, Yatta Sub County; notice authored by the plaintiff dated July 18, 2016 directing the tenants of plot number 39A renamed 14, Matuu Market to continue paying rent to account number 1183679289 at the Kenya Commercial Bank, Sarit Centre, Nairobi; electricity bill from KPLC dated July 24, 2016 addressed to the plaintiff; receipt of KPLC bill dated August 11, 2016 paid by the plaintiff; Sale Agreement dated May 4, 2016; copies of Bankers Cheque numbers 000251, 000250, and 000249, all dated May 4, 2016 for Kshs 748,000/=, 724,000/= and 764,000/= respectively; copy of Equity Bank cheque number 000248 for Kshs 145,000/= drawn in favour of Michael Wambua Musyoki ; copy of acknowledgement of payment dated May 4, 2016 for Kshs 145,000/=, written by Michael Wambua Musyoki; Copy of acknowledgment for payment dated May 4, 2016 for Kshs 60,000/= written by Paul Ngao Nzioki; copy of acknowledgment for payment dated May 4th, 2016 for Kshs 100,000/= written by Tasani James Mita; copy of acknowledgment for payment dated May 4, 2016 for Kshs 40,000/= written by John Katama Nzioki and copy of Identity Card for 2nd defendant.

Evidence of the Defendants

7. The defendants opted not to tender any evidence in this matter.

Submissions

SUBDIVISION - Plaintiffs Submissions

8. The plaintiff proceeded to highlight and rely on the evidence tendered herein. She contended that the defendants knew the transaction they purported to get into was illegal, unprocedural and irregular from the onset. Further, that the knowledge of the illegality of the aforementioned transaction has hampered any attempts at seriously defending their case. She reiterates that the defendants' actions are indicative of a guilty disposition. To buttress her averments, she relied on the following decision: *Nelson Erick Mzee vs Panal Freighters Limited* (2020) eKLR.

Defendants Submissions

9. The defendants in their submissions challenged the evidence presented by the plaintiff and insist the 1st defendant was acting bona fide based on available information at the time of the sale that all the beneficiaries had no objection to the same. They confirmed issuing a notice to the tenants as regards payment of rent as from June 1, 2016 but this was cancelled by the plaintiff. They insist the plaintiff never produced any evidence to confirm the 1st defendant indeed received rent from the suit land. To buttress their averments, they relied on the following decision: *Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & Another* (2014) eKLR.

Analysis and Determination

10. Upon consideration of the Plaintiff, Statements of Defence, testimony of the plaintiff, exhibits and submissions, the only issue for determination is whether the plaintiff is entitled to the orders as sought. In the Plaintiff, the plaintiff sought for orders of permanent injunction restraining the defendants from interfering with the suit land, revocation of notice to the tenants issued by the 1st defendant, refund of rent, damages for trespass and costs of the suit.
11. I note the plaintiff and the 2nd defendant are administrators of the estate of their late mother vide grant issued on January 10, 2003. It is not in dispute that the suit land is yet to be distributed to the deceased



beneficiaries in accordance with the Law of Succession Act. It was PW1's testimony that the grant was confirmed in 2020 but the suit land was left out of the distribution list, pending outcome of this suit. PW1 contended that the 2nd defendant in collusion with her aforementioned brothers sold the suit land to the 1st defendant before the grant was confirmed. She testified that the 2nd defendant used an imposter to forge her national Identity Card including signature to pose that she had consented to the sale of the suit land which she had not. She explained that on realization that the suit land had been sold to the 1st defendant, she issued a notice to the tenants to pay monies into her accounts. PW1 explained that the proceeds of the rental income are deposited into her account but are used to cater for her siblings as she is in gainful employment as the Chairperson of the National Gender and Equality Commission, hence takes care of herself.

12. The defendants only filed their respective Statements of Defence but never appeared in court to tender evidence despite their counsel having been present and even cross examined the plaintiff. Section 107 of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

13. In the case of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No 834 of 2002, Lesiit, J favourably cited the case of Autar Singh Bahra and Another vs Raju Govindji, HCCC No 548 of 1998 where it was held that:

“Although the defendant has denied liability in an amended Defence and Counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

14. See also the decision of Nelson Erick Mzee Vs Panal Freighters Limited (2020) eKLR.
15. In associating myself with the legal provisions I have cited above as well as the quoted decisions, I find that since the defendants failed to controvert the plaintiff's averments, the plaintiff's claim remains unchallenged.
16. On the issue of trespass, Clerk & Lindsell on Torts 18th edition at paragraph 18-01 defines the same as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is *prima facie* proof of possession.”

Section 3 of the Trespass Act further provides that:

“(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

17. In this instance, the plaintiff confirmed she wrote to the tenants advising them to disregard the notice from the 1st defendant indicating it took over ownership. The plaintiff as PW1 further confirmed that she was receiving rental proceeds from the suit land. From the exhibits produced, by the plaintiff, since the 1st defendant is not in control of the suit land, while relying on the decision I have cited, I find that



the defendants are not on suit land and will hence decline to grant the order for damages for trespass as sought.

18. On the prayer for a permanent injunction and in line with the principles established in the case of *Giella V Cassman Brown (1973) EA 358*, I find that the plaintiff has indeed established a *prima facie* case as against the defendants and will make an order to that effect.
19. On the issue of costs, since it is the 2nd defendant together with his brothers who entered into a Sale Agreement to sell the suit land to the 1st defendant and received the proceeds of sale as evident in the acknowledgment of payments which were produced as exhibits, I find that he is responsible for the dispute herein but not the 1st defendant. In the circumstances, I direct that he bears the costs of this suit.
20. It is against the foregoing that I find the plaintiff has proved her case on a balance of probability and will proceed to make the following final orders:
 - i. A permanent injunction be and is hereby issued restraining the defendants by themselves, agents, servants, employees or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the estate of Esther Nzioki Mita represented by the plaintiff, over all that property identified as plot number 39A renamed number 14 Matuu Market, within Machakos County.
 - ii. An order be and is hereby issued revoking the illegal notice issued to the tenants of plot number 39A renamed 14, Matuu Market by the 1st defendant.
 - iii. Costs of this suit to be borne by the 2nd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

