

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 80 of 2004

M'NYERI RIMUNYA PLAINTIFF

VERSUS

MUKIRI W/O ZABLON 1ST DEFENDANT

KAARI D/O ZABLON 2ND DEFENDANT

JUDGMENT

The plaintiff's suit is related to parcel no. KARINGANI/MUIRU/1749 which is registered in the plaintiff's name. The plaintiff averred in the plaint and repeated the same in evidence that the defendants were in illegal occupation of his said parcel of land. He prayed for the eviction of both defendants and also sought general damages and *mesne*. The defendants allege in their defence that the plaintiff illegally bought the suit property while knowing that the then registered owner was deceased. The defendants counter claimed for possession of the suit property. Interestingly, in evidence, the defendants sought for the transfer of the suit property into their names. They sought in evidence that the registration into the plaintiff's name be nullified. Yet, in their pleadings, all they sought was that they be granted possession. Parties are bound of their pleadings. The evidence that was adduced before court was simple, that the plaintiff saw an advertisement in the newspaper for the public auction of the suit property. The plaintiff attended and successfully bid for the property. He paid half of the purchase price at the auction and half afterwards. Thereafter he was registered as the owner of the suit property. He produced a title to proof the registration. It was on the basis of his ownership of that land that he sought the eviction of the defendants. The defendants in their pleadings alleged that the auction was unlawful but in evidence they did not advance that allegation. What they stated was that the plaintiff purchased the land when its then owner was deceased. At this point, I wish to dispel the wrong notion propounded by the defence. The defence in submission stated that the plaintiff failed to prove his case on a balance of probability. The plaintiff's case was that he is the registered owner of the suit property and to that end he produced evidence of his ownership and that the defendants are in illegal possession of the same. That is not denied by the defendants. Indeed, what the defendants seeks as stated before in their counter claim is that they be given possession of the suit property. Yet they impliedly admitted being in possession. In paragraph 5 of the defendant's counter claim they state:-

“The defendant herein make a counter claim for possession of all the parcel of land known as KIRINGANI MUIRU/1749”.

Bearing all that in mind, I find that the plaintiff more than proved his case on a balance of probability. It is the defendants who alleged in their defence that the auction where the plaintiff purchased the suit property was illegal and unlawful. Having made that allegation, Section 107 of the Evidence Act places the burden to prove that allegation squarely upon the defendants. That section provides as follows:

“107. (1) 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.

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

The defendants failed to shift the burden of proof made upon them by virtue of that section. They needed to prove, for example, that the plaintiff colluded with the auctioneer or that he purchased the property secretly or on friendly basis. The defendants did not in fact prove any of the particulars of illegality and unlawfulness alleged in the defence. There is an issue raised by the plaintiff in his submissions which needs my response. The plaintiff submitted that the defendants' counter claim was incompetent for lack of a verifying affidavit. I beg to differ with that submission because order VI Rule 1(2) provides:-

“The plaint shall be accompanied by affidavit sworn by the plaintiff verifying the correctness of averments contained in the plaint.”
(underlining mine)

It is clear from that rule that a counter claim need not be accompanied by a verifying affidavit. Defence and counter claim are under Order VIII and in that order, there is no requirement for a verifying affidavit be filed together with the defence and counter claim. The judgment of this court is that the plaintiff has proved his case on a balance of probability but only in respect of prayer for eviction since he did not offer evidence in respect of damages or mesne profit. In the end the judgment of the court is in the following terms:

1. *That an order is hereby issued for the defendants to give vacant possession of parcel No. KARINGANI/MUIRU/1749 within 30 days from this date hereof.*

2. *If within 30 days, the defendants fail to vacate the property as in number 1 above, the court does hereby order that an eviction order be issued against both defendants to be evicted from the property KARINGANI/MUIRU/1749 without further reference to this court.*

3. *The defendants' counter claim is hereby dismissed with costs to the plaintiff. The plaintiff is also awarded costs of this suit.*

Dated and delivered at Meru this 25th day of September 2009.

MARY KASANGO

JUDGE