



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 772 of 1996

KECIA WAMBUI AND ANOTHER APPLICANT

VERSUS

JOSEPH MWANGI KIMANIRESPONDENT

JUDGMENT

After a prolonged and chequered history of this matter the Counter-claim by the 2nd Defendant against the Plaintiff filed on 22nd January, 2003 was heard.

The Plaintiff's suit was dismissed on 27th July, 2004 by an order of this court.

In the Counter-claim the 2nd Defendant claims the vacant possession of suit premises known as L.R. No. Nbi/Block/84/220 in Dandora, Nairobi against the two Plaintiffs herein as well as mesne profits from 29th February, 1996 and payment of Shs.39,780 with interest.

2nd Defendant in her evidence produced following documents to show her proprietary rights over the suit premises – namely:

1. **Certificate of lease dated 21st January, 2000. (D.Ex.5)**
2. **Lease issued by the Nairobi City Council to the 2nd Defendant (D.Ex.5)**
3. **Agreement for sale between the 1st Defendant and 2nd Defendant dated 29.2.96 (D.Ex.1)**
4. **Confirmation of payments of dues in respect of the suit premises from the Nairobi City Council (D.Ex.2)**
5. **An assignment of the suit premises (D.Ex.3) dated 5.11.1997**
6. **Notice of Balance of payment from Nairobi City Council dated 19th February 1996 (D.Ex.9)**
7. **Letter to pay Shs.11,985 to collect the Title deed dated 21st September, 2001 and receipt for the said sum (D.Ex.8a and 8b)**
8. **Water bills to and the payment by the 2nd Defendant (D.Ex.7,9,7b and 7c)**

The 2nd Defendant further stated that on the issuance of assignment and in pursuance of Agreement of Sale, she visited the suit premises and found some people occupying the same but they promised to vacate and hence she bought and deposited building materials worth Shs.44,750 on 3rd September, 1997 but the occupants chased them away. She produced the receipts (D.Ex.6) to show the purchase. I do however, note that her claim is that of Shs.39,750 in the counter-claim.

According to her she was to occupy the premises on the payment of all the dues which according to her she finalized in February, 1996. But due to the actions of the Plaintiffs, she was unable to occupy the same and take possession thereof.

As per her own evidence, however, she went to take possession around September, 1997 when she bought the building materials. According to her the rent collected by the Plaintiffs is KShs.1500 but I do not have any proof of such rent payment and/or the valuation and market rent prevalent in the area.

I can however find that the 2nd Defendant is a first registered proprietor under Registered Land Act (Cap 300).

In her cross-examination, the 2nd Defendant was confronted with questions on cheating by the 1st Defendant and the suggestions that the plaintiffs were the ones who were allotted the suit premises. I may note that the Plaintiffs failed to show any documentary evidence to prove any legal right over the suit premises.

On the other hand the 1st Defendant was called to give evidence how he applied for allotment of the suit premises and how his application was granted. As he was working up country he put the Plaintiffs to manage the suit premises. They are still collecting rents and utilizing the property and averred that by the time the suit was filed, he had already sold the property.

This in brief is the facts before the court.

It is clearly proved by the 2nd Defendant that she is the registered lessee/proprietor of the suit premises and under Section 32 of Registered Land Act (Cap 300), it is a prima facie evidence which has not been controverted by the Plaintiffs. I do thus find that the 2nd Defendant is the proprietor of the suit premises and the Plaintiffs, failing to show any legal claim over the property, are trespassers to the suit premises and is obligated to vacate the same forthwith.

As far as the claim of Shs.39,750 is concerned, I do not have sufficient proof to believe the averments by the 2nd Defendant, that those building materials were left at the suit premises and the same have been taken by the Plaintiffs. Thus I reject prayer No.(c) of the Counter-claim dated 11th December, 2002.

I have also considered the claim of mesne profits from the 2nd Defendant and am unable to accept the same as the same has not been properly proved and quantified by the 2nd Defendant. The onus to prove the same on balance of probability is squarely on the claimant and I therefore reject the same.

In the premises, I allow the counter-claim in terms of prayer Nos.(a) and (d) thereof, and direct that the Plaintiffs do vacate the suit premises L.R.No.Nbi/Block/84/220 situate at Dandora, Nairobi. The costs of the suit also be borne by the Plaintiffs.

Dated and signed at Nairobi this 4th day of March, 2008.

K.H. RAWAL

JUDGE

4.3.08