



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 305 of 2005

CHARLES CHERUTICH.....1ST PLAINTIFF

SAMWEL K. TOWETT.....2ND PLAINTIFF

VERSUS

SALLY TOWETT1ST DEFENDANT

ISAAC TOWETT.....2ND DEFENDANT

MONICA TOWETT.....3RD DEFENDANT

CHRISTINE TOWETT.....4TH DEFENDANT

MARY TOWETT.....5TH DEFENDANT

BETTY TOWETT.....6TH DEFENDANT

ALICE TOWETT.....7TH DEFENDANT

DORCAS TOWETT.....8TH DEFENDANT

CHRISTOPHER TOWETT.....9TH DEFENDANT

WILLIAM TOWETT.....10TH DEFENDANT

IRENE TOWETT.....11TH DEFENDANT

JUDGMENT

This suit was instituted by Charles Cherutich and Samuel Towett as a simple claim for land known as Nakuru Municipality Block 29/1167 (Ronda). The 1st plaintiff alleged that he purchased the land for value, was registered the proprietor and issued with the title as absolute proprietor on 25th April 2002. However the defendants trespassed upon the said land and have interfered with the 1st plaintiff who has been unable to collect rent from the rental houses of the suit premises. He therefore sought for the following orders:

(a) *A perpetual injunction to restrain the defendant by themselves, their agents and or servants*

from occupying, letting out to third parties and or collecting rent out from tenants at Plot No. Nakuru Municipality Block 29/1167 (Ronda) and order that the plaintiff herein can do what he deems fit to it.

(aa) Eviction from the suit premises.

(ab) Mesne profits as set out at paragraph 5D

(b) Costs of the suit

(c) Interest upon (b) at court rates.

(d) Any other relief that this honourable court deems fit to grant.

This suit was initially against the 1st defendant but when she filed the defence and counterclaim she joined all her children as defendants. The defendants case is that the suit premises herein was acquired as a family property where the defendant has established her matrimonial home in which she resides with the children two of whom are minors. The 2nd plaintiff did not inform the defendants when he was selling the property. The defendants therefore sought for a mandatory order of injunction restraining the plaintiffs from evicting them or interfering with their peaceful enjoyment not only of the suit premises but also of plot No. 1104 and 1167 Ronda Estate. They also sought for an order cancelling the registration of Nakuru Municipality Block 29/1192, 1104 and 1167.

This matter was initially filed in the Chief Magistrate's Court. However the records are not clear how it was transferred to the High Court for hearing and determination. During the hearing of the case both plaintiffs testified. The 1st plaintiff testified that he was informed by a neighbour of an available plot which was being sold. He approached the 2nd plaintiff who is the registered owner and they agreed on the purchase price. They entered into a sale agreement which was produced as an exhibit. The 1st plaintiff paid a sum of Ksh 1.1 million towards the purchase.

Before purchasing the plot he had carried out a search and established that the title was in the name of the 2nd plaintiff. He produced the search certificate as an exhibit. Upon the completion of the payment of the purchase price the 2nd plaintiff duly transferred the title to him on the 30th July 2003. He is therefore the registered absolute proprietor of the suit premises. The 2nd plaintiff gave him a letter addressed to all the tenants advising them to pay rent henceforth since the property had been transferred. The plaintiff caused letters to be written to the tenants informing them that he was now the new landlord. All those letters were returned to his business premises with remarks 'rejected' by the 1st and 2nd defendants. The matter was reported to the police and the 1st and 2nd defendants were charged with a criminal offence. They were tried convicted and sentenced to a fine of Kshs 20,000/=.

However the defendants persisted in refusing to handover possession of the suit premises which comprised of 17 rooms. The 1st plaintiff testified that each room is rented for Kshs 2,000/= and he has been denied an income of Kshs 34,000/= per month from July 2003. Subsequently parties agreed that the rent be collected by counsel for the defendants and deposited in court but so far the rent has not been deposited in court. The 1st plaintiff therefore sought for orders that the defendants be evicted and be ordered to pay the mesne profits. The 2nd plaintiff also gave evidence. He is the husband of the 1st defendant and the father of the 2nd – 11th defendants. He told the court that he bought the suit premises from a land buying company known as Kalenjin Enterprises. He was allotted three plots that are adjacent to each other. He decided to sell the suit premises to the 1st plaintiff which had semi-permanent structures but left the other plots with permanent structures where his family lives. Apart from this plot he said that he owns another 15 acres plot with a house where the defendants can live. He denied that the suit premises is where the defendants live but only moved to occupy some of the rooms to frustrate the sale. He produced a copy of the original land for the title of land at Kampi ya Moto. The defendant is also said to have a plot within Ronda Estate in her own name and all the children are now of age except for two who are barely 18 years. The children are married and others are working outside the home. The

2nd plaintiff therefore asked the court to order the defendants be evicted from the suit premises. On cross-examination the 2nd plaintiff denied that the suit premises was a matrimonial property. He had bought it five (5) years before he sold it. There is another plot next to this one where the defendant can live in. He has not refused to provide for the children. He claimed to have paid school fees for all the children up to the level of the University for those who could pursue their education.

The 1st defendant gave evidence in support of the defence and counterclaim. She contended that she lives on the suit plot with her children. She married the 2nd plaintiff in 1970 and they are blessed with ten (10) children. She used to carry on the business of selling timber with the 2nd plaintiff. They moved to Nakuru and she jointly with her husband purchased the plots from the Kalenjin Enterprises. She contended that she is the one who paid for the plot but it was registered in the name of the 2nd plaintiff. She contributed to the construction of the structures on the plot which comprised of a shop, timber yard and a grocery stall. While on this plot they were able to purchase the adjacent plot 1167. The defendant alleged that she sold her pick up and raised Kshs 200,000/- which was used to purchase the suit premises. She admitted that she single-handedly purchased some other plots across the road which are in her name. She contended that the 2nd plaintiff was in the habit of selling properties and dispossessing the family and since now she was old she did not wish to be relocated to Kampi ya moto. The 1st defendant admitted that the 1st plaintiff purchased the suit premises because the matter was reported to the police but the 2nd plaintiff never informed her about the sale. She said that she objected to the sale and was ready to refund to the 1st plaintiff the sum of Ksh 1.1 million. She claimed that nearly all the rent that is collected from the premises of about Kshs 6,000/= is consumed by electricity and water bills. The rooms also require constant repairs. She urged the court to cancel the sale and the 2nd plaintiff to reimburse the purchase price paid.

Counsel for the plaintiff filed extensive submissions. The 1st plaintiff counsel submitted that the plaintiff was an innocent purchaser for value. The property vested upon him absolute proprietorship and the defendants were unable to prove the allegation of fraud or that the 2nd plaintiff held the suit premises in trust of the defendants. It was the counsel's view that the defendants claim ought to have been filed under the provisions of **Section 17 of the Married Women Property Act 1882** which provides as follows:

“in any question between husband and wife the transfer had already been effected. The plaintiff came to court too late as the title to or possession of property, either partymay apply by summon or otherwise. In a summary way to any judge of the high court of justice..... and the judge may make such order with respect to the property in dispute. And to the costs of and consequent on the application as he deem fit.”

Counsel therefore submitted that the defendants occupation and refusal to move out of the premises was without basis and the 1st defendant should be paid mesne profits for having been deprived of the premises. He prayed that a sum of Kshs 1,904,000/= be assessed as mesne profits as well as the orders of eviction.

Similarly the 2nd plaintiff's counsel filed submissions and urged the court to allow the plaintiffs' suit and dismiss the defence and counterclaim which in any event sought to introduce the 2nd – 11th defendants without first obtaining the leave of the court. The defence and counterclaim also sought to introduce two other plots namely plot No. 1193 and 1104 which were not the subject matter of this suit. They were merely introduced to the counterclaim without the leave of the court.

The plaintiffs' suit was simply for orders of injunction, eviction and mesne profits against the 1st defendant. However the matter took a different turn when the defendant filed a counterclaim and enjoined all her children as defendants. The issue raised in their defence and counterclaim is whether the 2nd plaintiff unlawfully disposed of the suit premises which is a matrimonial premises in breach of trust as husband and father of the defendants. The defendants would only have succeeded in their suit had they filed an originating summons under **Section 17 of the Married Women Property Act** as against the 2nd

plaintiff. That is where the defendant would have demonstrated to the court her contributions to the purchase of the suit premises.

The defendant would also have had to prove that she made financial contributions and that the suit premises was part of the matrimonial properties. The defendant did not do that. She did not even do anything to secure her interest because the title of the suit premises was in the name of the 2nd plaintiff. As at the time the 1st plaintiff conducted a search there were no incumbrances noted in the title therefore he proceeded to purchase the suit premises. He paid the entire purchase price and the title was registered in his name. Although the court sympathises with the defendant there is nothing the court can do to salvage the situation.

As the defendants came to court too late after the suit premises had been sold. On the 1st plaintiff's claim he has been able to prove that he was an innocent purchaser for value without any notice of defect in title as in deed there was none noted on the title. He is entitled to vacant possession of the premises. On the prayer for mesne profits I am unable to make an assessment. The figure proposed by the 1st plaintiff is inordinately too high. The proceedings in this file show that at one point rent was being collected by counsel for the defendants. The defendant herself testified that out of the rent that she collects there are outgoings such as electricity, water and repairs. The 1st plaintiff did not carry out an assessment of the rent from a property valuer. Therefore I am not able to award the mesne profits. I do not also know how much money has been deposited in court from the rents collected. In the circumstances I grant the prayer (a), (aa) and costs of the suit to the 1st plaintiff to be paid by the defendant. The 2nd plaintiff who is the cause of all this is not awarded any costs unless the defendants had over vacant possession in 30 days an eviction order to issue.

It is so ordered.

Judgment read and signed on 6th day of June 2008

M. KOOME

JUDGE

6/6/2008

Before Koome – Judge

Kihara – Court clerk

Karanja for the 1st plaintiff holding brief for Mrs Ndeda for 2nd plaintiff

Ogolla holding brief for Gai for defendant

Court: Judgment read and signed on 6th June 2008.

M. KOOME

JUDGE