



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 405 of 1988

NAIVANUI WANJIRU NGORIS.....PLAINTIFF

VERSUS

NGORIS OLE KURARU.....1ST DEFENDANT

ANNA MEMSI.....2ND DEFENDANT

FRANCIS WANJOHI NDIRANGU.....3RD DEFENDANT

JUDGMENT

The plaintiff filed this suit on 6th December, 1988 against the defendants, all of whom are now deceased. She claimed that she was the beneficial owner of two parcels of land situate at Lake View Estate within Nakuru Town and registered as **Plot Nos. L.R. 453/3/1 and 453/3/2** (hereinafter referred to as '**the suit properties**'). She stated that she had been occupying the suit properties since 1963, having been given the same by her father, Edward Eustace Cyril Hudson. She claimed that her father had transferred the suit properties to the first and second defendants as trustees for her benefit and use.

The plaintiff further alleged that on or about the 18th day of February, 1988, the first and second defendants with the connivance, condonation and/or knowledge of the third defendant wrongfully and fraudulently and without her consent purported to sell and transfer the suit properties to the third defendant. The plaintiff set out particulars of fraud on the part of all the defendants.

She prayed for several remedies, *inter alia*, a declaration that she was the lawful beneficial owner of the suit properties and that the first and second defendants were registered as owners of the same in trust for her. She also sought for a declaration that the purported sale and transfer of the properties was null and void and further, an order to transfer the suit properties to herself.

The first and second defendants filed a joint statement of defence and denied the plaintiff's claim. They stated that the plaintiff was only their agent and they had allowed her to stay in the suit properties on a clear understanding that she would vacate as and when called upon to do so. They further admitted that they sold the properties to the third defendant.

The third defendant filed a statement of defence and counter claim. He denied that the plaintiff was the beneficial owner of the suit properties. He further stated that he purchased the said properties from the first and second defendants in or about 18th February, 1988. He denied all the allegations of fraud that had been made against him by the plaintiff.

In his counter claim, he reiterated that he was the lawful owner of the suit properties. Upon purchase of the same, he served a notice of termination of tenancy upon the plaintiff but she refused to comply with the same and thereby the plaintiff became a trespasser. He prayed for an order of eviction against the plaintiff as well as damages for trespass and mesne profits.

The plaintiff filed a reply and defence to the third defendant's defence and counter claim. She denied that the third defendant lawfully purchased the suit properties from the first and the second defendants. She contended that the first and second defendants lacked capacity to sell and transfer the suit properties. The plaintiff also denied that she was ever served with a notice of termination of tenancy by the third defendant. She was not therefore a trespasser as alleged.

Upon the death of the first and second defendants, no application for joinder of their administrators as defendants was made and the plaintiff's suit against the two abated.

Alice Wanjiru Wanjohi, the legal representative of the estate of the third defendant, was joined as a party to the suit. When the matter came up for hearing the plaintiff withdrew her claim against the third defendant and the only claim that remained for this court's determination was the third defendant's counter claim.

Alice Wanjiru Wanjohi, hereinafter referred to as "**Mrs Wanjohi**", testified that her late husband purchased the suit properties from the first and second defendants and thereafter they were transferred to him. Her husband was a contractor and he intended to put up rental houses thereon. When he went to take possession of the properties, the plaintiff and her children refused him from doing so. They continued to occupy the parcels of land without permission from her late husband. She produced an Indenture dated 9th August, 1945 between Olga Helena Cooke and Edward Eustace Cyril Hudson whereby the former sold and transferred the suit properties to the latter. She further produced a Deed of a gift between the aforesaid Mr. Hudson as the grantor and Ngoris Enole Kuraro and Anna Memsi (the first and second defendants) as donees in respect of the suit properties. Mrs Wanjohi further produced an Indenture which showed that the first and second defendants sold and transferred to her husband the suit properties.

Sometimes thereafter, Mr. Ndirangu went to the suit properties but a son of the plaintiff chased him away, claiming that the properties belonged to the plaintiff. As a result he decided to file a case at the **Rent Restriction Tribunal** being **RRT Case No. 276 of 1988**. He was seeking orders of vacant possession and areas of rent. While that case was pending, the plaintiff filed this suit. Mrs Wanjohi produced a letter dated 19th May, 1988, that was addressed to the plaintiff by her late husband's advocates, Shapley Barret & Company, informing her that the suit properties had been sold and transferred to her husband and further advising her to pay rent to him. She also produced evidence that she had been paying Municipal rates for the two properties. She prayed for vacant possession and mesne profits from 1988 since her husband had been prevented from developing the properties by the plaintiff. She claimed that if she had been given possession of the property she would have put up rental houses out of which she would have been collecting at least Kshs.280,000/- per year for one storey house. She further prayed for damages for trespass.

The plaintiff testified and stated that her name was Mary Wanjiru. She said that she was also known as Naivanui Wanjiru Ngoris. The first defendant was her mother and the second defendant her sister. She said that when she left her husband's place at Ngarua, Laikipia District, her mother took her and she lived with her in the suit properties. Her mother was married to one Mr. Hudson. After a short stay with her, the first and the second defendants moved to Nairobi. The plaintiff admitted that when she went to stay with her mother and her sister, the suit properties were registered in their names, that is, the first and second defendants. However, the plaintiff stated that her father and mother gave her the suit properties to assist her in educating her children. There were several houses that had been erected thereon and some had been rented out.

The plaintiff was aware that before the demise of the first and second defendants they had sold the suit properties to the third defendant. She further conceded that the third defendant had visited the suit

premises and asked her to vacate but she refused. Thereafter she went to see the first and the second defendants and they confirmed to her that they had indeed sold the properties to the third defendant. She went back and reported the matter to the area chief and District Commissioner. She alleged that she had put up fourteen (14) rental rooms. She was staying in one of the houses which was there at the time she was accommodated by her mother and sister. Six of her grown up children were also living on the suit properties.

Although the plaintiff was aware that the suit properties were registered in the name of the third defendant, she urged the court not to grant orders for vacant possession as she had no where else to move to. She said that she was ready to refund to Mrs Wanjohi the purchase price that was paid by the third defendant for the suit properties.

From the foregoing, it is not in dispute that the suit properties were lawfully sold by the first and second defendants to the third defendant. All of them are now deceased. Mrs Wanjohi is the legal representative of the estate of the third defendant. Long before their demise, the plaintiff was well aware that ownership of the suit properties had changed hands as herein above stated.

There is no evidence that the plaintiff was the beneficial owner of the suit properties as she had claimed in her plaint which claim she later withdrew. The third defendant's counter-claim was sufficiently proved. The plaintiff was given notice to vacate the suit premises but she refused to do so. It is trite law that a party who refuses to give vacant possession upon service of a lawful notice becomes a trespasser and a court of law would be entitled to order eviction of that party from the suit premises; see **WAMWEA VS CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES [2003] KLR 389**.

I hold that Mrs Wanjohi, as the legal representative of the estate of the third defendant, is entitled to ownership and exclusive possession of the suit properties as against the plaintiff and any other person in occupation thereof. The plaintiff is ordered to vacate the suit properties within the next thirty (30) days from the date hereof failing which she may be forcefully evicted. The plaintiff is not entitled to any compensation for any developments she may have made on the suit properties because if at all she erected any structures thereon, it was not shown that she did so with consent and approval of any of the defendants.

The third defendant also prayed for mesne profits from 18th February, 1988 to the date of eviction as well as damages for trespass. What is "*mesne profits*"? **MOZLEY & WHITELEYS LAW DICTIONARY** page 214 defines mesne profits as:

"Profits of land taken by a tenant in wrongful possession, from the time that the wrongful possession commenced to the time of the trial of an action of ejectment brought against him".

On the other hand, **CHITTY ON CONTRACT**, 24th Edition paragraph 1552 defines general damages as:

"...such damage as the law presumes to result from the infringement of a legal right or duty. Damage must be proved but the claimant cannot quantify exactly any particular items in it."

The estate of the third defendant has been kept out of the suit properties for nearly twenty (20) years. The third defendant intended to put up rental houses thereon but he was prevented from so doing by the plaintiff's adamant refusal to vacate. The plaintiff continued to collect rent from tenants who are occupying some houses on the suit properties. Mrs Wanjohi has been paying municipal rates for the suit premises. Although she claimed that if she had put up rental houses as planned she would have been collecting at least Kshs.280,000/- per year from one storey house, her claim was not sufficiently proved. However, I am satisfied that she is entitled to some compensation by way of mesne profits because the plaintiff has unduly benefited financially from her wrongful possession of the suit property. According to notices issued by Highland Registrars Limited, the managing agents of some of the houses erected on the suit properties, the monthly rents in 1984 were between Kshs.565/- and Kshs.1845/-. The rents must have gone up considerably over the years. On the basis of the above figures, I would assess the mesne profits

payable at Kshs.1500/- per month for the period claimed in the counter claim. I also award general damages for trespass in the sum of Kshs.100,000/-. The plaintiff will also bear the costs of the counter claim.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Kagucia for the third defendant and Mr. Njuguna holding brief for Mr. Kimatta for the plaintiff.

D. MUSINGA

JUDGE